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The European Union and the International Seabed Authority: Interactions between Legal Orders under the United Nations Convention on the Law of the Sea

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TABLE OF CONTENTS

INTRODUCTION
THE UNCLOS AND THE 1994 AGREEMENT

1. SCOPE AND STRUCTURE OF THE WORK

The progressive development of activities for the exploration and potential exploitation of the mineral resources located in the seabed and ocean floor beyond national jurisdiction has reinforced the centrality of the legal regime established by the United Nations Convention on the Law of the Sea of 1982 (hereinafter 'UNCLOS' or the 'Convention')[1]. At the core of that regime lies the International Seabed Authority (the 'Authority' or the 'ISA'), mandated to administer the Area "for the benefit of mankind as a whole", in accordance with the principle of the common heritage of humankind, as will be further developed in the next paragraphs of this Introduction. The institutional and regulatory architecture designed under Part XI of the Convention aims to ensure that access to the resources of the Area and their future exploitation remain subject to multilaterally agreed rules, collective management, and safeguards for the protection of the marine environment.

Parallel to the evolution of the legal architecture of the Authority, the European Union (EU) has progressively asserted its role as an international actor with explicitly recognised competences in maritime affairs, environmental protection, and the sustainable management of natural resources. The EU's participation in the Convention and its status as a member of the ISA reflect this development. As the only international organisation to have acceded to the Convention, the EU operates within the Part XI regime through a complex interaction of its internal legal order with the international legal rules governing the Area.

The interrelations between the ISA regime and the EU legal system have become increasingly relevant in the current historical phase, characterised by a growing pressure to finalise the regulatory framework enabling the start of deep-seabed mining.

[1] United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982, in force 16 November 1994) 1833 *UNTS* 397.

This dissertation aims to investigate these interactions, with the purpose of demonstrating how the two systems converge, overlap and at times collide in their concurrent application to activities conducted in the Area. Particular attention is paid to the internal constraints arising from EU law – including principles of environmental protection, sustainable development, and judicial review – and how such constraints influence the manner in which the Union and its Member States may act within the Authority. Conversely, this work also examines how decisions adopted within the Authority – and the dispute settlement mechanisms provided under Part XI – can produce legal effects within the EU legal order or otherwise interact with it.

From a methodological perspective, the dissertation relies primarily on a legal analysis of relevant treaty law, secondary rules adopted within the ISA, case law of both the International Tribunal for the Law of the Sea and the European Court of Justice, as well as practice and policy documents issued by EU institutions.

Accordingly, the work is organised into four chapters, structured as follows. Following this Introduction – providing a brief historical summary of the process leading to the adoption of the Convention and its 1994 implementing agreement, as well as the interactions between the two instruments – Chapter I examines the institutional and regulatory framework of the International Seabed Authority. Building on the principles underpinning Part XI of UNCLOS – and notably the common heritage of humankind – the chapter analyses the mandate, powers and internal functioning of the Authority. It focuses in particular on its legislative and supervisory competences and the role of the 'Mining Code' as the primary instrument governing activities in the Area. In doing so, the chapter addresses the latest controversial issues and challenges that the Authority faces in finalising the adoption of the Mining Code, as well as the risk of unilateral claims over the seabed beyond national jurisdiction. Through this analysis, the chapter provides the necessary foundation to understand how international decision-making on deep seabed mining is structured and operationalised.

Chapter II shifts attention to the EU legal system and explores the international legal personality of the Union, its external competences linked to maritime affairs and environmental protection, and the principles regulating its participation in international organisations. This chapter clarifies the division of competences between the Union and its Member States, and the mechanisms through which EU internal law conditions the external action of both the Union and Member States in international *fora*. The chapter further investigates the mechanisms leading to the possibility for the Union to become a Party to the Convention, and the constraints and responsibilities to which is subject in such a capacity.

Chapter III moves to the operational interface between the EU and the ISA. It analyses how the Union contributes – and may contribute in the future – to the implementation of the Convention and the rules of the Authority, including through sponsorship of contractors established within EU territory, internal compliance mechanisms and enforcement of environmental obligations. Particular attention in this chapter is given to the role that the Union may play – as part of its obligations under the Convention – in order to react to unilateral claims over the seabed beyond national jurisdiction and its resources. Further to such analysis, the investigation will shift to how EU regulatory and policy choices – including those concerning the management of critical raw materials – might influence its positions in the negotiations within the Authority and shape future potential activities of member States.

Finally, Chapter IV assesses the relationship between the EU legal system and the dispute settlement mechanisms established under Part XI of UNCLOS. The chapter evaluates whether EU institutions or Member States may become parties to proceedings before the Seabed Disputes Chamber of the International Tribunal for the Law of the Sea or other *fora* designated under the Convention, and how the jurisdiction of those bodies interacts with the autonomy of the EU legal order. The potential role of advisory opinions will also be examined as a means through which international adjudication may indirectly influence the internal legal framework of the Union.

2. The exploration and exploitation of resources beyond national jurisdiction under the Convention: the Area and the principle of common heritage of mankind

Notably, the legal regime for the exploration and exploitation of resources located in the seabed is provided for by the United Nations Convention on the Law of the Sea of 1982 (hereinafter 'UNCLOS' or the 'Convention')[2], which differentiates depending on the

[2] United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982, in force 16 November 1994) 1833 *UNTS* 397.

maritime area where such exploration or exploitation occurs. On the one hand, it regulates such activities when they occur in areas subject to the jurisdiction or sovereign rights of coastal States – namely, the territorial waters, the exclusive economic zone (EEZ) and the continental shelf[3]. On the other hand, the regulatory regime applicable to deep seabed activities outside national jurisdictions is provided for by Part XI of the Convention, which applies to the so-called 'Area', defined in Article 1(1) of UNCLOS as 'the seabed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction'.

To understand the legal regime to which the Area is subject, it is necessary to start from the principles that inspired it, and namely the principle of the 'common heritage of humankind'. And to understand the principle of the common heritage of humankind, it is necessary to briefly address the different positions that were expressed concerning the legal regime of the seabed of the high seas after the First United Conference on the Law of the Sea of 1958.

As mentioned in the previous paragraph, the Geneva Convention on the Continental Shelf provided for two criteria to delineate the continental shelf: on the one hand, the depth of the water and, on the other hand, the criterion of exploitability. The ambiguous wording of the second criterion was perceived as implying the threat that the development of new technologies may in theory allow States (most likely developed ones) to carry out activities in areas which were previously not exploitable, thus potentially enabling them to appropriate of extremely wide areas to the detriment of developing and geographically disadvantaged States[4].

In the effort of granting a status to the seabed outside national jurisdictions that would preserve it from excessive claims by coastal States, the international community could not rely on traditional principles governing at the time the law of the sea. Two solutions were proposed, both deemed unsatisfactory[5]: on the one hand, it was suggested to consider that portion of seabed as *res communis*, exploitable by all States, including developing and land-locked ones. However, this approach – which compared the status

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[3] Exploration and exploitation activities carried out in waters subject to jurisdiction or sovereign rights of member States will not be investigated, since they do not relate to scope of the present dissertation. For further reference on this, reference is made to Y. TANAKA, *The International Law of the Sea* (4th Ed, Cambridge, Cambridge University Press, 2023) 98-200.
[4] S. C. VASCIANNIE, *Land-locked and geographically disadvantaged states in the international law of the sea* (Clarendon Press, Oxford, 1990) 106-109.
[5] See UNITED NATIONS DIVISION FOR OCEAN AFFAIRS AND THE LAW OF THE SEA, *The Law of the sea. Concept of the common heritage of mankind: legislative history of articles 133 to 150 and 311(6) of the United Nations Convention on the Law of the Sea* (United Nations, 1996) 92.

of the seabed with the one traditionally granted to the high seas[6] – would have in this case produced a discrimination, as the only States having in practice the necessary capabilities to carry out activities in such depths would have been developed ones[7]. A second solution proposed was to consider those areas as *res nullius*. However, granting this status to the seabed would have entailed making it capable of appropriation through occupation[8]: again, only developed States would have had the means to occupy the seabed, leaving behind the need of developing ones.

Against this background, on the 1st of November 1967 the Maltese Ambassador Arvid Pardo pronounced, during the twenty-second session of the UN General Assembly, his now famous speech, suggesting that the seabed outside national jurisdiction should be considered as "the common heritage of mankind"[9], to be only exploited for peaceful purposes and for the benefit of mankind as a whole[10]. This principle in the intention of Pardo would have allowed to preserve the seabed and subsoil beyond national jurisdiction from appropriation of coastal States, and to only exploit them in the interest of the humankind, including of future generations.

Pardo's proposal would later lead to the establishment of an Ad Hoc Committee to Study the Peaceful Uses of the Sea-Bed and the Ocean Floor beyond the Limits of National Jurisdiction[11], and to the subsequent adoption of the Declaration of Principles Governing the Sea-Bed and the Ocean Floor, and the Subsoil Thereof, beyond the Limits of National Jurisdiction, as included in the UN General Assembly Resolution 2749 of 17 December 1970[12] (hereinafter the 'Declaration'). The Declaration officially defined the 'area' (i.e. the seabed and ocean floor beyond national jurisdiction) as the common heritage of humankind and requested States to act in accordance with the international regime to be

[6] The principle according to which the high seas are *res communis*, and the consequential principle of the 'freedom of the high seas', had been at that time well established since the publication of the notorious *Mare Liberum* in 1609.
[7] Y. TANAKA, *The International Law of the Sea* (4th ed., Cambridge University Press, Cambridge, 2023) at 235-236.
[8] D.W. ARROW, *The Customary Norm Process and the Deep Seabed*, in *Ocean Development and International Law*, 1981, 12-13.
[9] The scope and main characteristics of the principle will be dealt with in detail in Chapter I.
[10] United Nations General Assembly, 22nd Session, 1515th and 1516th meetings of the First Committee (Documents A/C.1/PV.1515 and A/C.1/PV.1516).
[11] For whose work reference is made to S. ODA, *The Law of the Sea in our Time – II: The United Nations Seabed Committee 1968 – 1973* (A.W. Sitjhoff International Publishing Company B.V., 1977).
[12] United Nations General Assembly Resolution 2749 (XXV), 17 December 1970, available at the following link: https://digitallibrary.un.org/record/201718.

established[13] to preserve this principle and protect the area from potential threats and environmental damage.

Bearing in mind the principles outlined in the Declaration, the result of States' negotiations within the Third United Nations Conference on the Law of the Sea ('UNCLOS III' or the 'Conference') was Part XI UNCLOS, governing the 'Area'. Part XI – the longest of the Convention, as well as the most difficult to negotiate[14] – consists of Art. 133 to 191, providing for a complex and comprehensive legal regime relating to activities to be carried out in the Area. *Inter alia*, provisions of Part XI include a section on the principles governing the Area (art. 136 to 149, largely corresponding to the principles expressed in the Declaration[15]), one on the establishment of the International Seabed Authority[16] (hereinafter the 'ISA' or the 'Authority'), to which art. 156 to 185 are dedicated, and even a section on settlement of disputes and advisory opinions (art. 186 to 191). Moreover, Part XI must be read in conjunction with Annex III (Basic conditions of prospecting, exploration and exploitation) and IV (Statute of the Enterprise) to the Convention. Most of these provisions will be analyzed in the next chapters.

Despite the efforts of States within UNCLOS III, the final text of Part XI was not considered acceptable by a number of States. Some of these already expressed their dissatisfaction at the end of the negotiations: upon requests of the United States of America a vote was triggered, which prevented the Convention from being adopted by consensus. As a final outcome, four States (Israel, Turkey, United States and Venezuela) voted against the draft text, while seventeen more abstained[17]. Furthermore, also due to the provision of Art. 309, which prohibits States from making reservations or objections

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[13] For sake of brevity, it will not be possible to give here an overview of all the steps leading to the Declaration and, eventually, to the Convention. Reference is therefore made to M.C.W. PINTO, *The Common Heritage of Mankind: then and now* (Recueil des cours de l'Académie de La Haye en ligne, Vol. 361, Brill | Nijhoff, 2013) 19-33.

[14] As noted by M.W. LODGE, *The Deep Seabed*, in D. ROTHWELL, A. OUDE ELFERINK, K. SCOTT, T. STEPHENS (eds.), *The Oxford Handbook on the Law of the Sea* (Oxford University Press, 2016) 226, Part XI "was born amidst controversy, in the face of opposition from most of the industrialized States, that for many years threatened to undermine the prospects for the success of the Convention as a whole".

[15] M. NORDQUIST, S. NANDAN, S. ROSENNE, M. LODGE, *United Nations Convention on the Law of the Sea 1982 – A Commentary* (Vol. VI, Brill | Nijhoff, 2003) 93.

[16] For which see *infra*, Chapter I.

[17] States abstaining were Belgium, Bulgaria, Byelorussian Soviet Socialist Republic, Czechoslovakia, German Democratic Republic, Federal Republic of Germany, Hungary, Italy, Luxembourg, Mongolia, Netherlands, Poland, Spain, Thailand, Ukrainian Soviet Socialist Republic, Union of Soviet Socialist Republics, United Kingdom of Great Britain and Northern Ireland. See the report of the 182nd Plenary meeting of the Third United Conference on the Law of the Sea (document A/CONF.62/SR.182).

except if otherwise permitted by another article the same Convention[18] (so-called 'package deal')[19], several States, faced with the alternative of accepting the entire Convention (including Part XI) and not signing or ratifying it, chose the second option[20].

The ensuing legal uncertainty, caused by the failure of industrialised states (paradoxically, the ones that could have most easily started exploration and exploitation activities)[21] to sign or ratify the Convention led to the substantial renegotiation of the terms of Part XI[22], resulting in the 1994 Agreement relating to the implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982 (hereinafter the '1994 Agreement' or the 'Implementation Agreement')[23].

3. THE IMPACT OF THE 1994 AGREEMENT ON PART XI OF THE CONVENTION

Despite officially implementing Part XI, it has been highlighted by unanimous legal doctrine that the 1994 Agreement – whose provisions, in light of its Art. 2, prevail over those of UNCLOS in case of inconsistency[24] – *de facto* amends the Convention, by modifying or repealing several of the latter's provisions[25].

[18] It is noted however that there is in the Convention no specific provision allowing reservations. Under Art. 289, it only allows States to o exclude one or more of the procedures provided for in Part XV, section 2 (Compulsory procedures entailing binding decisions). See C.J. TAMS, *Article 309*, in A. PROELß, *United Nations Convention on the Law of the Sea: A Commentary* (Nomos Verlagsgesellschaft, 2017) 1998.

[19] H. TÜRK, *Reflections on the Contemporary Law of the Sea* (Publications on Ocean Development, Vol. 71, Martinus Nijhoff Publishers, 2012) 2.

[20] States which failed to sign or ratify the Convention include all those that abstained or objected to the adoption of the final text, as well as other States.

[21] As was noted in the *Summary of Informal Consultations Conducted by the Secretary-General on the Law of the Sea during 1990 and 1991*, industrialised States were "the major users of the sea, the heaviest polluters of the seas and […] important parties to disputes at sea". See International Seabed Authority, *Secretary-General's Informal Consultations on Outstanding Issues relating to the Deep Seabed Mining Provisions of the United Nations Convention on the Law of the Sea: Collected Documents* (Kingston, 2002), 86.

[22] As the renegotiations leading to the 1994 Agreement are outside the scope of the present dissertation, reference is made to M. WOOD, *A historical perspective: the evolution of the International Seabed Authority*, in A. ASCENCIO-HERRERA M.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) 39-63.

[23] Agreement relating to the implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982 (New York, 28 July 1994, provisionally in force 16 November 1994, definitively in force 28 July 1996) 1836 *UNTS* 42. See D. ANDERSON, *Modern Law of the Sea – Selected Essays* (Brill, 2008), 349-360.

[24] Given the prevalence of the 1994 Agreement over the provisions of the Convention, in the context of the present dissertation references to "Part XI" in the next Chapters will need to be interpreted as including the relevant provisions of the 1994 Agreement. However, when making reference to specific provisions, potential amendments provided for by the 1994 Agreement might be explicitly mentioned.

[25] According to L.D.M. NELSON, *The New Deep Sea-Bed Mining Regime*, in *International Journal of Marine and Coastal Law*, 1995, 195-196, the 1994 Agreement "goes beyond mere implementation" and "can therefore be considered a protocol of amendment".

The 1994 Agreement represents a compromise between the benefits originally granted to developing States and the Enterprise[26] and the requests of industrialised States. Among the main concerns of developed States was a reduction of budgetary costs of the Authority, which were to be borne mostly by them. Accordingly, pursuant to paragraph (1) of the Annex to the 1994 Agreement "all organs and subsidiary bodies to be established under the Convention and this Agreement shall be cost-effective. This principle shall also apply to the frequency, duration and scheduling of meetings". This provision must however be coordinated with following paragraph (2), which provides that the functioning of the Authority "shall be based on an evolutionary approach, taking into account the functional needs of the organs and subsidiary bodies concerned in order that they may discharge effectively their respective responsibilities at various stages of the development of activities in the Area". Quite evidently, the development of the legal regime of the Area is likely to entail for the ISA the need for additional resources, so that the requirement of cost-effectiveness cannot be formulated in absolute terms[27].

Further provisions relate to the Enterprise (and will therefore be analysed in the relevant Chapter), and to mandatory transfer of technology, which represented one of the most innovative aspects of the Convention and was foreseen in Art. 144 UNCLOS, as well as Art. 5 of its Annex III. In particular, Art. 144(2)(a) required States to cooperate with the Authority by initiating and promoting programmes for the transfer of technology to the Enterprise and to developing States with regard to activities in the Area. Even more clear was Art. 5 of Annex III: in essence, the provision required contractors carrying out activities in the Area to make available to the Enterprise on fair and reasonable commercial terms and conditions, whenever the Authority so requested, the technology which they used in carrying out activities in the Area under the contract. Despite its crucial role for the purposes of developing States's capacity-building[28], pursuant to Section 5 of the Annex to the 1994 Agreement Art. 5 of Annex III shall not apply, as both developing States and the Enterprise shall now obtain such technology "on fair and reasonable commercial terms and conditions on the open market, or through joint-venture arrangements".

[26] One of the four organs of the International Seabed Authority (see *infra*, Chapter I).
[27] On the requirements of cost-effectiveness and of the evolutionary approach, see K. RATTRAY, *Assuring universality: balancing the views of the industrialized and developing worlds*, in J.N. MOORE, M.H. NORDQUIST, *Entry into Force of the Law of the Sea Convention* (Brill | Nijhoff, 1995) 58-59.
[28] See S. VÖNEKY, F. BECK, *Article 144*, in A. PROELß, cit., 1002-1003.

Finally, it is worth mentioning that the 1994 Agreement also introduced the 'two-year rule', which is central to the architecture of the present dissertation and to which paragraph 3 of Chapter I will be dedicated.

CHAPTER I
THE INSTITUTIONAL FRAMEWORK FOR SEABED MINING ACTIVITIES IN THE AREA: THE INTERNATIONAL SEABED AUTHORITY

1. THE INTERNATIONAL SEABED AUTHORITY: PRINCIPLES, ORGANS AND POWERS

The International Seabed Authority (also 'ISA' or the 'Authority') is the international organization composed *ipso facto* by all the States having ratified the Convention (Art. 156(2) UNCLOS) and mandated under the Convention to govern the Area and manage its resources on behalf of humankind. In doing so, the Authority is required to act in accordance with the relevant provisions of the UNCLOS and of the 1994 Agreement, through the mechanisms set out in particular in Section 4 of Part XI, providing for the relevant institutional and regulatory framework governing its action.

Before moving to the institutional framework established by the two instruments under which the Authority operates, it is worth addressing the scope of the action of the Authority, as well as the relevant principles informing it.

1.1. The scope of the mandate of the Authority

The action of the Authority is limited both under the spatial and the functional viewpoint. Under the first perspective, and except for what will be said below, the spatial scope of its mandate essentially corresponds to the spatial extent of the Area, defined in Art. 1 and 135 of the Convention. As already mentioned, the former defines the Area as “the seabed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction”. The provision is further complemented by Art. 135, which clarifies that “[n]either [Part XI] nor any rights granted or exercised pursuant thereto shall affect the legal status of the waters superjacent to the Area or that of the air space above those waters”. Therefore, again with a few *caveats* that will be dealt with below, the activities that the Authority can govern are not the ones taking place in the high seas.

A first exception to what has been said above relates to the environmental mandate of the Authority[1], to be exercised in accordance with Art. 145 UNCLOS, whose scope is broader and requires the Authority to take necessary measures to "ensure effective protection for the marine environment from harmful effects which may arise from" activities in the Area. As specified in subparagraph (a), the marine environment includes the coastline; accordingly, there is no doubt that the Article does not only concern the Area, but must be interpreted holistically, aiming at protecting the marine environment in its entirety[2].

The second exception requires first an analysis of the functional mandate of the ISA, which is in first place limited to the 'resources' of the Area, defined in Art. 133(a) as "all solid, liquid or gaseous mineral resources *in situ* in the Area at or beneath the seabed, including polymetallic nodules" (the term 'mineral resources' being intended to also non-living resources such as oil and gas[3]). Contrary to the legal regime of the continental shelf (as provided for in Art. 77(4) UNCLOS) sedimentary species do not fall under the scope of Part XI, in the same way as activities other than the ones relating to minerals[4].

Still under the functional viewpoint, a clarification must be made on the scope of the phrase "activities in the Area", which under Art. 1(1)(3) of the Convention means "all activities of exploration for, and exploitation of, the resources of the Area". The definition is unclear, as it fails to specify in turn what is meant by "exploration" and "exploitation". The scope of these terms has nevertheless been clarified by the Seabed Dispute Chamber of the International Tribunal for the Law of the Sea ('ITLOS' or the 'Tribunal'), in the context of its advisory opinion[5] on the *Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area*[6]. The Tribunal, after

[1] Which will be analysed in more detail *infra*, paragraph 1.2.4.
[2] M.H. NORDQUIST, N.R. GRANDY, S. ROSENNE, A. YANKOV, *United Nations Convention on the Law of the Sea 1982 – A Commentary* (Vol. VI, Martinus Nijhoff Publisher, 1990) 196.
[3] *Ibidem*, at 75. See also the *Report of the Chairman of the Drafting Committee to the Plenary. Recommendations of the Drafting Committee. Part XI.* (document A/conf.62/l.67/Add.16), at 3.
[4] For instance, activities such as deep fishing and laying of cables and pipelines do not fall under the mandate of the Authority. See A.L. JAECKEL, *The Area and the role of the International Seabed Authority*, in V. TASSIN CAMPANELLA, *Routledge Handbook of Seabed Mining and the Law of the Sea* (Routledge, 2024) 157-177.
[5] While the advisory opinions of the ITLOS cannot be considered *strictu sensu* binding, they nevertheless provide an authoritative interpretation of the Convention, to which States in most cases adhere.
[6] International Tribunal for the Law of the Sea, *Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area*, advisory opinion rendered on 1 February 2011. See also Y. TANAKA, *Obligations and liability of sponsoring States concerning activities in the Area: reflections on the ITLOS advisory opinion of 1 February 2011*, in *Netherlands International Law Review*, 2013, 205-230; D. FREESTONE, *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*, in *American Journal of International Law*, 2011, 755-760.

an in-depth analysis of the provisions of Art. 145[7], as well as of Annexes III[8] and IV[9] to the Convention, reached the conclusion that the phrase "activities in the Area"[10] includes "recovery of minerals from the seabed and their lifting to the water surface"; activities directly connected with such recovery and the lifting, such as "the evacuation of water from the minerals and the preliminary separation of materials of no commercial interest, including their disposal at sea". On the contrary, processing and transportation to points on land are normally excluded from the scope of such activities[11].

Based on the above, the mandate of the ISA can be deemed to extend – also from the spatial perspective – to those activities directly connected with the "activities in the Area" and occurring in the superjacent water column, such as the transportation of minerals from the installation used for the purpose of mining and the vessels where such minerals are stored.

A final – and at present only potential – exception to the territorial scope of the Authority is represented by the mandate of the Enterprise (which will be dealt with *infra*), which under Art. 170 of the Convention is tasked of carrying out activities in the Area, "as well as [of] the transporting, processing and marketing of minerals recovered from the Area". In order to do so, the Enterprise can certainly extend the scope of its operations beyond the Area[12].

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[7] Art. 145(a) UNCLOS includes among such activities also "drilling, dredging, excavation, disposal of waste, construction and operation or maintenance of installations, pipelines and other devices related to such activities".

[8] Art. 17(2)(f) of Annex III UNCLOS in particular requires the adoption of rules to prevent harmful effects that may arise from activities such as "drilling, dredging, coring and excavation and from disposal, dumping and discharge into the marine environment of sediment, wastes or other effluents".

[9] Art. 1(1) of Annex IV UNCLOS states that "The Enterprise is the organ of the Authority which shall carry out activities in the Area […], as well as the transporting, processing and marketing of minerals recovered from the Area". The Article therefore seems to draw a distinction between "activities in the Area" and the phases of transportation, processing and marketing.

[10] On the meaning of the phrase "activities in the Area", see in particular paragraphs 82 to 97 (pages 34 to 38) of the advisory opinion.

[11] Even if, as ITLOS notes at paragraph 96, "transportation between the ship or installation where the lifting process ends and another ship or installation where the evacuation of water and the preliminary separation and disposal of material to be discarded take place" can be considered as an "activity in the Area".

[12] F. H. PAOLILLO, *The institutional arrangements for the international sea-bed and their impact on the evolution of international organizations* (*Recueil des cours de l'Académie de La Haye*, Brill | Nijhoff, 1984), 189.

1.2. The relevant principles governing the action of the Authority

1.2.1. The Principle of the common heritage of humankind

The principle of the common heritage of humankind[13] essentially represents the main reason for the very existence of Part XI[14], and is mainly embodied in Art. 136, 137, 140, and 141. The principle is stated in rather general terms in Art. 136, which only declares that "[t]he Area and its resources are the common heritage of mankind". Despite not being defined in Art. 136, its main features are further specified in the following articles, each of which provides for crucial elements for the purposes of its implementation. Starting from Art. 137 ('Legal status of the Area and its resources'), which has been defined as "an incident or an integral part of Art. 136"[15], this prohibits all States from exercising sovereignty or sovereign rights over the Area (first sentence of paragraph (1)), as well as on its resources (first sentence of paragraph (3)).

As noted by part of the academic literature, these provisions constitute the 'negative side'[16] of the principle of the common heritage but alone are not sufficient to fully define it[17]. The truly innovative elements of this principles lie first and foremost in the second sentence of both paragraph (1) and (3), requiring States not to recognise any such acquisition or exercise of sovereignty of respectively the Area and its resources[18]. In addition, Art. 137(2) introduces a 'positive side' of the principle[19], by actively requiring the Authority to act on behalf of humankind in managing resources of the Area. To this end, such resources cannot be alienated, except in accordance with Part XI of the Convention, the 1994 Agreement and the rules, regulations and procedures adopted by the ISA. While it is true that the establishment of an international organization tasked of governing the Area is not a direct and compulsory effect of the principle of the common

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[13] While the principle was already called 'common heritage of mankind', in the most recent years the preferred terminology is the one using the word 'humankind'. Therefore, in the present dissertation, the latter term will be used, except when referring to the historical origins of the principle.
[14] K. BASLAR, *The Concept of the Common Heritage of Mankind in International Law* (Brill | Nijhoff, 1998) 206.
[15] *Ibidem*, 208.
[16] R. WOLFRUM, *The Principle of the Common Heritage of Mankind*, in *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht (ZaöRV)*, 1983, 316-317.
[17] *Ibidem*. See also *Id*., *Common Heritage of Mankind*, in R WOLFRUM (ed.), *Max Planck Encyclopedia of Public International Law*, 2023, para 12-13.
[18] *Ibidem*. See also M.H. NORDQUIST, S. NANDAN, S. ROSENNE, M.W. LODGE, cit., 110, according to which the obligation not to recognise such acquisition implies "that the Area has a different status from its superjacent waters and a different status from the continental shelf".
[19] R. WOLFRUM, *The Principle of the Common Heritage of Mankind*, in *ZaöRV*, cit., 317.

heritage of humankind[20], it can nevertheless arguably be considered the most efficient mechanism to prevent States from appropriating its resources, as well as to properly implement the provisions of Art. 140. The latter, after reaffirming in paragraph (1) that activities in the Area must be carried out for the benefit of mankind as a whole, requires at paragraph (2) the Authority to provide for the equitable sharing of financial and other economic benefits derived from such activities on a non-discriminatory basis. The provisions implementing the principle of the equitable sharing of benefits will be further addressed *infra* in paragraph 1.2.2.; however, it must already be underlined that the latter represents a crucial part of the element of the broader principle of the common heritage.

Under Art. 141, the principle of the common heritage includes the duty to use the Area exclusively for peaceful purposes. The provision follows the general scheme of the Convention, which in several articles refers to peaceful uses or purposes. As noted by part of the legal doctrine, however, none of these provisions is clear in the scope[21], nor properly implemented[22]. Despite the lack of certainty of the Convention under this aspect, it is also true that the seabed is also partially protected from military activities by other international legal instruments, such as the widely ratified *Treaty on the prohibition of the emplacement of nuclear weapons and other weapons of mass destruction on the sea-bed and the ocean floor and in the subsoil thereof*[23].

Finally, a crucial element of the principle of the common heritage is its intertemporal (or transtemporal) dimension[24]. This element complements the interspatial dimension, represented by the inclusion of the entire international community in the work of the Authority, and requires the latter to act not only in the interest of present, but also of future generations[25]. Despite not being stated in general terms within the Convention, this

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[20] *Ibidem*.
[21] A. PROELß, *Peaceful purposes*, in R WOLFRUM (ed.), *Max Planck Encyclopedia of Public International Law*, cit., para. 12-18.
[22] As noted in M.H. NORDQUIST, S. NANDAN, S. ROSENNE, M.W. LODGE, cit., 149, the Convention "does not exclude military uses of the high seas that are consistent with the Charter of the United Nations and with other rules of international law, for example, actions taken under the authority of the UN Security Council". According to R. WOLFRUM, *The Principle of the Common Heritage of Mankind*, in *ZaöRV*, cit., 320, the same goes for the Area.
[23] Treaty on the prohibition of the emplacement of nuclear weapons and other weapons of mass destruction on the sea-bed and the ocean floor and in the subsoil thereof, opened to signature 11 February 1971, 955 UNTS 115 (entered into force 18 May 1972).
[24] R. WOLFRUM, *Common Heritage of Mankind*, in R WOLFRUM (ed.), *Max Planck Encyclopedia of Public International Law*, cit., para 22-23.
[25] See R-J. DUPUY, *La notion de patrimoine commun de l'humanité appliquée aux fonds marins*, in C.A. COLLIARD (ed.), *Droit et libertés à la fin du XXe siècle: influence des données économiques et technologiques: études offertes à Claude-Albert Colliard* (Éditions A. Pedone, 1984) 197-207.

element is nevertheless implemented through different provisions across Part XI: for instance, Art. 150(b) requires activities in the Area to be conducted with a view to ensuring "orderly, safe and rational management of the resources of the Area, including the efficient conduct of activities in the Area and, in accordance with sound principles of conservation, the avoidance of unnecessary waste". The environmental mandate of the Authority under Art. 145 of the Convention and the use of the Area only for peaceful purposes must also be interpreted in light of the intertemporal dimension of the principle of common heritage, as means to preserve resources of the Area also for future generations[26].

To summarize, the principle of the common heritage of humankind in relation to activities in the Area can be divided into the following five elements[27]: a prohibition from acquiring or exercising any right over the Area and its resources (except when in compliance with the Convention); a mechanism actively entrusting the Area to an *ad hoc* international organization; provisions on the equitable sharing of financial and other economic benefits, in the interest of developing States; the obligation to use the Area only for peaceful purposes, and; the intertemporal element.

A clarification must be made that these elements are helpful to define the principle of the common heritage only when it comes of activities in the Area, but do not necessary exist when the same principle is applied to different legal regimes. For instance, also the OST Treaty[28] is inspired by the principle of the common heritage of humankind, as its Art. 1 states that "[t]he exploration and use of outer space, including the moon and other celestial bodies, shall be carried out for the benefit and in the interests of all countries, irrespective of their degree of economic or scientific development, and shall be the province of all mankind". However, this declaration is not followed by the establishment of an international organization having a mandate comparable to the one of the ISA[29].

[26] R.J. DUPUY, D. VIGNES, *A Handbook on the New Law of the Sea, Volume 1* (Brill | Nijhoff, 1991), at 583-585.

[27] K. BASLAR, cit., 209. See also C.C. JOYNER, *Legal Implications of the Concept of the Common Heritage of Mankind*, in *The International and Comparative Law Quarterly*, 1986, 190-199.

[28] Treaty on principles governing the activities of States in the exploration and use of outer space, including the moon and other celestial bodies, opened to signature 27 January 1967, 610 UNTS 205 (entered into force 10 October 1967).

[29] On the OST Treaty, see S. AOKI, *Outer Space Treaty and Fundamental Principles*, in S.B. BHAT, U. DILIP, V. ADITHYA (eds.), *International Space Law in the New Space Era: Principles and Challenges* (Oxford Academic, 2024) 67-85.

The principle of the common heritage does not only inform the action of the Authority, but also the one of single States parties to the Convention, which are equally bound to its respect: pursuant to Article 311(6) UNCLOS, "States Parties agree that there shall be no amendments to the basic principle relating to the common heritage of mankind set forth in article 136 ", nor they cannot be party to any agreement which derogates from it.

A question arises however on the applicability of the principle to States non-parties to UNCLOS. Given the general principle of *res inter alios acta* provided by Article 34 of the Vienna Convention[30], both Art. 136 and 311(6) are normally not opposable to non-State parties[31], unless they represent customary international law or even *jus cogens*. Historically, it is worth noting that during the negotiations leading to the adoption of the Convention, same States sought to have the principle explicitly declared as *jus cogens*[32]; however, given the opposing view even on whether the principle had acquired a customary status[33], proposals going in this direction failed to be adopted[34].

As of today the majority of the academic literature tends to consider that, although the entire system provided for by the Convention in order to implement the principle cannot be regarded as customary international law, specific provisions – such as Art. 137(1) and (3), prohibiting States from exercising jurisdiction over the Area and appropriating its resources – also bind State non-Parties to the Convention[35]. In the absence of concrete evidence of *opinio iuris* of States, this position is nevertheless strengthened by the fact

[30] Vienna Convention on the Law of Treaties, opened to signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980). Art. 34 states that "[a] treaty does not create either obligations or rights for a third State without its consent".

[31] N. MATZ-LÜCK, *Article 311*, in A. PROELß, A.R. MAGGIO, E. BLITZA, O. DAUM, *United Nations Convention on the Law of the Sea: A Commentary* (Nomos Verlagsgesellschaft, 2017), 2017-2019.

[32] During the negotiations of UNCLOS, the delegation of Chile in particular insisted on the peremptory nature of the principle of the common heritage of mankind. See *Report of the President on the work of the informal plenary meeting of the Conference on general provisions* (Extract from the *Official Records of the Third United Nations Conference on the Law of the Sea, Volume XIV (Summary Records, Plenary, General Committee, First and Third Committees, as well as Documents of the Conference, Resumed Ninth Session)* (document A/CONF.62/L.58).

[33] See S. VÖNEKY, A. HÖFELMEIER, *Article 136*, in A. PROELß, A.R. MAGGIO, E. BLITZA, O. DAUM, cit., 956. *Contra*, see R. WOLFRUM, *Common Heritage of Mankind*, in R WOLFRUM (ed.), cit., paragraph 25.

[34] States considering that the principle of the common heritage has gained the status of peremptory norm rely also on the above-mentioned Art. 311(6), which prohibit any amendment to the principle. See E. EGEDE, *Africa and the Deep Seabed Regime: Politics and International Law of the Common Heritage of Mankind* (Springer, 2011), 70-71.

[35] R. WOLFRUM, *Common Heritage of Mankind*, in R WOLFRUM (ed.), cit., paragraph 25.

that the principle of the common heritage was also included in Resolution 2749 of 1970[36], adopted without dissenting votes from States[37].

1.2.2. The benefit-sharing principle

Despite being a key component of the common heritage of humankind[38], the benefit-sharing principle is indeed also a specific self-standing principle (with its own mechanisms of implementation), as such deserving a separate analysis. As noted above, the principle is first and foremost embodied in Art. 140 UNCLOS, requiring the Authority to adopt rules (in line with the decision-making procedures of the Assembly and the Council) to ensure "the equitable sharing of financial and other economic benefits derived from activities in the Area".

The provision is not however the only one dealing with the equitable sharing, as different mechanisms for the implementation of the principle are foreseen across the Convention. In this respect, two distinctions must be made, which will restrict the scope of the present section. First, the principle can concern both economic and non-economic benefits: while Art. 140 mainly refers to the second aspect, also the former is a crucial achievement of the Convention. Non-economic benefits are however more undetermined, for instance including the same prohibition of unrestrained and unregulated exploitation by the community of States provided for by the Convention[39]; as such, they will be not dealt with in the context of the present dissertation. Among the economic benefits, some of them (for instance the establishment of the Enterprise and the 'site-banking' system') will be analysed *infra*, in the paragraphs dedicated to the Enterprise. The focus of the present section will be narrower, only concerning the sharing of financial and other economic benefits.

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[36] See *supra*, Introduction.
[37] E. HOLMILA, *Common Heritage of Mankind in the Law of the Sea*, in *Acta Societatis Martensis*, 2005, 202-205.
[38] F.M. ARMAS-PFIRTER, *The "Common Heritage of Mankind" Principle and the Equitable Sharing of Benefits*, in A. ASCENCIO-HERRERA, M.H. NORDQUIST, *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), 85-98.
[39] INTERNATIONAL SEABED AUTHORITY, *Technical Study no. 31 - Equitable sharing of financial and other economic benefits from deep-seabed mining* (International Seabed Authority, 2021), at 21.

As a first general remark in this respect, it can be noted that the implementation of these aspects is normally split into two phases[40]: on the one hand, the collection by the Authority of payments and contributions in kind, followed on the other hand by their distribution to developing States. Both these aspects will be analysed below in rather general terms insofar as they may be relevant for the purposes of the dissertation, without therefore focusing on the different *formulae* currently under study both for collection[41] and redistribution of payments, and also taking into account that full implementation of none of the two phases has currently occurred yet.

1.2.2.1. Collection of payments and contributions in kind

Setting aside the revenues of the Enterprise, payments to the Authority for the purpose of the full implementation of the principle of equitable sharing mainly come from Contractors and States, in line with the provision of Art. 160(2)(f)(i), which requires the Assembly (upon recommendation of the Council) to develop "rules, regulations and procedures on the equitable sharing of financial and other economic benefits derived from activities in the Area and the payments and contributions made pursuant to article 82". Accordingly, two main sources of revenues for the Authority can be identified.

On the one hand, there are the contributions of Contractors and States carrying out activities in the Area, which – under Art. 173 UNCLOS – are to be redistributed in accordance with Art. 140 and 160(2)(g)[42] (deducting however in first instance the administrative costs of the Authority). Such contributions from Contractors may take for instance the form of payments of royalties and fees to the Authority, as for instance the ones currently included in the Regulations on Exploration or in the Draft Regulations on Exploitation[43].

The second source of revenues under Art. 160(2)(f)(i) derives from payments and contributions in kind made by States pursuant to Art. 82 of the Convention. Such payments are to be made by States in respect of the exploitation of the non-living

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[40] M.W. LODGE, K. SEGERSON, D. SQUIRES, *Sharing and Preserving the Resources in the Deep Sea: Challenges for the International Seabed Authority*, in *International Journal of Marine and Coastal Law*, 2017, 427-457, at 429.
[41] For the potential models of collection of payments from Contractors reference is made to D. WILDE, H. LILY, N. CRAIK, A. CHAKRABORTY, *Equitable sharing of deep-sea mining benefits: More questions than answers*, in *Marine Policy*, 2023, 1-12.
[42] According to which the Assembly has the power "to decide upon the equitable sharing of financial and other economic benefits derived from activities in the Area".
[43] See *infra* paragraph 2.1.

resources of the continental shelf beyond 200 nautical miles (paragraph (1)), and must be submitted to the Authority, which must subsequently redistribute them "on the basis of equitable sharing criteria" (paragraph (4)).

Two considerations may be made in relation to this mechanism: first, Art. 82 has been defined a 'dormant provision'[44], as there is currently no State carrying out activities in its extended continental shelf, even if some of them have started granting licenses for prospecting and exploration (so that is possible that discussions on the implementation of the provision may be triggered in the next future)[45]. Secondly, the role of the Authority is limited in this case to the reception and redistribution of payments and contributions in kind, as it does not have the power to regulate in any other way activities carried by States in their extended continental shelves. In the same way, it does not have the power to assess the precise amount of due payments and contributions in kind, nor to enforce them[46].

1.2.2.2. Equitable sharing of payments and contributions in kind

Despite the general agreement within UNCLOS III on the existence of a mechanism for the distribution of benefits, the latter's actual functioning did not receive much attention during the negotiations[47], leaving this issue to the discretion of the Authority, which must establish rules, regulations and procedures for its implementation. In doing so, one of the few limits that the Authority must comply with is represented by the beneficiaries of such measures, i.e. developing States[48].

While of course this remains a matter of crucial importance for the ISA, the lack of exploitation activities both in the Area and in the extended continental shelves of States – as well as the non-operationalization of the Enterprise – substantially resulted in a lack of revenues for the Authority, so that there is currently no payment or contribution to be

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[44] INTERNATIONAL SEABED AUTHORITY, *Technical Study no. 4 - Issues associated with the implementation of Article 82 of the United Nations Convention on the Law of the Sea* (International Seabed Authority, 2009) at XIV.

[45] See R.J. HARRISON, *Article 82 of UNCLOS: The day of reckoning approaches*, in *Journal of World Energy Law and Business*, 2017, 488-504.

[46] INTERNATIONAL SEABED AUTHORITY, *Technical Study no. 4*, cit., at 29. Furthermore, as noted in D. ONG, *Delimitation of the Outer Continental Shelf and prospects for revenue sharing between States and the international community*, in J. BARRETT, R. BARNES (eds.), *Law of the Sea: UNCLOS as a Living Treaty* (The British Institute of International and Comparative Law, 2016), 81-118, at 115, the provisions of the Convention do not allow the Authority to start proceedings pursuant to the dispute settlement mechanism of Part XI to invoke the correct implementation by the coastal State of Art. 82.

[47] INTERNATIONAL SEABED AUTHORITY, *Technical Study no. 31*, cit., at 17.

[48] It is noted however that, among developing States, the Authority is required under Art. 82(4) UNCLOS to take into account in particular the needs of "least developed and the land-locked" ones.

distributed. This explains why the Authority has not yet developed such rules, which can be still considered a 'work in progress'.

Currently, after carrying out studies on the different methods for the implementation of this phase of the benefit sharing, the Authority seems to be heading towards the establishment of a specific fund (currently referred to as the 'Common Heritage Fund') with the purpose of investing in knowledge and competence related to the Area, in order to provide "a qualitative distribution of the net financial benefits from the recovery of deep-sea minerals"[49].

The creation of the Common Heritage Fund, which in its current drafting has the purpose of investing "in capacity development, scientific knowledge of the Area and [ocean] valorization, as well as in competence related to the ocean, with a view to enhancing the contributions of the Authority to the effective implementation of the Convention and other relevant global commitments", was considered as a way to implement also the intertemporal element of the principle of the common heritage of humankind. Such objective would be achieved by ensuring a deeper understanding of the Area for the benefit of future generations, at the same time enhancing the scientific capacity of developing States. The Fund seems to be, at this moment, the most discussed mechanism of implementation of the principle, as well as probably the one that will be adopted, having replaced the idea of a mere financial distribution of revenues of the Authority, which was in theory another suitable option[50].

1.2.3. The principle of 'due regard'

The principle of 'due regard'[51] is embodied in Art. 147 UNCLOS and is twofold. On the one hand, paragraph (1) requires activities in the Area to be carried out "with reasonable

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[49] Report of the Finance Committee of the International Seabed Authority of 7 July 2023 (document ISBA/28/A/4-ISBA/28/C/13).

[50] M.W. LODGE, K. SEGERSON, D. SQUIRES, cit., 431.

[51] Despite the wording of UNCLOS requiring 'reasonable regard', the principle is mostly addressed as the one of 'due regard'. As noted by T. TREVES, *Background Paper – Advancing the practical implementation of the 'due regard'/ 'reasonable regard' obligations: The applicable legal framework and practical options for its implementation*, in INTERNATIONAL SEABED AUTHORITY, *Technical Study no. 24 - Deep Seabed Mining and Submarine Cables: Developing Practical Options for the Implementation of the 'Due Regard' and 'Reasonable Regard' Obligations under UNCLOS* (International Seabed Authority, 2019) 8-9, the different terminology "does not imply any difference of substance". See also D. ANDERSON, *The Principle of Reasonableness in the Law of the Sea*, in H.P. HESTERMEYER, D. KÖNIG, N. MATZ-LÜCK, V. RÖBEN, A. SEIBERT-FOHR, P-T. STOLL, S. VÖNEKY (eds.), *Coexistence, Cooperation and Solidarity: Liber Amicorum Rüdiger Wolfrum* (Brill | Nijhoff, 2012) 657-669, which defines the difference "purely semantic".

regard for other activities in the marine environment". Such activities include for example deep-sea fishing or the laying of submarine cables and pipelines, which could be damaged by the exploration or exploitation of the Area. On the other hand, Art. 147(3) requires other activities in the marine environment (therefore not only in the Area) to be conducted "with reasonable regard for activities in the Area". The latter provision must be read in conjunction with Art. 87(2) of the Convention, requiring States exercising the freedoms granted under the regime of the high seas "with due regard for the rights under [the] Convention with respect to activities in the Area".

The term 'reasonable regard' is left however both undefined and unimplemented in the Convention, and efforts to fill these *lacuna* have been made both by the academic literature[52] and the Authority. The latter in particular has not only carried out studies on the meaning and scope of such principle[53], but also actively implemented Art. 147 UNCLOS through the conclusion of agreements, such as the Memorandum of Understanding signed by the ISA and the International Cable Protection Committee (ICPC)[54] respectively in 2009 and 2010[55].

The Memorandum envisages for example the participation of each organization at the meetings of the other one, thus potentially creating a constructive dialogue between the different interests behind each of them. Quite evidently, however, the rather general terms of the agreement do not constitute a full implementation of the principle, as for instance modalities of exploration and exploitation compatible with the existence of submarine

[52] D. ANDERSON, cit.; M.H. NORDQUIST, N.R. GRANDY, S.N. NANDAN, S. ROSENNE, *United Nations Convention on the Law of the Sea 1982 – A Commentary* (Vol. III, Martinus Nijhoff Publisher, 1995) 72-86, which analyses the principle under Art. 87(2) UNCLOS, and according to which the principle requires States "be aware of and consider the interests of other States in using the high seas, and to refrain from activities that interfere with the exercise by other States of the freedom of the high seas". See also B.H. OXMAN, *The Principle of Due Regard, in International Tribunal for the Law of the Sea*, in *The Contribution of the International Tribunal for the Law of the Sea to the Rule of Law: 1996-2016* (Brill | Nijhoff, 2017) 108-117, who essentially qualifies the principle of due regard as an obligation of 'self-restraint'. Finally, see T. TREVES, *'Due Regard' Obligations under the 1982 UN Convention on the Law of the Sea: The Laying of Cables and Activities in the Area*, in *International Journal of Marine and Coastal Law*, 2019, 167–194.

[53] See the already mentioned *Technical Study no. 24*, but also INTERNATIONAL SEABED AUTHORITY, *Technical Study no. 14 - Submarine Cables and Deep Seabed Mining: Advancing Common Interests and Addressing UNCLOS "Due Regard" Obligations* (International Seabed Authority, 2015).

[54] The ICPC is an organization representing governmental administrations and commercial companies that own or operate submarine telecommunications or power cables, as well as other companies that have an interest in the submarine cable industry. Its main mission is the promotion of submarine cable protection and resilience.

[55] Available on the website of the International Seabed Authority at the following link: https://www-.isa.org.jm/wp-content/uploads/2022/04/MOU-ICPC.pdf.

cables will have to be provided for within the regulations of the Authority, or by additional arrangements between the latter and the ICPC.

1.2.4. The principle of marine environmental protection and the precautionary approach

The mandate of the Authority also extends to environmental protection, pursuant to Art. 145 of the Convention, which essentially requires the ISA to take adequate measures to prevent harmful effects arising from activities in the Area by adopting relevant rules, regulations and procedures. The spatial scope of the provision has been investigated above; in this context, it is worth analysing the principles underlying the action of the Authority with respect to its environmental mandate.

The first remark to be made in this regard is that Art. 145 requires measures to be taken "in accordance with [the] Convention", therefore not limiting their scope to the ones included in Part XI. Thus, the provision is unanimously considered to be strictly related to Part XII of the Convention on the "Protection and preservation of the marine environment", so that the principles governing the latter must also be respected by the Authority[56]. The key provision in this regard is Art. 209 UNCLOS, which in its first paragraph reiterates the obligation on the Authority to adopt rules, regulations and procedures, as already provided in Art. 145.

While the provision hardly adds any content to Art. 145[57], it nevertheless links Part XI of the Convention to Part XII, making the obligation provided for in Art. 192 UNCLOS to "protect and preserve the marine environment" mandatory also for the Authority[58]. As of today, it is undisputed that the Authority must operate in compliance with such environmental obligations, to the point that even the negotiations of the 1994 Agreement did not deem it necessary to revise Art. 145 of the Convention[59]. Far from showing lack

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[56] See M.H. NORDQUIST, S. NANDAN, S. ROSENNE, M.W. LODGE, cit. (Vol. VI), 196-197. See also S. VÖNEKY, F. BECK, *Article 145*, in A. PROELß, A.R. MAGGIO, E. BLITZA, O. DAUM, cit., 1021-1022.

[57] The only additional element included in Art. 209(1) is the requirement to revise such rules, regulations and procedures from time to time as necessary.

[58] *Ibidem*. See also D. CZYBULKA, *Article 192*, in A. PROELß, A.R. MAGGIO, E. BLITZA, O. DAUM, cit., 1280. It must be stressed in any event that Art. 192 UNCLOS is as of today considered as forming part of customary international law, as such binding on the entirety of the international community.

[59] J.L. KATEKA, *Protection and preservation of the marine environment in the Area under UNCLOS*, in H.P. HESTERMEYER ET AL., cit., 919.

of interest towards environmental issues, this decision was intended to reflect the consensus reached on this point[60].

The general obligation provided for by the Convention has been implemented by the Authority through the adoption of relevant rules, regulations and procedures (at present only the ones relating to prospecting and exploration of the Area), as required by Art. 145 and 209 UNCLOS. Such rules – which will be further analysed *infra* – have also enlisted the fundamental principles underlying the action of the Authority, among which the precautionary approach has gained a prominent role[61].

The precautionary approach, under the notorious formulation used in Principle 15 of the Rio Declaration[62], requires lack of full scientific certainty not to be used as a reason for postponing cost-effective measures to prevent environmental degradation. Despite the approach not being included in the Convention, it was nevertheless included in the Authority's Regulations on Exploration[63], so that the obligation therein included now also applies to the action of the ISA. The scope of the application of the precautionary approach under the Regulations is however limited to the activities of prospecting and exploration, as also noted by the ITLOS in the context of its advisory opinion on *Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area*[64].

Reference to the precautionary approach is also included in the latest drafts of the Regulations on Exploitation that are currently being negotiated, so that the obligation to

[60] M.H. NORDQUIST, S. NANDAN, S. ROSENNE, M.W. LODGE, cit. (Vol. VI), 197.
[61] In the context of the present dissertation only the legal basis of the precautionary approach for the action of the Authority will be dealt with, while its consequences and practical implementation will not be addressed. For a full analysis of the issue see A.L. JAECKEL, *The International Seabed Authority and the Precautionary Principle – Balancing Deep Seabed Mineral Mining and Marine Environmental Protection* (Brill | Nijhoff, 2017).
[62] Rio Declaration on Environment and Development, included in the Report of the United Nations Conference on Environment and Development (Rio de Janeiro, 3-14 June 1992), document A/CONF.151/26 (Vol. I).
[63] More specifically it is included in regulation 31(2) of the Regulations on Exploration of Polymetallic Nodules, and in regulation 33(2) of both the Regulations on Exploration of Polymetallic Sulphides and of Cobalt-rich Ferromanganese Crusts. The three provisions have the same wording, stating that "[i]n order to ensure effective protection for the marine environment from harmful effects which may arise from activities in the Area, the Authority and sponsoring States shall apply a precautionary approach, as reflected in principle 15 of the Rio Declaration, and best environmental practices".
[64] See footnote 6, in particular at paragraph 130 of the advisory opinion.

respect it will most likely apply also to exploitation[65], thus covering all the different phases of activities in the Area.

Finally, more in general, the approach is recognized as a guiding tool for the purposes of the Authority's Strategic Plan for the period 2019–2023[66] (subsequently extended to 2025)[67]. Since the Plan "embodies the vision of the International Seabed Authority for the implementation of part XI and other provisions relating to the Area" under the Convention and the 1994 Agreement, the precautionary approach can now be deemed to cover all aspects of the action of the Authority, and must be therefore respected in general in the exercise of its mandate.

1.3. Organs of the International Seabed Authority

In order to exercise its mandate, the Authority is composed of four main organs, namely the Assembly, the Council, the Secretariat and the Enterprise (which is however yet to be fully operationalized, as will be seen *infra*). In this paragraph, only the organs relevant for the purposes of the dissertation will be addressed in detail, these being the two organs with decision-making power (namely, the Assembly and the Council) as well as the Enterprise, in light of the importance of the principles and mechanisms underlying its action. On the contrary, in this context it will not be possible to fully investigate the Secretariat of the Authority[68], as well as the subsidiary organs[69] established under the

[65] See in particular regulation 2(4)(b) of the latest version of the draft Regulations on Exploitation, document referred to in footnote 151.
[66] Strategic plan of the International Seabed Authority for the period 2019–2023, included in the Annex to document ISBA/24/C/10. The Strategic Plan is intended to reflect the main priorities to be addressed and direction to be taken by the Authority for the period 2019-2023.
[67] As stated in the Decision of the Assembly of the International Seabed Authority on the second periodic review of the international regime of the Area pursuant to article 154 of the United Nations Convention on the Law of the Sea (document ISBA/28/C/16).
[68] The Secretariat is the administrative organ of the Authority, established under Art. 166 to 169 of the Convention and including pursuant to Art. 166(1) "the Secretary-General and such staff as the Authority may require".
[69] Subsidiary organs are established under Art. 163 of the Convention and Section 9 of the Annex to the 1994 Agreement to assist the Council (and – in the case of the Finance Committee – also the Assembly) in the exercise of its functions.

Convention and the 1994 Agreement (notably, the Economic and Planning Commission[70], the Legal and Technical Commission[71] and the Finance Committee[72]).

1.3.1. The Assembly

The Assembly is the organ of the Authority composed by all the member States and – precisely because of the fact that it represents the entire community of States having ratified the Convention – it must be considered under Art. 160 UNCLOS as "the supreme organ of the Authority to which the other principal organs shall be accountable"[73]. As of today, it counts 170 members, which include 169 States and the European Union (which, for the reason further explained *infra*, Chapter II, is a Party to the Convention).

In the original text of the Convention, the importance of the Assembly as a representative of all States was reflected in its – rather 'democratic' – voting procedure, provided for by Art. 159 UNCLOS, requiring two different *quorum* respectively for decisions on questions of procedure and on questions of substance. Under Art. 159(7), the former were to be taken by the majority of members present and voting; questions on substance on the contrary required – under subsequent paragraph (8) – a two-thirds majority of the members present and voting, provided that such majority included a majority of the

[70] Under Art. 164 UNCLOS, the Economic and Planning Commission is the subsidiary organ of the Council mandated with assisting the latter in the tasks provided for by paragraph (2). In order to reduce costs for State Parties, the implementation of Art. 164 has been suspended by Section 1, paragraph (4) of the Annex to the 1994 Agreement, so that the Economic and Planning has currently not yet been established. During the second part of the thirtieth Session of the Council of the Authority (July 2025), the Council decided "to initiate necessary steps with a view to operationalizing the Economic Planning Commission" (document ISBA/30/C/17), meaning that its establishment might occur in the next few years.

[71] The Legal and Technical Commission – governed by Art. 165 UNCLOS – provides the technical knowledge necessary for the operation of the Council, which – being more a political organ – heavily relies on its work. It is entrusted under the Convention of multiple tasks, the majority of which take the form of recommendations to be made to the Council. Among these tasks – listed in Art. 165(2) is for instance making recommendations to the Council on the protection of the marine environment (subparagraph (2)(e)); to formulate and submit to the Council the rules, regulations and procedures relating to prospecting, exploration and exploitation in the Area; recommending approval (or disapproval) of a plan of work – both for exploration and, potentially in the future, for exploitation. More in general, due to the general clause contained in Art. 165(a) UNCLOS, the Council may essentially request the Legal and Technica Commission a recommendation on any topic that falls within the competence of the Authority. See E. VAN DOORN, *Article 165*, in A. PROELß, A.R. MAGGIO, E. BLITZA, O. DAUM, cit., at 1179.

[72] The Finance Committee – established under Section 9 of the 1994 Agreement – is in essence tasked of providing recommendations to the Council and the Assembly on matters having financial and budgetary implications for the Authority.

[73] As noted in V. SCHATZ, *Article 160*, in A. PROELß, A.R. MAGGIO, E. BLITZA, O. DAUM, cit., 1134-1135, "The title 'supreme organ' as such does not, however, mean that the Assembly is truly the most powerful organ of the Authority, as can also be deduced from the wording 'shall be considered'. Instead, the supremacy of the Assembly is of a formal, symbolic nature linked to its status as the plenary organ of the Authority".

members participating in the session. As each member State had one vote, it is easy to note that this procedure may actually result in a 'loose' decision-making, bound to the will of the majority of States, which may easily be composed of developing ones. The procedure was therefore opposed by developed States[74], and was then partially revised by the 1994 Agreement (together with the voting procedure within the Council, that will be analysed below).

Despite not amending the procedure of Art. 159, Section 3 of the Annex to the 1994 Agreement has nevertheless introduced some limitations. On the one hand, it now requires as a general rule, pursuant to paragraphs (2) and (3), to adopt decisions by consensus; only when efforts to reach consensus are exhausted the voting procedure can be triggered. As noted in the academic literature, since the establishment of the Authority the overwhelming majority of the decisions of the Assembly have been adopted by consensus[75]. An additional significant limitation of the action of the Assembly is represented by the increased involvement of the Council in its decision-making process, especially in relation to the establishment of 'general policies' such as those included in Art. 150 of the Convention[76], which under Art. 160(1) represented an exclusive competence of the Assembly. At the current state, paragraph (1) of Section 3 of the Annex to the 1994 Agreement requires such policies to be established "in collaboration" with the Council. While the 1994 Agreement does not explain the meaning and the scope of such collaboration, it can be reasonably argued that the contribution of the Council to the work of the Assembly may come – as normally happens – in the form of a recommendation, while the final decision would still lie with the latter. This procedure would furthermore be consistent with paragraph (4) of the same Section, according to which also "decisions of the Assembly on any matter for which the Council also has competence or on any administrative, budgetary or financial matter" shall be based on the recommendations of the Council. The consequence of the additions provided for by the 1994 Agreement is that

[74] M.H. NORDQUIST, S. NANDAN, S. ROSENNE, M.W. LODGE, cit. (Vol. VI), 404.
[75] M.W. LODGE, *International Seabed Authority (ISA)*, in R WOLFRUM (ed.), *Max Planck Encyclopedia of Public International Law*, cit., para. 14.
[76] Among the recent examples of topics covered by the terms 'general policies' is the request made by Chile (also on behalf of other States) to include in the agenda of the Assembly the adoption of a draft decision on the establishment of a general policy of the Authority for the protection and preservation of the marine environment (document ISBA/29/A/4). While the item was finally not included in the agenda, its approval would have resulted in the development of a general policy of the Assembly.

the Assembly is substantially prevented from acting in a manner that is inconsistent with recommendations of the Council, thus granting the latter a wider mandate and power[77].

In addition to the power to establish general policies, paragraph (2) of Art. 160 enlists a number of specific functions of the Assembly, including: the election of members of the Council (paragraph (2)(a)), as well as of the Secretary-General of the Authority (among the candidates proposed by the Council) and of the Director-General of the Enterprise upon recommendation of the Council (respectively paragraphs (2)(b) and (2)(c)); the approval of the budget of the Authority submitted by the Council (paragraph (2)(h)); finally, the Assembly has the fundamental task of definitively approving the rules, regulations and procedures of the Authority on exploration and exploitation, as provisionally adopted by the Council (paragraph (2)(f)(ii)).

1.3.2. The Council

The Council, pursuant to Art. 162(1) UNCLOS, is the 'executive organ' of the Authority, in first instance tasked with adopting specific policies in accordance with the general policies established by the Assembly. As noted, as a result of the 1994 Agreement, the role of the Council has been much strengthened, as it now contributes also to the adoption of general policies and of other decisions for which the Council has competence[78]. This is also reflected in the working modalities the Council, if compared to the ones of the Assembly: while the latter in practice meets once a year (normally in July)[79], the Council has in the last years met twice (or sometimes even three times) for each Session[80]. Furthermore, in particular cases, such as for the negotiations of the draft Regulations on exploitation (which will be dealt with in detail *infra*, paragraph 2.2.) the Council also

[77] M.H. NORDQUIST, S. NANDAN, S. ROSENNE, M.W. LODGE, cit. (Vol. VI), 402. The limitations on the Assembly are further reinforced by the fact that, if the Assembly does not accept the recommendation of the Council, it can only return the matter to the Council for further consideration. The Council shall then reconsider the matter in the light of the views expressed by the Assembly.

[78] As highlighted by R. WOLFRUM, *The Decision-Making Process According to Sec. 3 of the Annex to the Implementation Agreement: A Model to be Followed for Other International Economic Organisations?*, in *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht (ZaöRV)*, 1955, 310-328, at 324, this has conferred upon the Council a 'right of initiative', which cannot be bypassed by the Assembly.

[79] Dates of meetings of both the Assembly and the Council are available on the website of the International Seabed Authority (https://isa.org.jm/).

[80] The term 'Session' includes all the meetings of the different organs in each year. For instance, all the meetings of the LTC, the Council, the Finance Committee and the Assembly of 2024 was the '29th Session' of work of the Authority.

meets 'intersessionally', meaning between both the different Sessions and the different parts of each Session, to carry out additional work (normally in an informal setting).

The Council is composed of 36 members, elected by the Assembly in accordance with the rules provided for paragraph (15) of Section 3 of the Annex to the 1994 Agreement, which replaced Art. 161(1) UNCLOS and essentially divides the members into five groups: (a) four members from among those States Parties which, during the last five years for which statistics are available, have either consumed more than 2 per cent in value terms of total world consumption or have had net imports of more than 2 per cent in value terms of total world imports of the commodities produced from the categories of minerals to be derived from the Area, provided that the four members shall include one State from the Eastern European region having the largest economy in that region in terms of gross domestic product and the State, on the date of entry into force of the Convention, having the largest economy in terms of gross domestic product, if such States wish to be represented in this group; (b) four members from among the eight member States which have made the largest investments in preparation for and in the conduct of activities in the Area, either directly or through their nationals; (c) four members from among States Parties which, on the basis of production in areas under their jurisdiction, are major net exporters of the categories of minerals to be derived from the Area, including at least two developing States whose exports of such minerals have a substantial bearing upon their economies; (d) six members from among developing States Parties, representing special interests[81]; (e) eighteen members elected according to the principle of ensuring an equitable geographical distribution of seats in the Council as a whole, provided that each geographical region[82] shall have at least one member elected under this subparagraph[83].

The division into groups is based on the need to ensure the respect of two conflicting principles, namely the principle of equitable geographic representation and the principle of the representation of special interests[84]. This is reflected in the revised voting system

[81] According to the 1994 Agreement, the special interests to be represented shall include those of States with large populations, States which are land-locked or geographically disadvantaged, island States, States which are major importers of the categories of minerals to be derived from the Area, States which are potential producers of such minerals and least developed States.
[82] The geographical regions are Africa, Asia, Eastern Europe, Latin America and the Caribbean and Western Europe and others.
[83] For a detailed analysis of how the provisions on the composition of the Council have been implemented in practice, reference is made to J-P- LEVY, *International Seabed Authority: 20 Years – Les vingt ans de l'Autorité Internationale des Fonds Marins* (International Seabed Authority, 2014) 5-8.
[84] R. WOLFRUM, *The Decision-Making Process According to Sec. 3 of the Annex to the Implementation Agreement*, cit., at 312.

within the Council, which following the adoption of 1994 Agreement strongly relies on the division into groups, in order to ensure that special interests are adequately protected[85]. In essence, the decision-making within the Council is in the first instance to be achieved by consensus, so that a vote can be triggered only when all efforts to reach such consensus have been exhausted. In the latter case, decisions by voting in the Council on questions of procedure are to be taken by a majority of members present and voting, whereas decisions on questions of substance shall be taken by a two-thirds majority of members present and voting[86]. However, this rule applies only provided that such decisions are not opposed by a majority in any one of the chambers referred to in paragraph (9) of the same Section, which essentially correspond to the groups referred to in paragraph (15)[87].

In practice, such voting system allows for instance a majority of three members within any of the first three groups (each of which represents a specific interest) to block any substantive decision in the Council. However, as of today the voting mechanism has never been triggered, as decisions within the Council have always been adopted by consensus[88].

The tasks of the Council are included in Art. 161 of the Convention: the first paragraph confers the power to establish specific policies, while paragraph (2) entrusts the Council additional tasks, some of which are symmetrical to the ones of the Assembly: for instance, the Council must propose to the latter the candidates for the role of Secretary-General of the Authority and of Director-General of the Enterprise (paragraphs (2)(b) and (2)(c)); or submit to the Assembly a proposed annual budget (paragraph (2)(r)). The Council has however additional tasks unrelated to the work of the Assembly and which are consistent with its role of 'executive organ'. Among these are the consideration and approval or disapproval of plans of work submitted by Contractors, upon recommendation of the LTC, in accordance with the procedure set forth in paragraph (11) of Section 3 of the Annex to the 1994 Agreement (which has in turn replaced the provisions of Art. 162(2)(j) UNCLOS). In this case, if consensus cannot be reached, the 1994 Agreement provides for two different procedures: on the one hand, if the LTC recommends the approval of a plan of work, a majority of two-thirds of its members present and voting (including a

[85] *Ibidem*, at 318.
[86] The rule applies except where the Convention provides for decisions by consensus in the Council.
[87] However, the developing States elected under paragraph 15(d) and States elected under paragraph (e) are to be treated as a single chamber for the purposes of voting in the Council.
[88] M.W. LODGE, *International Seabed Authority (ISA)*, cit., para 17.

majority of members present and voting in each of the chambers of the Council) is necessary to disapprove the plan of work. Furthermore, if the Council does not take a decision on a recommendation for approval of a plan of work within a prescribed period (which is normally 60 days unless the Council decides to provide for a longer period) the recommendation is deemed to have been approved by the Council at the end of that period. On the other hand, if the LTC recommends the disapproval of a plan of work or does not make a recommendation, the Council may nevertheless approve the plan of work in accordance with the procedure set forth for questions of substance.

Further tasks of the Council under Art. 162 include the possibility of instituting proceedings before the Seabed Dispute Chamber of the ITLOS (paragraph (2)(u)); the power to issue emergency orders, which may include orders for the suspension or adjustment of operations, to prevent serious harm to the marine environment arising out of activities in the Area (paragraph (2)(w)); and the establishment of an appropriate mechanisms for directing and supervising a staff of inspectors who shall inspect activities in the Area (paragraph (2)(z)). Finally, the Council is entrusted with the adoption and provisional application (pending definitive approval by the Assembly) of rules, regulations and procedures of the Authority relating to prospecting, exploration and exploitation[89] in the Area and the financial management and internal administration of the Authority (paragraph (2)(o)(ii)).

1.3.3. The Enterprise

The Enterprise is the organ of the Authority tasked of directly carrying out activities in the Area, on its own behalf or through joint ventures with other States. Often defined as 'operational arm' of the Authority[90], its establishment was proposed by Latin American States and strongly supported by developing States[91] – and in particular by the Group of 77[92]. Despite such support, the Enterprise is as of today not fully operational yet, for the reasons that will be explained below.

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[89] Such as the three Regulations on Exploration adopted to date and further addressed in paragraph 2.1. of the present dissertation, or the draft Regulations on Exploitation that are currently being negotiated, analysed in paragraph 2.2.

[90] P. FERRARA, *Article 170*, in A. PROELß, A.R. MAGGIO, E. BLITZA, O. DAUM, cit., 1211.

[91] As noted by C.W. PINTO, *The Developing Countries and the Exploitation of the Deep Seabed*, in *Columbia Journal of World Business*, 1980, 30-41, at 33 "the Enterprise represents in the highest degree, the principles of cooperation and interdependence upon which the new international economic order is based".

[92] The Group of 77 is the largest intergovernmental organization composed of developing States, representing and promoting the interests of the latter before the United Nations. It was established on 15

The Enterprise is governed by Art. 170 UNCLOS and Annex IV to the Convention, as well as provisions of Section 2 of the Annex to the 1994 Agreement, and its existence aims at ensuring the full implementation of the principles of the common heritage of humankind and of the equitable sharing of benefits, through multiple mechanisms, such as for instance the payments to be made by the Enterprise under Art. 10 of Annex IV UNCLOS[93], or through the provisions on so-called 'reserved areas' (which will be analysed in the next subparagraph).

For this purpose, the Enterprise was initially granted under the original wording of the Convention greater advantages than the one it currently has: together with the 'site-banking' system of reserved areas, two were especially crucial for its prompt and full operationalization. On the one hand, States were originally required under Art. 144(2)(a) of the Convention to initiate and promote programmes of transfer of technology to the Enterprise and developing States, as well as – under subsequent paragraph (2)(b), to implement other measure to ensure the advancement of technology of the Enterprise and developing States, such as for instance by providing opportunities to personnel from the Enterprise and from developing States for training in marine science and technology. The provisions were further specified by Art. 5 of Annex III to the Convention, pursuant to which every contract between the Authority and a Contractor was supposed to include undertakings by the latter to facilitate and make available to the Enterprise the technology used for carrying out the activities in the Area under the contract.

Under a second profile, States were also required under Art. 11(3)(a) of Annex IV to the Convention to provide the Enterprise with the funds necessary to explore and exploit one mine site, and to transport, process and market the minerals recovered therefrom and the nickel, copper, cobalt and manganese obtained, and to meet its initial administrative expenses. The provision aimed at 'kick-starting' the first operation of the Enterprise, so that the latter may be capable of funding by itself the following ones[94]. In turn, this aimed

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June 1964 by the signatories of the "Joint Declaration of the Seventy-Seven Developing Countries" issued at the end of the first session of the United Nations Conference on Trade and Development, held in Geneva. Despite being still called 'Group of 77', as of today it counts 134 member States.

[93] Art. 10 of Annex IV to the Convention requires the Enterprise to make payments to the Authority (except for a portion of its net income, which is to be retained as reserves of the Enterprise) "under Annex III, article 13, or their equivalent". However, under Section 8, paragraph 2 of the Annex to the 1994 Agreement, the above provision shall not apply. As noted by P.H.P. VRANCKEN, *Annex IV*, in A. PROELß, A.R. MAGGIO, E. BLITZA, O. DAUM, cit., 2299, it is therefore likely that the Authority (and especially the Council) will have to consider how to implement Art. 10 of Annex IV once the Enterprise will be fully functional.

[94] *Ibidem*, at 2304.

at speeding up the process of gathering financial resources for the Enterprise, so that these could be transferred to the Authority and – finally – to developing States.

Following the adoption of the 1994 Agreement, none of these provisions apply any more. As noted[95], paragraph (1)(a) of Section 5 of its Annex added new principles governing transfer of technology under the Convention, so that now the Enterprise (as well as developing States) must acquire such technology on fair and reasonable commercial terms and conditions on the open market, or through joint-venture arrangements. Pursuant to the following subparagraph (1)(b), only if the Enterprise is not able to acquire technology in such way, the Authority may require contractors and their sponsoring States to cooperate in order to facilitate its acquisition "consistent with the effective protection of intellectual property rights". Together with the cautious wording of this provision, another obstacle is represented by the decision-making process for triggering it, which would also involve the Council, as the latter is the executive organ responsible under Art. 160(2)(a) of the Convention of coordinating "the implementation of the provisions of [Part XI] on all questions and matters within the competence of the Authority". As seen above, a decision of the Council in this regard may easily be blocked by each of its chambers, including the ones composed mostly of developed States.

Also the second advantage of the Enterprise is no longer applicable: pursuant to paragraph (3) of Section 2 of its Annex "[t]he obligation of States Parties to fund one mine site of the Enterprise as provided for in Annex IV, article 11, paragraph 3, of the Convention shall no longer apply and States Parties shall be under no obligation to finance any of the operations in any mine site of the Enterprise or under its joint-venture arrangements".

1.3.3.1. 'Reserved areas' and the 'site-banking' system

The mechanism of 'reserved areas', often referred to also as the 'site-banking system'[96], is part of the broader 'parallel system'[97] provided for by the Convention, which essentially represents a compromise between developed and developing States in ensuring equitable participation of both to activities in the Area. The first proposal for a parallel system was

[95] See *supra*, Introduction.
[96] Y. TANAKA, *The International Law of the Sea* (4th ed., Cambridge University Press, Cambridge, 2023) at 243. See also M.W. LODGE, *The Common Heritage of Mankind*, in *The International Journal of Marine and Coastal Law*, 2012, 733–742; G. LE GURUN, *Annex III*, in A. PROELß, A.R. MAGGIO, E. BLITZA, O. DAUM, cit., 2167-2168.
[97] *Ibidem*.

theorised by the then U.S. Secretary of States Henry Kissinger in 1976[98], and reflected the position of the U.S. according to which the Treaty (which would later become the UNCLOS) should have guaranteed "non-discriminatory access for States and their nationals to deep seabed resources under specified and reasonable conditions", incompatible with "arbitrary and restrictive limitations on the number of mine sites which any nation might exploit". As a compromise, Kissinger declared that the U.S. may accept "a system in which prime mining sites are reserved for the exclusive exploitation by the Enterprise or by developing countries directly".

The parallel system has therefore been included in the Convention, specifically through the implementation of the site-banking system, as proposed by Kissinger[99] and included in Art. 8 and 9 of Annex III to the Convention, which have been preserved also following the adoption of the 1994 Agreement. The first Article requires applications submitted by developed States or entities sponsored by developed States[100] to cover a total area "sufficiently large and of sufficient estimated commercial value to allow two mining operations", and to divide such area into two different parts of equal estimated commercial value[101]. Then, the Authority has the possibility to choose which of the two areas will be reserved to the Enterprise (or, under the conditions mentioned below, to developing States) and which will be included within the plan of work of the Contractor.

Under Art. 9, the Enterprise can exercise a discretionary choice on whether it intends to carry out activities in a reserved area. This decision can be taken at any time, except in the case when a developing State, or an entity sponsored by a developing State notifies the Authority that it wishes to carry out activities in the Area. While in such cases the Enterprise can still decide whether or not keep the reserved area, it must do so "within a reasonable time". The wording of Art. 9(1) has given rise to some (still existing) uncertainties, as it requires the Enterprise to make a choice on whether it intends to "carry

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[98] H. KISSINGER, *The Law of the Sea: A Test of International Cooperation*, statement made in New York on 8 April 1976 before the Foreign Policy Association, the U.S. Council of the International Chamber of Commerce and the U.N. Association of the U.S.A., available at https://www.cia.gov/reading-room/docs/CIA-RDP82S00697R000400140048-9.pdf.
[99] *Ibidem*: "Under this system, each individual contractor would propose two mine sites for exploitation. The Authority would then select one of these sites which would be mined by the Authority directly or made available to developing countries at its discretion. The other site would be mined by the contractor on his own".
[100] As noted in G. LE GURUN, *Annex III*, cit., at 2168, the provision does not apply to applications submitted by the Enterprise or by developing States (or entities sponsored by developing States).
[101] In practice, as noted in *Ibidem*, at 2172, it is often upon the LTC the assessment of whether the two areas are of equal estimated commercial value.

out activities” in the reserved area, and therefore it does not specify whether said choice must be made in relation to each phase of activities in the Area (namely, exploration and exploitation) or on the contrary 'once and for all'[102].

Further uncertainties have emerged during the last years concerning the used of reserved areas (at present, only for the exploration phase) by entities sponsored by developing States but economically controlled by other entities based in developed States. Since this issue relates to the concept of 'effective control', it will be analysed *infra* in paragraph 3.2, however already anticipating that it may have an impact also on the legal regime of reserved areas.

The adoption of the 1994 Agreement, despite not amending the site-banking system, has led to the inclusion of advantages for the Contractor which has identified (or, using the language of the Convention, has contributed) a particular reserved area. Under Section 2, paragraph (5) of the Annex to the 1994 Agreement, such Contractor has the right of first refusal to enter into a joint-venture arrangement with the Enterprise for exploration and exploitation of that area. Moreover, if the Enterprise does not submit an application for a plan of work for activities in respect of such a reserved area within a certain period of time[103], the contractor which contributed a reserved area shall be entitled to apply for a plan of work for that area provided it offers in good faith to include the Enterprise as a joint-venture partner.

[102] This uncertainty can be for instance inferred from the text of the draft Regulations on Exploitation, currently being negotiated at the ISA and included (in its last version) in the document mentioned in footnote 151. Looking in particular at draft Regulation 10, paragraph (5), it can be noted that the text states: “Where an application concerns a Reserved Area [that is not or has not been subject to an Exploration Contract], the Enterprise shall be given an opportunity to decide whether it intends to carry out activities in the area in accordance with Art. 9 of Annex III to the Convention, and Section 2 of the Annex to the Agreement”. The addition between squared brackets (“that is not or has not been subject to an Exploration Contract”) was proposed by Nauru Ocean Resources Inc. (an entities carrying out activities in the Area) and its sponsoring State, the Republic of Nauru. Such an addition changes significantly the meaning of the sentence, in the following terms: without it, the sentence would mean that, following exploration of a reserved area by a Contractor, the Enterprise would still be given the choice to keep the reserved area for the exploitation phase, essentially taking advantage of the exploration made by that Contractor. The addition prevents this outcome, by aiming at making it possible only when the reserved area has not been subject to an exploration contract. It is further noted that the draft Regulations on Exploitation currently require, as a prerequisite to start the exploitation phase, that the area covered by the plan of work has already been covered by an Exploration Contract; therefore, the addition made to Draft Regulation 10(5) would essentially make the provision inapplicable. In any case, the debate around this addition clearly shows the ambiguity of the provisions of the Convention.

[103] In particular within 15 years of the commencement of its functions independent of the Secretariat of the Authority (for which see *infra,* the next paragraph) or within 15 years of the date on which that area is reserved for the Authority, whichever is the later.

Quite interestingly, derogations to the legal regime of the site-banking system have been included in the different Regulations for Exploration both of polymetallic sulphides and cobalt-rich ferromanganese crusts in the Area (for which see below paragraph 2.1.), apparently in absence of a legal basis within the Convention or the 1994 Agreement. Under Regulation 6 of the two Regulations for Exploration, the applicant can choose whether to contribute a reserved area pursuant to Art. 9 of Annex III to the Convention or – alternatively – to offer an equity interest in a joint venture arrangement to the Enterprise in accordance with the requirements set out in Regulation 19[104]. While, as noted, this addition does not seem to be consistent with the provisions of the Convention, it was nevertheless imposed by practical difficulties, as two sites of equal commercial value are relatively easy to identify in case of two-dimensional spaces, but rather difficult when three-dimensional resources (such as polymetallic sulphides and ferromanganese crusts) are involved[105].

1.3.3.2. Current status of the Enterprise and its future operationalization

After negotiations of the Convention, it became clear that it would not be possible to carry out exploitation activities in the Area before decades. Consistent with this idea, it was agreed during the negotiations of the 1994 Agreement that the establishment of the Authority should be based on an 'evolutionary approach', as a means to comply with the cost-effectiveness requested by developed States. The Enterprise was no exception: quite the contrary, it is the organ that have been downgraded the most by the adoption of the 1994 Agreement[106].

Under Section 2 to its Annex, the functions of the Enterprise are currently performed by the Secretariat, and it is only formally represented by an Interim Director-General (IDG) appointed by the Secretary-General of the Authority. The tasks of the IDG under paragraph (1) of Section 2 are much more limited than the ones that the Convention (in

[104] Which include, for instance, the obligation to offer the Enterprise at least a minimum of 20 per cent of the equity participation in the joint venture arrangement, and the possibility for the latter to purchase a further thirty per cent of the equity in the joint venture arrangement.

[105] As noted in G. Le Gurun, *Annex III*, cit., at 2172-2173, the site-banking system therefore suits particularly well to activities relating to polymetallic nodules, as they normally lie on the seabed and their size (normally around 5 to 10 centimetres) make them a "two-dimensional" resource. On the physical and geographical features of polymetallic nodules, reference is made to the brochure prepared by the International Seabed Authority for this resource, available at https://www.isa.org.jm/wp-content/uploads/2022/06/eng7.pdf.

[106] E. Charles, *The Enterprise under the 1982 United Nations Convention on the Law of the Sea and the Common Heritage of Mankind*, in A. Ascencio-Herrera, M.H. Nordquist, cit., 99-108.

particular Art. 6 of Annex IV) conferred upon the Governing Board of the Enterprise, and essentially consist in the collection of information relating to the different aspects of seabed mining governed by UNCLOS, such as trends of market conditions of minerals, development of new technologies, the status of reserved areas and potential approaches to joint-venture agreements.

The collection of such information can be considered as a 'preparatory work' for the full operationalization of the Enterprise, which can however occur only once several requirements have been fulfilled. First of all, as provided by paragraph (2) of Section 2, the Council is obliged to take up the issue of the functioning of the Enterprise independently of the Secretariat only upon the approval of a plan of work for exploitation for an entity other than the Enterprise, or upon receipt by the Council of an application for a joint-venture operation with the Enterprise (which, as will be seen below, is the only way for the latter to conduct its first operations). In other words, until one of those two events takes place, the Council is certainly not precluded from discussing the issue[107], but is not on the other hand legally compelled to do so. It is also underlined that the two events do not trigger the independent functioning of the Enterprise, but a discussion on it within the Council. The third sentence of paragraph (2) of Section 2 is however more clear-cut as it provides that, if a joint-venture offered to the Enterprise accords with "sound commercial principles", the Council must issue a directive in accordance with Art. 170(2) UNCLOS providing for the full independent functioning of the Enterprise. As however the phrase "sound commercial principles" is left undefined, it has been noted that the Council should first, as part of the discussion on the operationalization of the Enterprise, clarify its meaning[108].

One more obstacle to the independent commencement of activities by the Enterprise arises from the first sentence of paragraph (2) of Section 2, according to which "[t]he Enterprise shall conduct its initial deep seabed mining operations through joint ventures". As mentioned above, this means that the Enterprise can carry out its first activities (i.e. submit its first plan of work) only through a joint-venture agreement, while the following ones may also be conducted independently. However, practically speaking, nor the

[107] *Ibidem*, at 108.
[108] E. EGEDE, M. PAL, E. CHARLES, *Technical Report 1/2019: A Study Related to Issues on the Operationalization of the Enterprise – Legal, Technical and Financial Implications for the International Seabed Authority and for States Parties to the United Nations Convention on the Law of the Sea* (International Seabed Authority, 2019), at 20-22.

Convention or the 1994 Agreement clarify the form that such joint-venture may take, nor the approaches to be followed in defining such form, which must be consequently discussed and agreed upon by the Council.

Currently therefore, despite the crucial role of the Enterprise for the purpose of implementing the principle of the common heritage of humankind, several difficulties for its independent functioning are still in place; even if they will be overcome, it can be noted that the latter has nevertheless lost its original position of advantage, to the point that it is on the contrary in a position of disadvantage *vis-à-vis* other Contractors[109].

2. THE LEGISLATIVE JURISDICTION OF THE INTERNATIONAL SEABED AUTHORITY

From the discussion above on the powers of the different organ of the Authority, it is clear that the latter holds both a legislative jurisdiction and an enforcement jurisdiction in relation to activities in the Area[110]. The focus of this paragraph will relate to the first type of jurisdiction, which essentially relates to the power of the Authority to adopt binding "rules, regulations and procedures" (hereinafter also only 'rules'), as well as documents of non-binding and recommendatory nature (such as guidelines). Those instruments may relate both to activities in the Area *strictu sensu*, as well as other aspects covered by the mandate of the Authority. As an example of this second category Art. 162(2)(o)(i) can be mentioned, which requires the Authority to adopt rules "on the equitable sharing of financial and other economic benefits derived from activities in the Area and the

[109] E. CHARLES, *The Enterprise under the 1982 United Nations Convention on the Law of the Sea and the Common Heritage of Mankind*, cit., at 105.

[110] Enforcement jurisdiction consists in the supervision by the appropriate organ (normally the Council) to ensure that these instruments are complied with. This second power is for instance represented by the right "to inspect all installations in the Area used in connection with activities in the Area", provided for under Art. 153(5) of the Convention, as well as by the possibility for the Council "to institute proceedings on behalf of the Authority before the Seabed Disputes Chamber in cases of non-compliance" with its decisions, in accordance with Art. 162(2)(u) UNCLOS. See Y. TANAKA, *The International Law of the Sea*, cit., at 240. While the existence of the Authority's legislative jurisdiction over 'activities in the Area' is not disputed, its enforcement powers are not, however, universally recognised in the academic literature. According, for instance, to T. BERRY, *Sovereignty and the Limits of International Law – Regulating Areas Beyond National Jurisdiction* (Routledge, London, 2023), at 162, the Authority "does not, however, have any power to enforce its mandate". In support of this conclusion, several shortcomings in the Authority's powers are identified, including the absence of jurisdiction over non-parties (such as the United States), as well as the impossibility for the ISA to play a role in the delineation of States' continental shelves beyond 200 nautical miles. At the same time, it must be acknowledged that – at least with respect to 'activities in the Area', as interpreted by ITLOS (see this Chapter, footnote 6) – the powers of the Council referred to in the previous paragraph must indeed be regarded as being of an enforcement nature. In this respect, see A.L. JAECKEL, *The International Seabed Authority and the Precautionary Principle – Balancing Deep Seabed Mineral Mining and Marine Environmental Protection* (Publications on Ocean Development, Volume 83, Brill | Nijhoff, 2017), at 106-110.

payments and contributions made pursuant to article 82". As noted above, while these rules are crucial for the purposes of the correct implementation of the principles of the common heritage of humankind and of the equitable sharing of benefits, their enactment has not yet been achieved[111]. In its first three decades of operations, the Authority has mostly concentrated on the adoption of the first category of rules, on "prospecting, exploration and exploitation in the Area" as well as the financial management and internal administration of the Authority, in accordance with Art. 162(2)(o)(ii) of the Convention.

In adopting this type of rules, the Authority is required to take into account the general principles governing its activity and included especially in Art. 145 and 146 of the Convention. As seen above, under the first the Authority must pay due consideration to appropriate measures for the "prevention, reduction and control of pollution and other hazards to the marine environment", as well as the "protection and conservation of the natural resources of the Area and the prevention of damage to the flora and fauna of the marine environment". Art. 146 deals with effective protection of human life, which must be ensured through appropriate measures included in the rules[112].

The procedure for the adoption of these rules is outlined in particular in Art. 162(o)(ii) of the Convention, which specifies all the different decision-making steps. The Article needs to be further coordinated with paragraph (15) of Section 1 of the Annex to the 1994 Agreement (the so-called 'two-year rule'), which will be however better analysed below, in paragraph 2.2. Under Art. 162(2)(o)(ii) UNCLOS (as well as Art. 165(2)(f)), said rules must be first and foremost formulated by the LTC, which then submits them to the Council. The Council can adopt the rules as they are presented or amend them through appropriate negotiations (as is currently happening for the draft Regulations on Exploitation). Once consensus has been reached within the Council, the latter adopts the rules, which are provisionally applicable pending a decision of the Assembly. The latter does not have the power to directly amend the rules, as evident from the text of the last sentence of Art. 16(2)(o)(ii): if it decides not to recommend the rules, it can only send

[111] A.L. JAECKEL, J.A. ARDRON, K.M. GJERDE, *Sharing benefits of the common heritage of mankind– Is the deep seabed mining regime ready?*, in *Marine Policy*, 2016, 198-204.

[112] Art. 146 requires such rules to "supplement existing international law as embodied in relevant treaties". As noted in S. VÖNEKY, F. BECK, *Article 146*, in A. PROELß, A.R. MAGGIO, E. BLITZA, O. DAUM, cit., 1028-1035, in particular at 1032-1033, the word 'supplement' seems to indicate that the Authority must first take into account existing rules of international law relating to safety of human life. For instance, existing rules may be the ones provided for by the International Maritime Organization, or by the International Labour Organization.

them back to the Council, which will discuss how to amend them in the light of any views expressed by the Assembly"[113].

In practice, the Authority has divided these rules (which are collectively referred to also as the 'Mining Code')[114] into two groups: on the one hand, rules relating to the prospecting and exploration of the Area and its resources; on the other hand, those concerning their exploitation. Both these categories will be dealt with below, taking into account that the rules on exploitation are currently being negotiated at the ISA, and may still be subject to significant changes in the future.

2.1. The Regulations on Prospecting and Exploration

At present, the Authority has approved three sets of Regulations for the Prospecting and Exploration (also the 'Regulations on Exploration') of three different resource categories, namely polymetallic nodules[115], polymetallic sulphides[116] and cobalt-rich ferromanganese crusts[117]. More 'classic' resources, such as oil and gas, are not yet covered by specific Regulations, and as such are not explorable.

Since the commencement of the operations of the Authority in 1996, its main priority has been the development of the first set of Regulations for Exploration and Prospecting of Polymetallic Nodules (hereinafter also the 'Nodules Regulation'), in accordance with the

[113] As noted by S. MAHMOUDI, *The Law of Deep Sea-Bed Mining – A Study on the Progressive Development of International Law Concerning the Management of the Polymetallic Nodules of the Deep Sea-Bed* (Amqvist & Wiksell International, 1987) at 282 "the Assembly has no power to force amendments on the provisionally adopted drafts by the Council, and if the Council does not agree with the amendments proposed by the Assembly, it can continue applying those rules, regulations and procedures by attaching the adjective of 'provisional' to them. The helplessness of the Assembly, as the 'supreme organ' of the Authority, to act against the will of the Council is remarkable". It is also noted that such 'helplessness' was already existing under the original wording of the Convention, and is not a result of the adoption of the 1994 Agreement.
[114] M.W. LODGE, *The International Seabed Authority and the Development of the Mining Code*, in J.N. MOORE, M.H. NORDQUIST, *Oceans Policy: New Institutions, Challenges and Opportunities* (Kluwer Law International, 1999), 47-57.
[115] Defined in regulation 1(3)(d) of the relevant Regulations as "one of the resources of the Area consisting of any deposit or accretion of nodules, on or just below the surface of the deep seabed, which contain manganese, nickel, cobalt and copper".
[116] Defined in regulation 1(3)(d) of the relevant Regulations as "hydrothermally formed deposits of sulphides and accompanying mineral resources in the Area which contain concentrations of metals including, inter alia, copper, lead, zinc, gold and silver".
[117] Defined in regulation 1(3)(a) of the relevant Regulations as "cobalt-rich iron/manganese (ferromanganese) hydroxide/oxide deposits formed from direct precipitation of minerals from seawater onto hard substrates containing minor but significant concentrations of cobalt, titanium, nickel, platinum, molybdenum, tellurium, cerium, other metallic and rare earth elements".

provisions of Art. 162(2)(o)(ii) of the Convention[118]. After being submitted by the LTC to the Council in 1998[119], they were further negotiated and discussed within the latter, and their final text[120] was provisionally adopted by consensus by the Council at its 6th Session in 2000[121], to be subsequently finally adopted during the same Session by the Assembly[122]. Amendments to the Regulations on exploration of polymetallic nodules have been subsequently adopted by the Council[123] and finally approved by the Assembly[124] in 2013[125]. Immediately after the final approval of the first version of the Nodules Regulations, the adoption of the following two Regulations for Exploration (of polymetallic sulphides and cobalt-rich ferromanganese crusts) was urged by the Russian Federation[126], which submitted a request in this regard pursuant to the fourth sentence of Art. 162(2)(o)(ii)[127]. Since the term of three years therein provided was not complied with, the Regulations on Prospecting and Exploration of Polymetallic Sulphides (also the 'Sulphides Regulations') were provisionally adopted by the Council[128] (and finally approved by the Assembly) during the 16th Session of 2010[129], whereas the Regulations on Prospecting and Exploration of Cobalt-Rich Ferromanganese Crusts (the 'Crusts Regulations') were adopted with the same procedure during the 18th Session of 2012[130].

As their name suggests, the Regulations do not cover exclusively the phase of exploration of the Area, but also the one of prospecting, uniformly defined in the three set of

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[118] According to which "[p]riority shall be given to the adoption of rules, regulations and procedures for the exploration for and exploitation of polymetallic nodules".
[119] As per document ISBA/4/C/4/Rev.1.
[120] As reflected in document ISBA/6/C/8 (later slightly corrected by document ISBA/6/C/8/Corr.1).
[121] Document ISBA/6/C/12.
[122] Document ISBA/6/A/18. For a more detailed discussion on the process leading to their adoption, reference is made to M.W. LODGE, *International Seabed Authority's Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area*, in *Journal of Energy & Natural Resources Law*, 2002, 270-295.
[123] Document ISBA/19/C/17.
[124] Document ISBA/19/A/9.
[125] The *Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area* are annexed to the document reported in the footnote 129.
[126] As reported in the *Statement of the President of the Assembly on the work of the Assembly during the resumed fourth Session*, document ISBA/4/A/18.
[127] According to which "Rules, regulations and procedures for the exploration for and exploitation of any resource other than polymetallic nodules shall be adopted within three years from the date of a request to the Authority by any of its members to adopt such rules, regulations and procedures in respect of such resource".
[128] Document ISBA/16/C/12.
[129] Regulations on prospecting and exploration for polymetallic sulphides in the Area, annexed to document ISBA/16/A/12/Rev.1.
[130] *Regulations on Prospecting and Exploration for Cobalt-rich Ferromanganese Crusts in the Area*, first provisionally approved by the Council with decision ISBA/18/C/23, and annexed to the decision of the Assembly on their final approval (document ISBA/18/A/11).

Regulations adopted to date as "the search for deposits of [a specific resource category] in the Area, including estimation of the composition, sizes and distributions of deposits of [that specific resource category] and their economic values, without any exclusive rights". In essence, prospecting is normally a preparatory phase for exploration, and as such does not need to be covered by a plan of work and does not give rise to any right with reference to the portion of Area where is conducted. Under regulation 2 and 3 of the three sets of Regulations[131] adopted to date, prospectors are still required to notify the Authority the commencement of such activity, without however being subject to the latter's specific authorization[132]. This is consistent with the fact that prospecting is not covered by a plan of work (and subsequent contract with the Authority). Thus, as the Convention is only binding upon States, the prospector is not bound – in the absence of a contract – by the rules, regulations and procedures of the Authority. Moreover, it can be considered consistent with the modalities through which prospecting is carried out, normally less invasive and which allow the prospector only to "recover a reasonable quantity of minerals, being the quantity necessary for testing and not for commercial use" (regulation 2(4) of the three Regulations on Exploration).

Unlike prospecting, exploration[133] of the Area must be actually covered by a plan of work (and therefore by a contract) and gives rise to specific rights and obligations for the Contractor. Rights include in particular exclusivity, meaning that no other entity may apply for an area already covered by a plan of work for the same category of resources, as provided for by regulation 21(6)(a) and 24 of the Nodules Regulations and regulation 23(6)(a) and 26 of both the Sulphides and the Crusts Regulations, and in accordance with Art. 6(3)(a) of Annex III to the Convention. Moreover, under Art. 10 of the same Annex

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[131] It is here specified that the term "Regulations" is twofold. On the one hand, it refers to the overall set of Regulations adopted by the Authority (as for instance the three Regulations on Explorations currently adopted, which will be analysed *infra*). However, it may also refer to the specific regulations which, put together, compose the above sets of Regulations. For clarity, in the context of the present dissertation the term "Regulation" with capital "A" will be used with the first meaning, whereas the term "regulation" will refer to the second case, except in the standard phrase "rules, regulations and procedures".

[132] As it can be inferred from the overall text of the three Regulations: while the prospector must submit to the LTC an annual report on the status of prospecting, it is not clarified the action that the latter is required to take. As an evidence, it is sufficient to recall that during the 29th Session of work of the Authority the LTC, upon receipt of an annual report of prospecting, simply took note of it, without however recommending its approval or indicating any additional measure to be taken (as evident from document ISBA/29/C/7/Add.1).

[133] 'Exploration' is uniformly defined in regulation 1(3)(b) of the three Regulations adopted to date as "searching for deposits of [a given resource] in the Area with exclusive rights, the analysis of such deposits, the use and testing of recovery systems and equipment, processing facilities and transportation systems, and the carrying out of studies of the environmental, technical, economic, commercial and other appropriate factors that must be taken into account in exploitation".

III, a contract of exploration grants to the Contractor preference and a priority among applicants for a plan of work covering exploitation of the same area and resource category.

Obligations of the Contractor are on the other hand the ones included in the Regulations, as well as in the Convention and the 1994 Agreement, which the latter accepts as binding by signing the contract. As it will be seen below[134], these are enforceable thanks to the mechanism of sponsorship, through which the provisions of the Convention become part of the national legislation of the sponsoring State.

Obligations included in the Regulations on Exploration are not as stringent as the ones that are currently planned to be included in the draft Regulations on Exploitation[135], consistent with the less invasive nature of – and the lack of economic revenues deriving from – the operations carried out under the exploration contract[136]. They include for instance environmental obligations, such as the one foreseen in regulation 31(6) of the Nodules Regulation and regulation 33(6) of both the Sulphides and the Crusts Regulation to "cooperate with the Authority in the establishment and implementation of programmes for monitoring and evaluating the impacts of deep seabed mining on the marine environment"; or the duty (under regulation 32(1) of the Nodules Regulations and regulation 34(1) of both the Sulphides and the Crusts Regulations) to "gather environmental baseline data and to establish environmental baselines".

Training obligations towards personnel of the Authority and developing States are also provided for in the Regulations, thus implementing the provisions of Art. 15 of Annex III to the Convention.

Finally, another main requirement to which the Contractor must conform concerns the so-called 'relinquishment'. In essence, the initial area awarded to the Contractor under the exploration contract cannot exceed a certain spatial extent specified in the Regulations: for polymetallic nodules such is fixed to no more than 150,000 square kilometres (regulation 25 of the Nodules Regulations), while for polymetallic sulphides such initial area cannot exceed 10,000 square kilometres (regulation 27 of the Sulphides

[134] See *infra*, paragraph 3.1.
[135] While the text of the draft Regulations on Exploitation is still being negotiated – and as such may potentially change in the future – the current text (as reported in footnote 151) seems to show a general agreement towards more stringent requirements.
[136] For a full overview of the obligations of the Contractors under the Exploration Regulations, reference is made to E.D. BROWN, *Sea-Bed Energy and Minerals: The International Legal Regime* (Vol. 2 on Sea-Bed Mining, Martinus Nijhoff Publishers, 2001).

Regulations)[137]. The rules for cobalt-rich ferromanganese crusts slightly differ, as the Contractor is required under regulation 12 of the Crusts Regulations to identify no more than 150 cobalt crust blocks[138], located entirely within a geographical area measuring not more than 550 kilometres by 550 kilometres. In all these case this is the initial area awarded to the Contractor; the latter is however required to relinquish a certain percentage of it during the exploration, so to revert it to the Area and make it available again for future exploration.

Following the approval of the three Regulations for exploration, the ISA has signed to date 32 exploration contracts[139], allowing entities meeting the relevant requirements to engage in exploration activities in the Area without, however, being currently able to move to the exploitation phase, in the absence of a Mining Code on exploitation.

2.2. The draft Regulations on Exploitation, the 'two-year rule' and the risk of unilateral exploitation of the Area

Efforts towards the drafting and adoption of the Regulations on Exploitation[140] formally date back to 2011 when, pending the approval by the Council of the Crusts Regulations and further to a first statement in this sense made by the Republic of Fiji[141] – also supported by other delegations – the Council requested the Secretariat of the Authority to prepare a workplan for the formulation of the Regulations on Exploitation[142]. Following

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[137] Further limitation relating to the number of polymetallic sulphide blocks (defined as "cell[s] of a grid as provided by the Authority, which shall be approximately 10 kilometres by 10 kilometres and no greater than 100 square kilometres") are however included in regulation 12.

[138] Defined in regulation 12(1) as "cells of a grid as provided by the Authority, which may be square or rectangular in shape and no greater than 20 square kilometres in size".

[139] The list of contracts signed by the Authority for the exploration of resources of the Area is available on the website of the Authority at the following link: https://www.isa.org.jm/exploration-contracts/. It is noted that the webpage reports 31 contracts being signed by the Authority. However, it still doesn't take into consideration the approval of a plan of work for exploration for polymetallic sulphides presented by the Earth System Science Organization-Ministry of Earth Sciences of the Government of India (as evidenced by decision ISBA/29/C/23).

[140] The current provisions of the draft Regulations on Exploitation will not be analysed here, since it is still subject to changes within the negotiations. However, single regulations will be dealt with when relevant for the purposes of the dissertation.

[141] Statement to the Council by the delegation of Fiji (document ISBA/17/C/22).

[142] Statement of the President of the Council of the International Seabed Authority on the work of the Council during the seventeenth session (document ISBA/17/C/21). The workplan prepared by the Secretariat for the 18th Session was however considered by the Council too ambitious, as it set the deadline for the adoption of the Regulations on Exploration in 2016. See K.-A. BROWN, *The Draft Regulations on Exploitation of Mineral Resources in the Area – "A Work in Progress"*, in A. ASCENCIO-HERRERA, M.H. NORDQUIST, *The United Nations Convention on the Law of the Sea, Part XI Regime and the International Seabed Authority*, cit., 303-352, at 307.

some years of discussion within the LTC[143], the latter presented a first draft of the Regulations on Exploitation to the Council in 2019[144]. Since then, the draft Regulations on Exploitation have been negotiated within the Council, and their approval is still pending[145].

The urgency of approving the draft Regulations on Exploitation has increased since 2021, following the decision of the Republic of Nauru to trigger the so-called 'two-year rule', provided for by Section 1, paragraphs (15)(b) and (c) of the Annex to the 1994 Agreement. Under the former, the Council is required, upon request of a member State whose national intends to apply for approval of a plan of work for exploitation, to complete the adoption of the rules relating to the exploitation of the Area within two years of such a request. Under following subparagraph (c), if the Council fails to comply with such deadline and an application for approval of a plan of work for exploitation is pending, the Council must "consider and provisionally approve such plan of work based on the provisions of the Convention and any rules, regulations and procedures that the Council may have adopted provisionally, or on the basis of the norms contained in the Convention and the terms and principles contained in this Annex as well as the principle of non-discrimination among contractors".

While the rule was designed to prevent the opposition of a restricted number of States within the Council from indefinitely postponing and delaying the adoption of the Regulations (essential for the commencement of exploitation activities)[146], the decision of Nauru to trigger the rule seems to be unlinked from this kind of disagreement within the organ, relating more to the intention of Nauru Ocean Resources Inc. (NORI), an entity sponsored by the same Nauru[147], to present an application for approval of a plan of work in the short term[148].

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[143] For a timeline of such discussion, reference is made to the report of the Secretary-General of the Authority on Status of the draft regulations on exploitation of mineral resources in the Area and proposed road map for 2022 and 2023 (document ISBA/26/C/44), in particular to Annex I to such document.

[144] The first draft is included in document ISBA/24/LTC/WP.1.

[145] The latest version of the draft Regulations on Exploitation is included in the so-called 'Revised Consolidated Text', included in document ISBA/30/C/CRP.1.

[146] P.A. SINGH, *The Invocation of the 'Two-Year Rule' at the International Seabed Authority: Legal Consequences and Implications*, in *International Journal of Marine and Coastal Law*, 2022, 375-412, at 384.

[147] Further details on the mechanism of sponsorship and on NORI are provided *infra*, paragraph 3.1. and 3.2.

[148] See the Letter dated 25 June 2021 from the President of the Republic of Nauru addressed to the President of the Council of the International Seabed Authority, included in document ISBA/26/C/38.

Also due to the historical moment when it was triggered (30 June 2021, effective from 9 July 2021)[149], coinciding with the Covid-19 pandemic, the request of Nauru raised concerns among several States[150], also possibly contributing to the increase of demands for a moratorium on exploitation activities in the Area[151]. While the deadline for the approval of the Regulations on Exploitation expired on 9 July 2023, the lack of a common view among States within the negotiations prevented the Council from successfully adopting them, so that now paragraph 15(c) of Section 1 of the Annex to the 1994 Agreement shall apply.

Following the Authority's failure to adopt the exploitation regulations during its 29th session in 2024, the Republic of Nauru – through a letter attached to Note Verbale no 719/2024 dated 12 November 2024[152] addressed to the President of the Council – officially requested the inclusion of an item on the agenda of the 30th Session (2025), entitled "Process for Consideration of Applications for Plan of Work in the absence of Adopted Exploitation Regulations". As clarified in the letter, Nauru considered the discussion – scheduled for the March meeting – as a necessary step to allow NORI to submit a plan of work for exploitation on 27 June 2025.

During the March meeting of the 30th Session, the item – whose title had been changed to "Further consideration of actions that the Council may take if an application were to be submitted before the Council has completed the RRPs relating to exploitation"[153] – was discussed, albeit inconclusively[154].

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[149] The decision to defer the effective date of notification was taken by Nauru following a consultation with the members of the Authority, as reported in Annex II to the document referred to in the previous footnote.
[150] See in particular the Submission by Costa Rica (on behalf of Argentina, the Bahamas, Chile, Cuba, the Dominican Republic, Guyana, Jamaica, Panama and Trinidad and Tobago) in relation to the request made by Nauru pursuant to section 1, paragraph 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 of 10 December 1982 (document ISBA/26/C/47), as well as an akin submission made by the African Group (document ISBA/26/C/40).
[151] For which see *infra*, Chapter III, paragraph 4.1.1.
[152] Note Verbale 719/2024 is available at the following link: https://www.isa.org.jm/wp-content/uploads/2024/11/NV-ISA-Council18.pdf. The attached letter can be found at the following different link: https://www.isa.org.jm/wp-content/uploads/2024/11/Nauru-Letter-to-ISA-Council-President-re-Process-for---Plan-of-Work_10112024.pdf.
[153] As evident from the final version of the Agenda of the Council (document ISBA/30/C/1).
[154] As evident from the Statement of the President on the work of the Council of the International Seabed Authority during the first part of the thirtieth session (document ISBA/30/C/5), in particular paragraphs 25 and 26 of the document.

One reason for the lack of concrete outcomes (such as the adoption of a decision or recommendation) likely lies in the fact that, the day before the scheduled discussion[155], The Metals Company (TMC)[156], which wholly controls NORI, issued a press release announcing its intention to apply for an exploitation licence in the Area under existing United States legislation[157]. In other words, TMC declared its intention to bypass the Authority's jurisdiction under the Convention by seeking a permit from the U.S. government. Unsurprisingly, the announcement triggered strong reactions from both ISA member States and the Authority, as exemplified by the statement delivered by the ISA Secretary-General on 28 March 2025[158]. In it, the Secretary-General expressed "deep concern" over the threat posed by such an announcement to the principle of the common heritage of humankind and the institutional integrity of the Authority.

At the time, it remained unclear whether the United States would actually support TMC in pursuing this course of action. However, any uncertainty was dispelled by the issuance of a new executive order by the President of the United States on 24 April 2025. Entitled "Unleashing America's Offshore Critical Minerals and Resources"[159], the order expressly authorised the Secretary of Commerce, acting through the relevant administrations, to "expedite the process for reviewing and issuing seabed mineral exploration licenses and commercial *recovery permits in areas beyond national jurisdiction* under the Deep Seabed Hard Mineral Resources Act (30 U.S.C. 1401 et seq.), consistent with applicable law" (emphasis added), thereby confirming the U.S. government's support for such unilateral action.

At present, TMC has not yet obtained a U.S. licence to exploit the Area, and the situation remains highly uncertain. Nonetheless, several observations can be made regarding the

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[155] As per the Indicative Program of Work of the March meeting of the Council (available at the following link: https://www.isa.org.jm/wp-content/uploads/2025/03/IPW-Council-30th-session-part-I-28Mar2025.-pdf) the discussion on this item was conducted on 28 March 2025.
[156] See below, paragraph 3.2.
[157] Press Release by The Metals Company of 27 March 2025 entitled "The Metals Company to Apply for Permits under Existing U.S. Mining Code for Deep-Sea Minerals in the High Seas in Second Quarter of 2025", available at the following link: https://investors.metals.co/news-releases/news-release-details/metals-company-apply-permits-under-existing-us-mining-code-deep.
[158] Statement by Madam Secretary-General of the International Seabed Authority, Leticia Carvalho 28 March 2025, on the Announcement by The Metals Company, available at the following link: https://w-ww.isa.org.jm/wp-content/uploads/2025/03/Statement_Announcement-by-The-Metals-Company.pdf.
[159] The text of the order can be found at the following link: https://www.whitehouse.gov/presidential-actions/2025/04/unleashing-americas-offshore-critical-minerals-and-resources/.

adherence of the United States' conduct to general international law[160]. As previously noted (paragraph 1.2.1), although qualifying the entirety of the common heritage of humankind as a customary international law principle remains controversial, there is a widely shared view in the academic literature that at least the prohibition of appropriation of the Area and its resources – as established in Art. 137(1) and (3) of the Convention – forms part of customary international law. This position is not denied by the United States, as evident from its intervention during the Assembly meeting of the 30th Session in July 2025[161]. However, the United States argues that – while the rule may be customary – it is not opposable to it, due to its status as a 'persistent objector'[162].

Arguably, however, the United States' conduct does not meet the requirements necessary to invoke the persistent objector doctrine. Even setting aside the limited recognition of the doctrine in international law[163], the International Law Commission (ILC) has clarified in its Draft conclusions on identification of customary international law[164] that "[t]he objection must be clearly expressed, made known to other States, and maintained persistently" (Conclusion 15). Put it differently, a State must provide clear and unequivocal evidence of sustained objection during the formation of the customary norm and maintain that position thereafter. The conduct of the United States seems however to have followed throughout the years a different direction. While it has not ratified the Convention, it did for instance sign the 1994 Agreement: importantly, by signing the Agreement, the United States became subject to the obligation under Art. 18 of the Vienna Convention on the Law of Treaties not to defeat its object and purpose "until it shall have made its intention clear not to become a party" to it.

Moreover, the United States was among the States that adopted the 1970 Declaration of Principles Governing the Sea-Bed and the Ocean Floor, and the Subsoil Thereof, beyond

[160] Some preliminary remarks on this issue can be found in C. LATHROP, *The Latest Trump Threat to International Law: Unilaterally Mining the Area* (6 May 2025) *EJIL:Talk! Blog of the European Journal of International Law*.
[161] Available at the following link: https://www.isa.org.jm/wp-content/uploads/2025/02/USA-statement-for-ISA-Assembly-July-2025.pdf.
[162] For a comprehensive definition and discussion on the notion of 'persistent objector', reference is made to O. ELIAS, *Persistent Objector*, in R WOLFRUM (ed.), *Max Planck Encyclopedia of Public International Law*, cit.
[163] J. CRAWFORD, I. BROWNLIE, *Brownlie's principles of public international law* (9th Ed., Oxford, Oxford University Press, 2019), at 26.
[164] International Law Commission, Draft conclusions on identification of customary international law, Adopted by the International Law Commission at its seventieth session, in 2018, and submitted to the General Assembly as a part of the Commission's report covering the work of that session (A/73/10, para. 65), available at the following link: https://legal.un.org/ilc/texts/instruments/english/draft_articles/1_13_2018.pdf.

the Limits of National Jurisdiction[165] – a declaration that already provided for the prohibition of appropriation of the Area and its resources, and envisaged the creation of an *ad hoc* international regime (which eventually became the Authority) applicable to it. The conduct of the United States towards the Declaration falls far from being qualifiable as one of a 'persistent objector'; quite the contrary, it can even be considered as an evidence of *opinio iuris* under Conclusion 10(2) of the same ILC Draft conclusions on identification of customary international law[166].

As an additional example, reference can be made to a 1975 statement by the U.S. Department of State in response to a claim submitted in 1974 by Deepsea Ventures Inc., a private company that had discovered resources in what is now the seabed beyond national jurisdiction and requested diplomatic protection to exploit them[167]. Encouraged by international opposition to the claim, the U.S. Department of State declared: "[t]he Department of State does not grant or recognize exclusive mining rights to the mineral resources of an area of the seabed beyond the limits of national jurisdiction. The appropriate means for the development of the law of the sea is the Third United Nations Conference on Law of the Sea and not unilateral claims. The United States supports the achievement of a widely acceptable and comprehensive law of the sea treaty in 1975 that would include a regime and machinery for the exploration for and exploitation of the mineral resources of the deep seabed beyond the limits of national jurisdiction"[168].

On this basis, it may be concluded that the United States cannot rely on the theory of the persistent objector in the present case. For the purposes of this dissertation, the position adopted will therefore be to regard the conduct of the United States as incompatible with customary international law. A separate issue, however, is how States should respond to this violation, given that the dispute settlement mechanisms under the Convention cannot be invoked against the U.S., which is not a party to UNCLOS. This question will be further examined in Chapter III, in the context of actions the European Union might take to prevent unilateral claims in the Area.

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[165] See the Introduction to this dissertation, footnote 12.
[166] According to which "Forms of evidence of acceptance as law (opinio juris) include […] conduct in connection with resolutions adopted by an international organization or at an intergovernmental conference".
[167] See *Deepsea Ventures, Inc.: Notice of Discovery and Claim of Exclusive Mining Rights, and Request for Diplomatic Protection and Protection of Investment* (1975) *International Legal Materials*, at 51 and following.
[168] Ibidem, at 66.

3. THE SYSTEM OF EXPLORATION AND EXPLOITATION OF RESOURCES OF THE AREA AND THE MECHANISM OF SPONSORSHIP

Having clarified the composition and powers of the different organs of the Authority, as well as how such powers are enforced through its rules, it is worth focusing on the basic conditions set out in the Convention to carry out activities in the Area. More specifically, the present paragraph will analyse which entities may be allowed to carry out such activities, and the requirement of 'sponsorship'. To this end, the notion of 'effective control' will also be dealt with.

Under Art. 153(2) of the Convention, activities in the Area may be carried out by the Enterprise (under the conditions analysed above) or, according to letter (b) of the same paragraph "in association with the Authority by States Parties, or state enterprises or natural or juridical persons which possess the nationality of States Parties or are effectively controlled by them or their nationals, when sponsored by such States, or any group of the foregoing which meets the requirements provided in this Part and in Annex III". A few remarks can be made on this provision. First, the phrase "in association with the Authority" does not mean that the conduct of activities must be shared with the ISA (for instance through joint-venture agreements with the Enterprise), but it wishes to remark once more that such activities will be in any case subject to the Authority's jurisdiction and control[169].

Second, the Article requires two conditions to be fulfilled in order for an entity to apply for a plan of work: it must be either a national of a State party or be effectively controlled by a State party (or by its nationals) on the one hand; furthermore, it must be sponsored by such State[170]. Once these requirements (which will be further analysed below) are fulfilled, the entity is entitled to apply for a plan of work, the approval of which is however subject to the respect of the more specific requirements set out in the rules, regulations and procedures of the Authority.

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[169] J. SIEGFRIED, *Article 153*, in A. PROELß, A.R. MAGGIO, E. BLITZA, O. DAUM, cit., at 1085.

[170] In addition to that, if an applicant possesses the nationality of more than one State Party, it will be required to obtain the Sponsorship from all of them. The same applies in case a Contractor possesses the nationality of a State Party but is effectively controlled by another, as it will have to be sponsored by both of them. This rule is envisaged in Art. 4(3) of Annex III to the Convention.

3.1. The system of sponsorship

A first clarification to be made is that the mechanism of sponsorship does not necessarily entail a financial involvement for the sponsoring State; it is on the contrary a form of control by the State (and – as a consequence – of the Authority, with which States must cooperate) on the Contractor in order to prevent the latter's potential noncompliance, as rules of the Convention are not directly applicable on individuals[171]. While only State parties to UNCLOS (i.e. ISA member States) can become sponsoring States, this is a voluntary commitment, as the Convention does not provide for any obligation for a State to sponsor an entity.

Despite requiring the sponsorship, the Convention does not define in precise terms its meaning and consequences, nor the exact obligations incumbent on the sponsoring State. To clarify those aspects, the Authority requested in 2010[172] an advisory opinion to the Seabed Dispute Chamber of the ITLOS, pursuant to Art. 191 of the Convention, which was rendered in 2011[173].

As mentioned above, the *raison d'être* of the existence of sponsoring States is to ensure that the obligations set out in the Convention (which are normally binding only on States Parties) are complied with by entities that are subjects of domestic legal systems[174]. It is not a case therefore that the most important obligation identified by the ITLOS is the so-called 'responsibility to ensure', mainly provided for by the combination of Art. 139(1) and Annex III, Ar. 4(4) of the Convention[175]. This requires in particular sponsoring State (or States) to "ensure, within their legal systems, that a contractor so sponsored [carries] out activities in the Area in conformity with the terms of its contract and its obligations under this Convention". In other words, the Convention requires the sponsoring State to properly implement its domestic legislation, in order to make its provisions legally

[171] *Ibidem*, at 1084-1085.
[172] Decision of the Council of the International Seabed Authority requesting an advisory opinion pursuant to Article 191 of the United Nations Convention on the Law of the Sea (document ISBA/16/C/13). The decision to request an advisory opinion followed in turn a proposal of the Republic of Nauru in its capacity as sponsoring Nauru Ocean Resources Inc., an entity carrying out activities in the Area (document ISBA/16/C/6).
[173] See footnote 6.
[174] In the words of ITLOS "[t]he role of the sponsoring State, as set out in the Convention, contributes to the realization of the common interest of all States in the proper application of the principle of the common heritage of mankind which requires faithful compliance with the obligations set out in Part XI" (Paragraph 76 of the advisory opinion).
[175] See ITLOS advisory opinion (this Chapter, footnote 6), paragraphs 107-116.

binding upon the Contractor. As also noted by the Tribunal, the wording of paragraph 4 of Annex III clarifies that this obligation of the sponsoring States is one of due diligence, meaning that the sponsoring State cannot be held liable for damage caused by the sponsored Contractor, if it has adopted “laws and regulations and taken administrative measures which are, within the framework of its legal system, reasonably appropriate for securing compliance by persons under its jurisdiction”.

The second category of obligations of the sponsoring States includes so-called 'direct obligations', resulting from several provisions of UNCLOS and in part from the rules of the Authority. Direct obligations include: the obligation to assist the Authority in its task of controlling activities in the Area for the purpose of ensuring compliance with the relevant provisions of Part XI of the Convention (in accordance with Art. 153(4) UNCLOS); the obligation to apply a precautionary approach, as well as the “best environmental practices”[176]; when a Contractor does not provide the Council with “a guarantee of its financial and technical capability to comply promptly with emergency orders or to assure that the Council can take such emergency measures”, the obligation to “take necessary measures to ensure that the contractor provides such a guarantee or to take measures to ensure that assistance is provided to the Authority […]”[177]; the obligation to ensure that legal recourse is available in accordance with the sponsoring State’s legal systems “for prompt and adequate compensation or other relief in respect of damage caused by pollution of the marine environment by natural or juridical persons under their jurisdiction” (pursuant to Ar. 235(2) UNCLOS); lastly, the obligation to conduct an Environmental Impact Assessment (as required by Regulation 31(6) of the Nodules Regulations, as well as Regulation 33(6) of the Sulphides and the Crusts Regulations). This obligation is equally provided for States by the Convention itself in broader terms, as Art. 206 UNCLOS requires them to conduct such assessment every time they “have reasonable grounds for believing that planned activities under their jurisdiction or control may cause substantial pollution of or significant and harmful changes to the marine environment”. Unlike the ‘responsibility to ensure', direct obligations are not ones of due diligence: the former, has highlighted above, consists in the implementation of a proper legislation (including enforcement measures) for the purposes of Art. 139(1). Once this has been done, the obligation of the State is fulfilled,

[176] As required by regulation 33(2) of both the Sulphides and the Crusts Regulations.
[177] Also this obligation comes from the rules of the Authority, in particular regulation 32(7) of the Nodules Regulations, and regulation 35(8) of both the Sulphides and the Crusts Regulations.

and the latter cannot be held liable even in case on non-compliance with that same legislation by the Contractor[178]. Noncompliance with direct obligations is treated differently, as these are placed directly upon the sponsoring State, and therefore always entail the liability of the sponsoring State[179].

As a last remark, it is highlighted that such obligations apply to both developed and developing sponsoring States, as the Convention does not envisage a difference of treatment between them[180].

From a formal and procedural viewpoint, the implementation of the sponsorship mechanism is entrusted by the Authority to the Mining Code. The three Regulations on Exploration currently require (at regulation 11) the sponsoring State to issue a certificate of sponsorship, which must accompany the application for a plan of work and represents the commitment of the State to comply with the rules described above.

3.2. The requirement of 'effective control'

As mentioned above, Art. 153(2)(b) UNCLOS allows activities in the Area to be carried out by entities which possess the nationality of a State party or which are "effectively controlled" by it or its nationals. However, what constitutes such an 'effective control' is left undefined both in the Convention and in the 1994 Agreement.

This legal vacuum has become more and more relevant in the last few years, to the extent that discussions on what the notion of 'effective control' means now regularly take place within the Authority, mostly in the context of the negotiations of the draft Regulations on Exploitation[181]. To understand the origin of the discussion, it is first important to keep in mind the advantages granted to developing States in the context of activities in the Area, especially those relating to reserved areas. As already explained, under the site-banking system entities sponsored by developing States have the right to request the Enterprise the authorization to carry out activities in a reserved area, while this opportunity is not

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[178] This applies provided that the measures taken by the sponsoring State are of legislative nature: on the contrary, according to ITLOS, the State cannot limit itself to sign a contract with the sponsored entity requiring compliance with the provisions of the Convention.
[179] See paragraph 206 and 207 of the advisory opinion.
[180] As also underlined by the Tribunal in paragraphs 151 to 163 of the advisory opinion referred to in footnote 6.
[181] See for instance the *Briefing paper on conceptual topics related to the Informal Working Group on Institutional Matters in the ISA's Exploitation Regulations* on Effective Control, provided by the Co-Facilitators of the discussion on this topic during the first part of the 29th Session.

granted to entities sponsored by developed countries. As a consequence of the convenience resulting from the sponsorship of a developing State, in the last years some entities based on (and sponsored by) a developing country but economically controlled by a different entity (based on a developed State) have commenced carrying out activities in the Area, and especially in reserved areas. To provide a concrete example, it is sufficient to make reference to Nauru Ocean Resources Inc. (NORI): the company is based in the Republic of Nauru and is sponsored by the same State; however, it is wholly controlled at the financial level by another entity, The Metals Company (TMC), which is based in Canada[182]. While TMC does not directly carry out any activity in the Area, its subsidiary NORI – being sponsored by the developing State of Nauru – was able to apply for the exploration of a reserved area[183].This is not an isolated case: the same TMC holds for instance the entirety of the shares of another entity exploring the Area, Tonga Offshore Mining Limited (TOML), sponsored by the small island developing State of Tonga[184].

A similar situation occurs in cases of close cooperation between the entity carrying out the activities and other private companies: this is the case for instance of Cook Islands Investment Corporation (CIIC), whose application for a plan of work for exploration, presented in 2014, was approved the same year by the Council, during the 20th Session[185]. Despite CIIC being a State-owned enterprise fully controlled by the Cook Islands, it was made clear within the application[186] that the same was "supported by CI-GSR, an equal and equitable arrangement between the Cook Islands Government and G-TEC Sea Mineral Resources NV (GSR) of Belgium". Being based in and sponsored by a developed State, GSR had previously contributed to a reserved area in accordance with the site-

[182] As stated in the website of TMC, on the page dedicated to NORI. It is also noted that, when applying for a plan of work for exploration of the Area, NORI was wholly controlled by Nautilus Minerals Inc., which declared bankruptcy in 2019. For further reference, see O. HEFFERNAN, *Deep-sea Mining could begin soon, regulated or no*t, in *Scientific American*, available at https://www.scientificamerican.com/article/deep-sea-mining-could-begin-soon-regulated-or-not/.
[183] This information is included in the application for plan of work for exploration submitted by NORI (document ISBA/14/LTC/L.2).
[184] TOML applied for a plan of work in 2008, being at the time completely owned by Nautilus Minerals Inc., as evident from its application (document ISBA/14/LTC/L.3). Its plan of work was approved by the Council during the 17th Session of 2011 (Decision of the Council relating to a request for approval of a plan of work for exploration for polymetallic nodules submitted by Tonga Offshore Mining Limited, document ISBA/17/C/15).
[185] Decision of the Council relating to an application for the approval of a plan of work for exploration for polymetallic nodules submitted by the Cook Islands Investment Corporation, document ISBA/20/C/29.
[186] Application for approval of a plan of work for exploration for polymetallic nodules by the Cook Islands Investment Corporation, document ISBA/20/LTC/3.

banking system[187]; the application of CIIC concerned that same reserved area identified by GSR, and envisaged a coordination with the latter in the exploration of the area[188]. Moreover, the application stated that the two companies would "further endeavour to align their respective plans of work for exploration in order to improve the efficiency of the campaigns and to achieve a better understanding of the environmental conditions by integrating results covering a larger area". Despite this case being less clear-cut than the ones of NORI and TOML, it is however still evident that, in practice, the exploration of the area covered by the contract would be sub-contracted to GSR or to a joint-venture between the latter and CIIC[189], so that in essence there would still be a high degree of involvement of the latter in the activities.

The existence of these "new models of business arrangements" was first acknowledged by the LTC in 2013[190] and again in 2014[191]: despite being considered compliant with the Regulations of the Authority (and therefore with the Convention)[192], it was however noted that their consequences should be further monitored. As highlighted in the note prepared by the Secretariat of the Authority for the LTC in 2016[193], "the existence of close associations or collaborations between developing States and their sponsored entities, with the business interests of entities registered in, or owned by nationals of, developed States" may have an impact "on foundational concepts such as the parallel system, the Enterprise and the principle of the common heritage of mankind". The LTC was therefore invited to keep the matter into its agenda, but the matter was not further addressed within the subsidiary organ.

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187 See the Application for approval of a plan of work for exploration for polymetallic nodules submitted by G-TEC (document ISBA/18/LTC/L.5), approved by the Council with decision ISBA/18/C/28.

188 As explicitly stated in the document mentioned in the previous footnote "[t]he formal arrangement between the Government of the Cook Islands and GSR allows for parties to jointly undertake exploration of the reserved area under application, GSR-A, through the Cook Islands State enterprise named Cook Islands Investment Corporation, the applicant".

189 K. WILLAERT, P.A. SINGH, *Deep Sea Mining Partnerships with Developing States: Favourable Collaborations or Opportunistic Endeavours?*, in *International Journal of Marine and Coastal Law*, 2021, 199-217, at 213.

190 Summary report of the Chair of the Legal and Technical Commission on the work of the Commission during the nineteenth session of the International Seabed Authority (document ISBA/19/C/14).

191 Summary report of the Chair of the Legal and Technical Commission on the work of the Commission during the twentieth session of the International Seabed Authority (document ISBA/20/C/20).

192 See in particular the document referred to in the previous footnote. Furthermore, the same approval of the plans of work of entities mentioned above constitutes evidence of the compliance of these models of business with the Regulations.

193 Issues related to the sponsorship of contracts for exploration in the Area, monopolization, effective control and related matters (document ISBA/22/C/13).

This discussion has however progressed in the context of the negotiations for the adoption of the Regulations on Exploitation: according to some delegations[194], since there is an involvement of a third company controlling the entity carrying out activity in the Area, the sponsorship of the State to which the company is national should also be required. The relevance of the discussion is also shown by the fact that, as noted above, an informal working group tasked of carrying out the discussion on the issue of 'effective control' was established within the Council[195]. While an agreement has not yet been reached within the Council on the meaning and legal implications of the phrase 'effective control', two potential approaches have been identified and considered to be suitable to date. The first is the one applied in practice until now, which has been defined as 'regulatory approach', and which would only require the sponsorship of the State having the ability to exercise regulatory jurisdiction over the entity carrying out the activities (which would normally coincide with the country of registration or incorporation of that entity)[196]. By contrast, other delegations have proposed to further explore the possibility of an 'economic approach', which "examines which State has the (*de facto*) ability to exercise economic and management control over the entity. In this regard relevant factors may include: the wider company structure (e.g. holding and parent companies); owners of majority shares and voting rights; source of the capital and ongoing resources invested into the ISA project; who has the rights to elect the company's Board; who has influence over company decisions; who represents the entity in its dealings"[197]. Accordingly, the sponsorship of this additional State would also be required.

As mentioned, the discussion is still taking place at the ISA: delegations supporting the economic approach insist that it would "assist in operationalizing protections against monopolistic activities and equitable development of reserved areas through the Enterprise"[198]. Without prejudice to which option the ISA will pursue in the end, it can be however noted that the practical result of adopting an economic approach would

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[194] The term 'delegation' in the context of negotiations of the Regulations on Exploitation is understood to include also observers of the Authority, which often intervene without however holding the right to vote.
[195] The informal working group is tasked more in general with the discussion of 'institutional matters', as detailed in the annex to the Decision of the Council concerning working methods to advance discussions on the draft regulations for exploitation of mineral resources in the Area (document ISBA/26/C/11). Among the issues discussed by the group is also the one of 'effective control', as evidenced by the several papers and studies presented to facilitate the discussion.
[196] A.S. ROJAS, F.-K. PHILLIPS, *Effective Control and Deep Seabed Mining: Toward a Definition*, in *Liability Issues for Deep Seabed Mining Series | Paper No. 7*, 2019, at 9-10.
[197] *Briefing paper on conceptual topics related to the Informal Working Group on Institutional Matters in the ISA's Exploitation Regulations on Effective Control*, referred to in footnote 185.
[198] A.S. ROJAS, F.-K. PHILLIPS, *Effective Control and Deep Seabed Mining: Toward a Definition*, cit., at 10.

essentially consist in requiring to entities carrying out activities in the Area one (or more) further sponsoring State(s). As it was noted above, the role of the sponsoring State is not to provide a financial guarantee, but mainly to ensure that obligations provided for by the Convention and related legal instruments become binding upon the sponsored entity, as it was also highlighted by supporters of the regulatory approach[199]. While this issue, almost paradoxically, may have implications on the policies of the European Union (as it will be further explored in Chapter III), it can be noted that the impact at the ISA level would be quite limited.

[199] See in particular the Non-paper submitted by Nauru on State sponsorship of activities in the Area and the interpretation of the "Effective Control" requirement, available at the following link: https://www.isa.org.jm/wp-content/uploads/2024/05/Non-Paper-by-Nauru.pdf.

CHAPTER II

THE EUROPEAN UNION AND ITS COMPETENCES IN RELATION TO MINING ACTIVITIES IN THE SEABED

1. Introduction

On 7 December 1984, the European Economic Community (EEC) – now the European Union (hereinafter also the 'EU' or the 'Union')[1] – signed the United Nations Convention on the Law of the Sea; upon formal confirmation[2] on 1 April 1998, it became the first, and to date still the only international organisation[3] Party to it.

Previously, the EEC had been allowed to attend – without however the right to vote – the negotiations which took place in the context of UNCLOS III, through the inclusion in the rules of procedure of the Conference adopted on 1974[4] of Rule 64, stating that "[t]he specialised agencies, the International Atomic Energy Agency and other intergovernmental organizations invited to the Conference may designate representatives to participate as observers […]"[5].

The possibility for the EU to ratify the Convention was explicitly envisaged by the Convention itself, which allows "international organization[s]" to become Parties, subject to the conditions set out therein. To understand why the EU can be qualified as such, it is

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[1] It will not be possible to provide here a full overview of the history and evolution of the European Union. On this, reference is made to R.H. FOLSOM, *European Union law including Brexit in a nutshell* (9th ed., West Academic Publishing, 2017).

[2] The term is used to refer to ratification by international organisations.

[3] The difficulty of defining the European Union as an international organization is acknowledged: despite attempts to categorize the legal status of the EU are numerous in the academic literature, they still didn't reach a unique view; nevertheless, the Union is normally defined as a *sui generis* organization or as a 'Regional Economic Integration Organization' (REIO). In the context and for the purposes of the present dissertation, the discussion on the legal nature of the Union is not particularly relevant, since the Convention describes – as it will be further discussed below – the requirements that "international organization[s]" must fulfil in order to become Parties. For further discussion on the legal nature of the EU, reference is therefore made to C. ECKES, R.A. WESSEL, *An International Perspective*, in R. SCHÜTZE, T. TRIDIMAS (eds.), *Oxford Principles of European Union Law* (Vol. I, Oxford University Press, 2018), 74-102, at 80-83, and to A. ROSAS, L. ARMATI, *EU Constitutional Law – An Introduction* (2nd ed., Hart Publishing Ltd., Oxford, 2012), at 7-17.

[4] Third United Nations Conference on the Law of the Sea, Rules of Procedure (adopted at its 20th meeting on 27 June 1974 and amended at its 40th, 52nd and 122nd meetings on 12 July 1974, 17 March 1975 and 6 March 1980 respectively), document A/CONF.62/30/Rev.3.

[5] Furthermore, the EU had already attended since 1972 the work of the Sea-Bed Committee. See D. VIGNES, *La Communauté européenne dans le domaine du droit général de la mer*, in T. TREVES, L. PINESCHI, *The Law of the Sea: the European Union and its Member States* (Leiden, Brill | Nijhoff, 1997), 7-26, at 20.

necessary to recall the Union's unique legal nature, particularly the attribution of specific competences that distinguish it from other international organizations and which may be exercised through the adoption of policies and even binding acts, enacted by the Union's institutions[6] and addressed to its Member States.

The discussion of EU competences in this Chapter will follow a threefold structure: the next paragraph will focus on the development of external competences, in order to clarify why it was necessary for the Union to sign and ratify the Convention; the third paragraph will analyse the specific requirements laid down in the Convention itself for international organizations to become Parties, and the way in which the EU fulfilled them; finally, the fourth paragraph will explore the Union's current competences relevant to deep seabed mining, with a view to assessing their potential relevance for the policies of the Authority.

The conclusions of the Chapter, contained in the fifth paragraph, will investigate whether – in light of subsequent legal developments – there is a need for the Union to adapt its approach to the representation and exercise of its competences under the Convention.

2. THE EXTERNAL COMPETENCES OF THE EUROPEAN UNION

The adoption of UNCLOS came at a time when the powers of the Treaty establishing the European Economic Community[7] (hereinafter the 'EEC Treaty') was in force and did not explicitly provide for a competence of the EEC in matters related to the Law of the Sea. The present paragraph aims at analysing – through an examination of how the attribution of competences operated prior to the Treaty of Lisbon[8] – how, despite the above, the EEC was nevertheless conferred the competence to sign and ratify the Convention.

Following such analysis, it will be assessed how the situation has evolved following the adoption Treaty of Lisbon, in order to properly identify potential future developments and legal implications. Finally, particular focus will be given to mixed agreements, among which is the Convention.

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[6] The procedure for the adoption of these acts will not be analysed in the context of the dissertation except when specifically relevant.

[7] Treaty establishing the European Economic Community, signed in Rome on 25 March 1957 and in force 1 January 1958 (document 11957E/TXT, accessible only in Dutch, French, German and Italian).

[8] Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon on 13 December 2007 (Document 12007L/TXT). The Treaty of Lisbon has introduced for the first time into the Treaty on the Functioning of the European Union (TFEU) specific provisions listing the competences of the Union.

This analysis will focus exclusively on the Union's competence to conclude international agreements, excluding other forms of external action such as, for example, the Common Foreign and Security Policy. Furthermore, the discussion will be limited to the substantive scope of the Union's external competence, without addressing procedural aspects governed by Art. 218 TFEU, which will be considered only when relevant to the objectives of this dissertation.

2.1. The external competence prior to the adoption of the Treaty of Lisbon

Since the early years of the EEC, it has been undisputed that the legal personality of the Union – now codified in Art. 47 of the Treaty on the European Union (TEU)[9] – extended to the international level. However, given the absence of an explicit general external competence in the then EEC Treaty, uncertainty arose as to whether this personality – and the corresponding capacity to conclude international agreements – could be exercised solely in cases expressly provided for in the EEC Treaty[10], or whether it could also apply in areas not explicitly addressed by the latter. In particular, it was debated whether the Treaty implicitly established a relationship of parallelism between internal and external competences.

The answer to this question was primarily developed through the case-law of the ECJ, most notably in Case C-22/70 (*ERTA*)[11]. While the factual background of the judgment is not relevant for the purposes of this dissertation and will therefore not be addressed[12], the principles established by the Court requires close examination. In its reasoning, the Court – starting from the analysis of former Art. 210 EEC (now Art. 47 TEU) – affirmed that, by virtue of the Community's legal personality, its authority to enter into international agreements derived "not only from an express conferment by the Treaty" but could "equally flow from other provisions of the Treaty and from measures adopted, within the framework of those provisions, by the Community institutions"[13].

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[9] According to which "[t]he Union shall have legal personality".
[10] A reference to the possibility for the EEC to conclude international agreements was for instance included in Art. 238 of the Treaty of Rome, on association agreements.
[11] European Court of Justice, judgment of 31 March 1971, Case C-22/70, *Commission v. Council* (*ERTA*) ECLI:EU:C:1971:32. Depending on the language used, the case may be referred to as the 'ERTA' or the 'AETR' case, from the name of the European Road Transport Agreement which originated the case. Here the former acronym will be used.
[12] For a detailed analysis of the case, reference is made to P. EECKHOUT, *EU External Relations Law* (2nd Ed., Oxford University Press, 2011) at 71-76.
[13] *Ibidem*, at para 15-16.

This reasoning, based on a teleological interpretation of the Treaty[14], built on to the doctrine of 'implied powers'[15], according to which the obligation imposed on the EU to achieve certain objectives must be accompanied by the power necessary to attain them[16]. The *ERTA* judgment further refined this principle by holding that "[i]n particular, each time the Community, with a view to implementing a common policy envisaged by the Treaty, adopts provisions laying down common rules, whatever form these may take, the Member States no longer have the right, acting individually or even collectively, to undertake obligations with third countries which affect those rules. As and when such common rules come into being, the Community alone is in a position to assume and carry out contractual obligations towards third countries affecting the whole sphere of application of the Community legal system"[17].

This excerpt from the *ERTA* judgment introduces an additional element that has since then become pivotal in shaping the external action of the Community (and later the Union): namely, the principle that the exercise of any internal competence – regardless of whether it is exclusive – through the adoption of common rules results, in the Court's view, in the emergence of an exclusive external competence. In the specific context of the *ERTA* case, the Court held that the objective set out in Art. 3(e) of the EEC Treaty – namely "the adoption of a common policy in the sphere of transport" – precluded Member States from entering into international obligations, outside the institutional framework of the Community, that could affect those common rules established in accordance with that provision.

In summary, the implications of what would later be termed the '*ERTA* doctrine'[18] are twofold from the perspective of the Union's external competence. First, the ECJ inferred from the Treaty's recognition of the Community's legal personality a general principle of parallelism between internal and external competences, thereby rejecting the view that external competence arose solely from an express Treaty provision[19]. Second, it

[14] T. TRIDIMAS, P. EECKHOUT, *The external competence of the Community and the case-law of the Court of Justice: principle versus pragmatism*, in *Yearbook of European Law*, 1994, at 149-150.
[15] D. THÜRER, P-Y. MARRO, *Article 47*, in H.-J. BLANKE, S. MANGIAMELI (eds.), *The Treaty on European Union (TEU)* (Springer, 2013), at 1322-1323.
[16] *Ibidem*.
[17] *ERTA* judgment, at paragraph 17-18.
[18] S. KADELBACH, *ERTA Case*, in R. WOLFRUM, *Max Planck Encyclopedia of Public International Law*, cit.
[19] It must be noted that this point was significantly limited by the following case-law of the ECJ. Reference is made in particular to the Opinion of the Court 2/92 of 24 March 1995 on the *Competence of the Community or one of its institutions to participate in the Third Revised Decision of the OECD on national*

established that, once internal competence has been exercised through the adoption of common rules, Member States were no longer permitted to act individually or collectively in ways that might affect those rules, thus conferring exclusive external competence on the Union[20]. In doing so, the Court drew a distinction between the Union's substantive external competence – encompassing external action and policy – and its specific capacity to conclude international agreements. Notably, the judgment was innovative in affirming the latter capacity even in the absence of an explicit legal basis in the EEC Treaty[21].

These core elements of the *ERTA* doctrine have subsequently informed several ECJ rulings. Among them, the judgment in *Kramer*[22] is particularly relevant to this dissertation, as it provided the foundation for recognising the Community's external competence in the field of conservation of marine biological resources. In light of its significance, it is useful to briefly recall the facts that gave rise to that case.

Between May and August 1975, criminal proceedings were initiated against Dutch fishermen accused of violating national regulations setting maximum fishing quotas for that year. These measures, enacted by the Dutch authorities, were based on the provisions of the North-East Atlantic Fisheries Convention (NEAFC)[23], which had been ratified by the Kingdom of the Netherlands on 21 April 1960. The fishermen however contested the competence of the Dutch authorities to adopt such legislation, arguing that the Netherlands no longer had the authority to enter into international agreements such as the NEAFC. In their view, this competence had been transferred exclusively to the EEC, pursuant to various legal instruments: among the legal bases invoked were provisions of the EEC Treaty, including Art. 38(1), which states that "[t]he common market shall extend

treatment, later confirmed on this aspect by the Opinion of the Court 1/94 of 15 November 1994 on *Competence of the Community to conclude international agreements concerning services and the protection of intellectual property - Article 228 (6) of the EC Treaty*. In both cases, the Court held that the application of the *ERTA* doctrine did not only depend on the existence of the respective internal competence, but also on the actual exercise of such competence through the adoption of a legally binding act. See R. GEIGER, *Treaty on the Functioning of the European Union, Article 216*, in R. GEIGER, D-E. KHAN, M. KOTZUR (eds.) *European Union Treaties: Treaty on European Union, Treaty on the Functioning of the European Union* (London, Hart Publishing, 2015) 780-784, at 782.

[20] As noted in J. WOUTERS, F. HOFFMEISTER, G. DE BAERE, T. RAMOPOULOS, *The Law of EU External Relations* (Oxford University Press, 2021) at 6, the idea at the base of the *ERTA* doctrine (as also specified in other cases) "consists in upholding exclusive external EC (by now EU) competence when the conclusion of an international agreement by one or even all Member States would 'affect' internal legislation", in the same logic of preemption that now governs the area of shared competences of the Union.

[21] P. EECKHOUT, *EU External Relations Law*, cit., in particular at 75.

[22] European Court of Justice, judgment of 14 July 1976, joined cases C-3/76, 4/76 and 6/76, *Cornelis Kramer and others* ('Kramer'), ECLI:EU:C:1976:114.

[23] North-East Atlantic Fisheries Convention (signed in London 24 January 1959, in force 25 June 1963) 486 UNTS 7078.

to agriculture and trade in agricultural products", a term that includes "the products of the soil, of stock-farming and of fisheries and products of first-stage processing directly related to these products". Additional instruments cited included the Act of Accession to the EEC of Denmark, Ireland, and the United Kingdom[24], as well as Council Regulations 2141/70/EEC[25] and 2142/70/EEC[26], both of which laid down common rules for the fishing industry and the trade in fishery products[27]. Relying on the principles of the *ERTA* doctrine the fishermen argued that, since the Community had already adopted common rules in the fisheries sector, the Member States no longer retained the competence to act unilaterally in this field. As a result, a request for a preliminary ruling was submitted to the ECJ[28].

In its decision, the Court reaffirmed the principles established in the earlier *ERTA* case. Given their significance, the relevant passage of the judgment is reproduced below:

It follows from these provisions taken as a whole that the Community has at its disposal, on the internal level, the power to take any measures for the conservation of the biological resources of the sea, measures which include the fixing of catch quotas and their allocation between the different Member States. It should be made clear that, although Article 5 of Regulation No 2141/70 is applicable only to a geographically limited fishing area, it none the less follows Article 102 of the Act of Accession, from Article 1 of the said regulation and moreover from the very nature of things that the rule-making authority of the Community ratione materiae *also extends – insofar as the Member States have similar authority under public international law – to fishing on the high seas. The only way to ensure the conservation of the biological resources of the sea both effectively and*

[24] Treaty concerning the accession of the Kingdom of Denmark, Ireland, the Kingdom of Norway and the United Kingdom of Great Britain and Northern Ireland to the European Economic Community and to the European Atomic Energy Community, in force on 1 Janvier 1973 (Document 11972B/TXT). The relevant provision in the Act is Article 102, under which "[f]rom the sixth year after accession at the latest, the Council, acting on a proposal from the Commission, shall determine conditions for fishing with a view to ensuring protection of the fishing grounds and conservation of the biological resources of the sea".

[25] Regulation (EEC) No 2141/70 of the Council of 20 October 1970 laying down a common structural policy for the fishing industry (OJ L 236, 27.10.1970).

[26] Regulation (EEC) No 2142/70 of the Council of 20 October 1970 on the common organisation of the market in fishery products (OJ L 236, 27.10.1970).

[27] The two legal instruments are commonly considered the foundation of the Common Fishery Policy (CFP) of the then EEC. See K.R. SIMMONDS, *The European Economic Community and the New Law of the Sea* (The Hague Academy Collected Courses / Recueil des cours de l'Académie de La Haye, Brill, 1989) at 43-46.

[28] A reference for a preliminary ruling can be defined as a request from a national court of a Member State to the European Court of Justice to give an authoritative interpretation on an EU act or a decision on the validity of such an act. See M.P. BROBERG, N. FENGER, *Broberg and Fenger on Preliminary References to the European Court of Justice* (3rd Ed., Oxford University Press, 2021), in particular at 1-28.

equitably is through a system of rules binding on all the States concerned, including non-member countries. In these circumstances it follows from the very duties and powers which Community law has established and assigned to the institutions of the Community on the internal level that the Community has authority to enter into international commitments for the conservation of the resources of the sea[29].

In the specific context of the case at stake the Court rejected the fishermen's arguments, finding that – despite the existence of an external competence on the part of the EEC as outlined above – this competence had not yet been fully exercised, so that the Kingdom of the Netherlands remained entitled to adopt the contested measures in order to fill the regulatory gap cause by such inaction. However, the judgment also made clear that once such competence was exercised, Member States would be precluded from adopting unilateral or collective measures in areas falling within the scope of the common rules established by the Community.

As a final note, following the reasoning developed in the *Kramer* case, the ECJ analysed again the relevant provisions of Community law in the 1981 *Commission v United Kingdom* case[30]. On that occasion, the Court held that, further to the expiration as of 1 January 1979 of the transitional period set out in Art. 102 of the Act of Accession, the "power to adopt, as part of the common fisheries policy, measures relating to the conservation of the resources of the sea has belonged fully and definitively to the Community". In other words, the Community's competence in this field had become exclusive, both internally and externally[31]. It is therefore evident that, by 1982, the competence to sign the Convention lay with the Union, rather than with its Member States.

2.2. The external competence after the Treaty of Lisbon

The scope of the Union's external competence following the adoption of the Treaty of Lisbon has been substantially shaped by the case-law of the ECJ, to the extent that the *ERTA* doctrine[32] can now be considered fully integrated into the Union's legal framework.

[29] *Kramer* judgment, at paragraph 30/33.
[30] European Court of Justice, judgment of 5 May 1981, Case C-804/79, *Commission v. United Kingdom*, ECLI:EU:C:1981:93.
[31] P. EECKHOUT, *EU External Relations Law*, cit., at 78.
[32] See previous paragraph.

As indicated in the introductory remarks to this second paragraph, the present analysis is limited to the Union's competence to conclude international agreements (thus excluding other forms of external action, such as the Common Foreign and Security Policy). The primary legal basis for this competence is found in Art. 216 of the Treaty on the Functioning of the European Union (TFEU), which outlines the circumstances under which the Union may enter into international agreements. As noted in the literature, the language of this provision is particularly broad, to the extent that the absence of Union competence to conclude an agreement is now considered the exception rather than the norm[33].

Art. 216(1) TFEU identifies four scenarios in which the Union may conclude international agreements, namely "where the Treaties so provide or where the conclusion of an agreement is necessary in order to achieve, within the framework of the Union's policies, one of the objectives referred to in the Treaties, or is provided for in a legally binding Union act or is likely to affect common rules or alter their scope". The first scenario – "where the Treaties so provide" – is supported by several specific provisions within the TFEU that establish an express external competence. Particularly relevant for the purposes of this dissertation is the field of environmental policy, in which the Union is explicitly empowered to act externally pursuant to Art. 191(1) and (4) TFEU.

The second case ("where the conclusion of an agreement is necessary in order to achieve, within the framework of the Union's policies, one of the objectives referred to in the Treaties") essentially codifies the *ERTA* doctrine as developed by the ECJ. The third scenario concerns cases in which a legally binding secondary act (such as a regulation or directive) has already been adopted and expressly provides for the Union's competence to conclude an international agreement. Finally, the fourth situation – where the conclusion of the agreement "is likely to affect common rules or alter their scope" – also derives directly from the *ERTA* case-law, as indicated by the reference to "common rules". As previously noted, this condition imposes significant constraints on the development of external competence in areas where the adoption of common rules is not feasible – such as in the case of supporting competences.

While Art. 216 TFEU outlines the general circumstances in which the Union may conclude international agreements, it does not clarify whether the competence in each

[33] P. CRAIG, *The Lisbon Treaty*, cit., at 165.

case is exclusive or shared. This question – also addressed in the context of the *ERTA* ruling – is now governed by Art. 3(2) TFEU[34].

For the Union to possess exclusive external competence in areas of shared or complementary internal competence, the conditions laid down in Art. 3(2) must be met. This provision identifies three such situations, namely "when its conclusion is provided for in a legislative act of the Union or is necessary to enable the Union to exercise its internal competence, or in so far as its conclusion may affect common rules or alter their scope". The first and third cases – i.e. where the agreement is provided for in a legislative act or is likely to affect common rules – are often referred to in academic literature as instances of '*ERTA* preemption'[35], as they are rooted in the ECJ's interpretation in *ERTA*. By contrast, the second scenario – where the conclusion of an agreement is necessary to enable the Union to exercise its internal competence – concerns situations where the internal competence has not yet been exercised. In such cases, the external action precedes, or is carried out concurrently with, the internal exercise of competence[36].

2.3. The 'mixed agreements'

Having outlined the principles governing the Union's external action, it is now appropriate to turn to the category of so-called 'mixed agreements', namely international agreements concluded jointly by the Union and its Member States[37]. Although the

[34] The second paragraph of Art. 3 governs competences other than those listed in the first paragraph – which lists areas where the Union has exclusive internal competence. The reason is that competences listed in the first paragraph fall, by implication, within the Union's exclusive external competence. In other words, the Treaty assumes a parallelism between exclusive internal and external competences, albeit without expressly stating it. See S. MANGIAMELI, *Article 3*, in H.-J. BLANKE, S. MANGIAMELI (eds.), *Treaty on the Functioning of the European Union – A Commentary*, (Volume I, Springer, 2021), at 191-192.

[35] A. ARENA, *The Twin Doctrines of Primacy and Pre-emption*, in R. SCHÜTZE, T. TRIDIMAS (eds.), *Oxford Principles of European Union Law*, cit., at 341-347.

[36] This second alternative also codifies the previous case-law of the ECJ, and in particular its Opinion 1/76 of 26 April 1977 on the *Draft Agreement establishing a European laying-up fund for inland waterway vessels*. See M. KLAMERT, *Article 3*, in M. KELLERBAUER, M. KLAMERT, J. TOMKIN (eds.), *The EU Treaties and the Charter of Fundamental Rights*, cit., at 365. The basis for such category of competence is therefore often referred to as the 'Opinion 1/76 Doctrine'. See R. SCHÜTZE, *European Union, Party to International Agreements*, in R. WOLFRUM, *Max Planck Encyclopedia of Public International Law*, cit.

[37] In the context of the present dissertation only the essential relevant aspects of mixed agreements will be dealt with. For a more detailed discussion, see *inter alia* C. HILLION, P. KOUTRAKOS (eds.), *Mixed Agreements Revisited: The EU and its Member States in the World* (Hart Publishing, 2014); N. LEVRAT, Y. KASPIAROVICH, C. KADDOUS, R.A. WESSEL, *The EU and its Member States' Joint Participation in International Agreements* (Hart Publishing, 2022); J. WOUTERS, F. HOFFMEISTER, G. DE BAERE, T. RAMOPOULOS, *The Law of EU External Relations* (Oxford University Press, 2021) at 101-127.

Treaties do not provide a definition[38], mixed agreements are a fundamental instrument for enabling the Union to exercise its external competences effectively, while simultaneously safeguarding the competences retained by the Member States.

Excluding the category of 'voluntary mixity'[39], which falls outside the scope of this dissertation, the principal focus here is on compulsory (or obligatory) mixity[40]. This arises in situations where an international treaty encompasses both matters falling within Union competence and others that remain within the exclusive competence of the Member States. The need to conclude an agreement in mixed form is thus dictated by the fact that the treaty's subject matter does not fall entirely within the Union's competence. This scenario is particularly common in the context of broad multilateral treaties, whose scope has not been defined in advance by the Union[41].

A particularly relevant example of a mixed agreement for the purposes of this dissertation is the Convention[42]. As previously noted, already at the time of its signature, certain aspects of its matters – most notably those relating to the conservation of marine biological resources – already fell within the exclusive external competence of the EEC. However, the Convention's broad scope also encompasses numerous areas that remain within the exclusive competence of the Member States. For instance, this includes the provisions governing the delineation and delimitation of maritime zones under national jurisdiction or sovereign rights, such as territorial waters and exclusive economic zones (EEZs).

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[38] E. NEFRAMI, *Mixed Agreements as a Source of European Union Law*, in E. CANNIZZARO, P. PALCHETTI, R.A. WESSEL, *International Law as Law of the European Union* (Studies in EU External Relations, Brill, 2011) 325-349, at 326.

[39] 'Facultative mixity' occurs when an international agreement is concluded both by the EU and its member States mainly for reasons of political convenience. Reference is made to M. CHAMON, I. GOVAERE, *EU External Relations Post- Lisbon The Law and Practice of Facultative Mixity* (Brill, 2020). As noted also in J. WOUTERS, F. HOFFMEISTER, G. DE BAERE, T. RAMOPOULOS, *The Law of EU External Relations*, cit., at 101, a limit to the cases of voluntary mixity is that the agreement must in any case concern matters of non-exclusive competence of the EU.

[40] I. GOVAERE, *'Facultative' and 'Functional' Mixity Consonant with the Principle of Partial and Imperfect Conferral*, in M. CHAMON, I. GOVAERE, cit., 21-47, at 21.

[41] J. WOUTERS, F. HOFFMEISTER, G. DE BAERE, T. RAMOPOULOS, *The Law of EU External Relations*, cit., at 101.

[42] It is recognised that, particularly in cases of obligatory mixity, each agreement may give rise to specific challenges concerning its application and interpretation, including the risk of double representation of Member States. Given the inherently case-specific nature of such arrangements, a detailed examination of these complexities – except for what concern UNCLOS – falls outside the scope of this dissertation. For further details, reference is made to A. ROSAS, *Mixed Union - Mixed Agreements*, in M. KOSKENNIEMI, *International Law Aspects of the European Union* (Brill | Nijhoff, 1997) 125-148. Reference is also made to P. EECKHOUT, *EU External Relations Law*, cit., at 212-266.

Accordingly, UNCLOS constitutes a textbook case of obligatory mixity. The following paragraph will therefore examine the legal basis upon which the Union was permitted to become a Party to the Convention, as well as the practical challenges that have arisen in the context of its participation.

3. The European Union as a Party to the Convention

As noted at the outset of this Chapter, the European Union – then the European Economic Community (EEC) – was permitted, as of 1974, to attend the negotiations of UNCLOS as an observer, in light of its growing interest in the conservation of marine biological resources following the establishment of the Common Fishery Policy (CFP) in 1970[43].

In its capacity as an observer, the EEC had no voting rights. Although the aforementioned interest in marine resource conservation had, by 1977[44], evolved into an exclusive external competence of the EEC, the latter was nonetheless not permitted to participate more actively in the negotiations, while Member States frequently prioritised regional or national interests over the articulation of a unified Community position[45]. By the conclusion of UNCLOS III, the only common stance shared by all Member States and the EEC was support for the latter's right to become a Party to the Convention[46].

Against this background, the caution expressed by non-Member States to a participation of the Community to the UNCLOS is unsurprising: concerns were raised regarding potential ambiguities in the allocation of competences between the Community and its Member States, which might lead to undue advantages for the latter[47], or result in the

[43] See footnote 85.
[44] K.R. Simmonds, *The European Economic Community and the New Law of the Sea*, cit., at 52. As reported by the Author, a crucial role for the creation of such exclusive competence was played by the *Council Resolution of 3 November 1976 on certain external aspects of the creation of a 200-mile fishing zone in the Community with effect from 1 January 1977* (document 31981Y0507(01)), which mandated the Commission to negotiate itself with non-member countries over access to the Member States' new fisheries waters extending up to 200 nautical miles. At the same time, the exclusive nature of such competence was openly stated by the ECJ in the *Kramer* case.
[45] *Ibidem*, at 110-115; D. Vignes, *La Communauté européenne dans le domaine du droit général de la mer*, in L. Pineschi, T. Treves, *The Law of the Sea – The European Union and its Member States* (Publications on Ocean Development, Volume: 28, Brill | Nijhoff, 1996), 7-26, at 10-11.
[46] T.T.B. Koh, S. Jayakumar, *Negotiating Process of UNCLOS III*, in M.H. Nordquist, *United Nations Convention on the Law of the Sea 1982 – A Commentary* (Vol. I, Brill | Nijhoff, 1985) 84.
[47] As noted in M.H. Nordquist, S. Rosenne, L.B. Sohn, *United Nations Convention on the Law of the Sea 1982 – A Commentary* (Vol. V, Martinus Nijhoff Publisher, 1989), at 186 "Above all, anxiety was felt lest certain European States, as actual or potential members of the Community, would try and take advantage of the benefits accruing from the participation of the Community in the Convention, for instance as regards the exclusive economic zone, while simultaneously avoiding the obligations of the Convention,

duplication of voting rights under the Convention[48]. A compromise was eventually reached, allowing the Community to become a Party to UNCLOS, subject to stringent conditions, which will be analysed below. In this respect, it should be noted that the analysis will focus exclusively on the provisions of the Convention relevant to the Union's competences. Other aspects – such as those concerning responsibility, liability, or dispute settlement – will be addressed only where pertinent to the objectives of this dissertation.

To begin with, the possibility for the Union to become a signatory to the Convention is provided for in Art. 305, which, at paragraph 1(f), expressly allows 'international organizations' to do so in accordance with Annex IX to the Convention. The following Art. 306 and 307 extend this requirement, stipulating that compliance with Annex IX is also necessary for the purposes of formal confirmation[49] or accession.

The relevant conditions are therefore set out in Annex IX. The procedure established therein is not open to all international organisations, but only to those falling within the definition provided in its Art. 1, i.e. "intergovernmental organization[s] constituted by States, to which its member States have transferred competence over matters governed by this Convention, including the competence to enter into treaties in respect of those matters". In other words, the organisation must be composed exclusively of States and must possess competences that it can exercise autonomously, independently of its members. This definition clearly appears to be specifically designed to accommodate the legal nature of the EU[50].

Additional requirements are laid down in Art. 2 and 3 of Annex IX, which respectively govern the conditions for signature and for formal confirmation or accession. For the signature, two conditions must be met: first, that "a majority of its member States are signatories of this Convention"; and second, the deposit of a declaration specifying the matters governed by the Convention in respect of which competence has been transferred

for instance regarding recognition of the rights of passage and overflight of other States, by the simple expedient of themselves not becoming parties to the Convention".

[48] L. LIJNZAAD, *Declarations of Competence in the Law of the Sea, a Very European Affair*, in M. LODGE, M.H. NORDQUIST, *Peaceful Order in the World's Oceans: Essays in Honor of Satya N. Nandan* (Brill | Nijhoff, 2014), 186-207, at 193.

[49] This term is used to refer to the ratification by international organisations.

[50] As noted in E. FRANCKX, M. BENATAR, D. CAMBOU, K. JANSSEN, E. MAMPAEY, N. SCOTCHER, T. VAN TRAN, *Annex IX*, in A. PROELß, A.R. MAGGIO, E. BLITZA, O. DAUM, cit., 2512-2552, at 2513, this definition is moreover identical to the one agreed upon in other UN multilateral conventions where membership of the Community/Union has been accepted.

to the Union by its Member States which are signatories and detailing the nature and extent of that competence.

The first condition was satisfied on 7 December 1984, when the majority of the then ten Member States of the EEC signed the Convention[51]. On the same day, following a decision of the EEC Council to that effect[52], the EEC formally signed the Convention and submitted a declaration identifying its UNCLOS-related competences[53]. In line with the *Kramer* case-law[54], the declaration stated: "Member States have transferred competence to [the Community] with regard to the conservation and management of sea fishing resources. Hence, in the field of sea fishing it is for the Community to adopt the relevant rules and regulations (which are enforced by the Member States) and to enter into external undertakings with third states or competent international organisations".

The declaration also refers to rules concerning the protection and preservation of the marine environment, noting that Member States had transferred to the Community competences in this area, as reflected both in internal provisions adopted by the Community and in its participation in certain international agreements. As further detailed in the Annex to the declaration, the EEC had at the time concluded a number of international agreements related to environmental protection, many of which covered matters also governed by UNCLOS[55], meaning that the Community had already exercised

[51] Namely Belgium, Denmark, France, Greece, Ireland, Italy, Luxembourg, Netherlands. The only two EEC member states that did not sign the Convention were Germany and the United Kingdom.
[52] From the perspective of EU law, authorisation to sign the Convention had to be granted by a unanimous decision of the Council, pursuant to Articles 228 and 235 of the EEC Treaty. The latter provision – which expressly required unanimity – was deemed necessary, according to H. DA FONSECA-WOLLHEIM, *The European Community and the Law of the Sea Convention*, in E.L. MILES, T. TREVES (eds.), *The Law of the Sea: New Worlds, New Discoveries, Proceedings of the Law of the Sea Institute 26th Annual Conference, Genoa, 1992* (Honolulu, Law of the Sea Institute, University of Hawaii, 1993) 170-188; V. FRANK, *The European Community and Marine Environmental Protection in the International Law of the Sea – Implementing Global Obligations at the Regional Level* (Martinus Nijhoff Publisher, 2007), at 160), in order to allow the exercise of competence in environmental matters. The decision (unpublished) was ultimately adopted with Germany and the United Kingdom abstaining. Although the two States did not sign the Convention themselves, they nevertheless refrained from blocking the decision, thereby enabling the EEC to proceed with the signature.
[53] The text of the declaration is included in the EC bulletin 12-1984, publicly available online.
[54] See this Chapter, paragraph 2.1.
[55] Namely, the Convention for the prevention of marine pollution from land-based sources (Paris, 29 September 1989, in force 6 May 1978) 1546 UNTS 103; the Convention on long-range transboundary air pollution (Geneva, 13 November 1979, in force 16 March 1983) 1302 UNTS 217; the Convention for the protection of the Mediterranean Sea against pollution, with annex and Protocol for the prevention of pollution of the Mediterranean Sea by dumping from ships and aircraft and Protocol concerning co-operation in combating pollution of the Mediterranean Sea by oil and other harmful substances in cases of emergency (Barcelona, 16 February 1976, in force 12 February 1978) 1102 UNTS 27; and the Protocol concerning Mediterranean Specially Protected Areas (Geneva, 3 April 1982, in force 23 March 1986) 1425 UNTS 161.

both its internal competence – through the adoption of common rules – and its external competence in this field. In accordance with the *ERTA* doctrine[56], the Community therefore possessed competence (albeit not necessarily exclusive) in matters concerning the protection of the marine environment.

The declaration identifies two additional areas of competence. First, the EEC asserted that it held certain powers in relation to Part X of the Convention (on Right of Access of Land-Locked States to and from the Sea and Freedom of Transit), justified on the basis of the Community's objective of creating an economic union founded on a customs union. Second, with respect to Part XI, the declaration specified that the Community had competence in the field of commercial policy, including the regulation of unfair economic practices. In this case, the exclusive nature of the competence – now explicitly codified in Art. 3(1) TFEU – had already been affirmed by the ECJ at the internal level[57].

As noted in academic literature, the declaration is characterised by a considerable degree of vagueness, which reflects not only the inherent complexity of competence allocation within the EEC at the time[58], but also the political urgency behind the Community's decision to sign the Convention – namely, its interest in participating in the Preparatory Commission that would ultimately lead to the adoption of the 1994 Agreement[59]. It is therefore unsurprising that since "[t]he exercise of the competence that the Member States have transferred to the Community under the Treaties is, by its very nature, subject to continuous development", the Community accordingly reserved the right to make further declarations at a later stage.

A second declaration, superseding that of 1984, was issued by the EEC at the time of formal confirmation, in accordance with Art. 3 of Annex IX to the Convention, which once again sets out two requirements. As with the signature, Art. 3(1) required that a majority of the organisation's Member States must have deposited their instruments of

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[56] V. FRANK, *The European Community and Marine Environmental Protection in the International Law of the Sea – Implementing Global Obligations at the Regional Level*, cit., at 161.
[57] European Court of Justice, judgment of 15 December 1976, Case C-41/76, *Suzanne Criel, née Donckerwolcke and Henri Schou v Procureur de la République au tribunal de grande instance de Lille and Director General of Customs*, ECLI:EU:C:1976:182. The exclusive nature at the external level – despite being unchallenged by member States – will be explicitly declared by the Court only in its Opinion 1/94 of 15 November 1994 on the *Competence of the Community to conclude international agreements concerning services and the protection of intellectual property*, ECLI:EU:C:1994:384.
[58] K.R. SIMMONDS, *The Community's Declaration upon Signature of the U.N. Convention on the Law of the Sea*, in *Common Market Law Review*, 1986, 521-544, at 530-531.
[59] V. FRANK, *The European Community and Marine Environmental Protection in the International Law of the Sea*, cit., at 161-162.

ratification or accession. As mentioned in the Introduction to this dissertation, most Member States only ratified the Convention following the adoption of the 1994 Agreement, and is therefore unsurprising that the Council decision authorising the formal confirmation of the then European Community (EC) was adopted only in 1998[60] (and it will therefore referred to hereinafter as the '1998 declaration'). In this context, it should also be noted that by ratifying the Convention, the EC simultaneously expressed its consent to be bound by the 1994 Agreement, pursuant to Art. 4 of the latter, which applies equally to the EC by virtue of Art. 8(2) [61]. In any event, the Community had already signed and provisionally applied the Agreement in 1994[62].

Pursuant to Art. 3(2) of Annex IX, the declaration made by the EC at the time of formal confirmation was required to include the undertakings and declarations set out in Art. 4 and 5. The former sets forth general principles and embodies the compromise reached with non-member States of the EC, reflecting concerns expressed during the negotiation of the Convention[63]. For instance, Art. 4(3) obliges the EC to "exercise the rights and perform the obligations which its member States which are Parties would otherwise have under this Convention, on matters relating to which competence has been transferred to it by those member States" in accordance with Art. 5. It also clarifies that Member States "shall not exercise competence which they have transferred to [the Community]".

Moreover, Art. 4(4) specifies that the Community's participation "shall in no case entail an increase of the representation to which its member States which are States Parties would otherwise be entitled, including rights in decision-making". This provision is of particular relevance to the present dissertation, as it was clearly intended to prevent any

[60] Council Decision 98/392/EC of 23 March 1998 concerning the conclusion by the European Community of the United Nations Convention of 10 December 1982 on the Law of the Sea and the Agreement of 28 July 1994 relating to the implementation of Part XI thereof (document 31998D0392), published in the Official Journal of the European Communities, L 179, 23 June 1998, available at the following link: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=OJ:L:1998:179:TOC. As reported in E. FRANCKX, M. BENATAR, D. CAMBOU, K. JANSSEN, E. MAMPAEY, N. SCOTCHER, T. VAN TRAN, *Annex IX*, cit., at 2524, at that time 12 out of 15 member States of the EC had ratified the Convention.
[61] On the contrary, ratification of UNCLOS did not entail automatic acceptance of the second implementation agreement of the Convention, namely the Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (New York, 4 August 1995, in force 11 December 2001) 2167 UNTS 3.
[62] See Council Decision 94/562/EC of 25 July 1994 concerning the signing by the European Community of the Agreement relating to the implementation of Part XI of the 1982 United Nations Convention on the Law of the Sea and the provisional application by the Community of that Agreement and of Part XI of the Convention (document 31994D0562).
[63] Below, only the relevant provisions of Art. 4 will be taken into account. For instance, paragraph 6 will not be mentioned, since it lost its relevance when all EU member States ratified UNCLOS.

duplication of representation – especially, as it will be seen in Chapter III, within the Council and the Assembly of the Authority – where the Union would otherwise be entitled to vote in addition to its member States[64].

Art. 5, in turn, provides for the implementation of the principles established in Art. 4 by requiring the Community to submit a declaration "specifying the matters governed by this Convention in respect of which competence has been transferred to the organization by its member States which are Parties to this Convention" (paragraph (1)). Simultaneously, pursuant to paragraph (2), Member States are also required to make a corresponding declaration. Before analysing the content of the 1998 declaration, it must be emphasised that such declarations are not purely formal in nature. According to paragraph (3), member States "shall be presumed to have competence over all matters governed by this Convention in respect of which transfers of competence" to the Union "have not been specifically declared, notified or communicated by those States" under Art. 5. While this issue will be further developed below (see paragraph (5)), the wording of this provision clearly highlights the necessity of keeping the declarations up to date, particularly "in light of any changes to the distribution of competence, including new transfers of competence", as required under Art. 5(4).

Turning to the content of the 1998 declaration[65], a significantly more precise articulation of the Community's competences can be observed, which reflects the substantial evolution that had occurred in the intervening years, notably through the adoption of primary and secondary EU legislation, as well as the conclusion of numerous international agreements by the Community since 1984[66].

To begin with, the declaration identifies the areas in which the Community (now the Union) exercises exclusive competence. These include, first, the conservation and management of sea fishing resources, applying both to "waters under national fisheries jurisdiction and to the high seas"[67], and second, "those provisions of Parts X and XI of

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[64] E. FRANCKX, M. BENATAR, D. CAMBOU, K. JANSSEN, E. MAMPAEY, N. SCOTCHER, T. VAN TRAN, *Annex IX*, cit., at 2530-2531.
[65] The text of the declaration of 1998 is annexed to the Council Decision 98/392/EC (see footnote 118) as Annex II.
[66] E. FRANCKX, M. BENATAR, D. CAMBOU, K. JANSSEN, E. MAMPAEY, N. SCOTCHER, T. VAN TRAN, *Annex IX*, cit., at 2538.
[67] At the same time, it is specified that "measures relating to the exercise of jurisdiction over vessels, flagging and registration of vessels and the enforcement of penal and administrative sanctions, competence rests with the Member States whilst respecting Community law. Community law also provides for administrative sanctions". As noted in R. CHURCHILL, D. OWEN, *The EC Common Fisheries Policy* (Oxford

the Convention and of the Agreement of 28 July 1994 which are related to international trade". As previously noted, the reference to Part XI is of particular relevance for the purposes of this dissertation.

The declaration subsequently outlines the UNCLOS-related shared competences, beginning with fisheries. It notes that "for a certain number of matters that are not directly related to the conservation and management of sea fishing resources, for example research and technological development and development cooperation, there is shared competence".

Of particular significance is the section concerning marine pollution, as the declaration states that "[w]ith regard to the provisions on maritime transport, safety of shipping and the prevention of marine pollution contained inter alia in Parts II, III, V, VII and XII of the Convention, the Community has exclusive competence only to the extent that such provisions of the Convention or legal instruments adopted in implementation thereof affect common rules established by the Community. When Community rules exist but are not affected, in particular in cases of Community provisions establishing only minimum standards, the Member States have competence, without prejudice to the competence of the Community to act in this field". In other words, although the Union enjoys exclusive competence over those matters where existing Union rules would be affected, this does not exclude the existence of shared competences in areas not yet covered by Union legislation – competences which may ultimately evolve into exclusive ones under the conditions set out in the *ERTA* doctrine in the past, and in Art. 3(2) TFEU at present.

As for complementary competences, the declaration clarifies that, "with regard to the provisions of Parts XIII and XIV of the Convention, the Community's competence relates mainly to the promotion of cooperation on research and technological development with non-member countries and international organizations. The activities carried out by the Community here complement the activities of the Member States".

Finally, the declaration highlights the potential impact of the Convention on other Community policies, by stating that "[m]ention should also be made of the Community's policies and activities in the fields of control of unfair economic practices, government procurement and industrial competitiveness as well as in the area of development aid.

University Press, 2010), arguably "the EC is in breach of Annex IX in including matters of shared competence in its declaration without indicating which of itself or its Member States actually exercises competence in relation to those matters".

These policies may also have some relevance to the Convention and the Agreement, in particular with regard to certain provisions of Parts VI and XI of the Convention".

While all competences mentioned in the declaration have been considered in this paragraph, it is important to note that not all of them are directly relevant to Part XI of the Convention. Conversely, not all competences relevant to Part XI are explicitly included in the declaration – due, as previously highlighted, to the evolving nature of EU competences. The next paragraph will therefore examine those competences established under the Treaties that may be pertinent to seabed mining and that may require closer coordination with the policies and regulations of the Authority. This examination will serve as a basis for the final paragraph, which will assess whether the declaration is still fit for the purpose or whether its revision is necessary or advisable. It should already be clarified that this analysis will focus solely on potential amendments to the declaration deriving from the inclusion of new competences related to Part XI. Any new competences of the Union in relation to other Parts of the Convention – which have indeed emerged[68] – will not be addressed, except where relevant for comparative purposes.

This assessment will also serve as a foundation for Chapter III, where the implementation of such competences will be analysed. Accordingly, the next paragraph will be limited to assessing the relevance of such competences for seabed mining, without addressing their practical implementation.

4. RELEVANT EU COMPETENCES RELATING TO DEEP SEABED MINING ACTIVITIES

4.1. Exclusive competences

As noted in the previous paragraph, of the exclusive competences listed in Art. 3(1) TFEU, only two are mentioned in the 1998 declaration. First, the conservation and management of sea fishing resources – currently classified as an exclusive competence under Art. 3(1)(d) TFEU – was the principal reason the Union advocated for participation in the Convention. However, this competence is evidently not pertinent to seabed mining,

[68] This is the case, for instance of the competence acquired by the Union in the area of enforcement at sea in the framework of its operations against Somali pirates. See L.B. SOHN, K. GUSTAFSON JURAS, J.E. NOYES, E. FRANCKX, *Law of the Sea in a Nutshell* (2nd Ed., St. Paul, MN: West, a Thomson Reuters business, 2010), 85–87, according to which "This new competence should therefore be added to the competences included I the EC declaration filed at the time of confirmation […]".

as it applies specifically within the scope of the Common Fisheries Policy[69]. While seabed mining activities may indeed have an environmental impact on marine biological resources, any EU action in response – such as adopting measures under the Common Fisheries Policy to prevent overlapping exploitation in designated areas – would operate solely at the internal level and thus would not bind non-member States. Consequently, this competence is unlikely to intersect meaningfully with the legal regime established by Part XI of the Convention, which concerns areas beyond national jurisdictions.

The second and third competences mentioned – both expressly identified in the declaration as relevant to Part XI – are those relating to the customs union (Art. 3(1)(a) TFEU) and to the common commercial policy (Art. 3(1)(e) TFEU), whose establishment is also being an exclusive EU competence. While their implementation will be addressed in Chapter III, it may be preliminarily observed that these competences can indeed influence the application of Part XI. Specifically, the imposition of duties on mineral resources extracted from the Area – subject to the constraints that will be discussed in Chapter III – falls within the Union's exclusive remit and must therefore comply with the relevant principles established under the Convention and other relevant international agreements binding the Union.

A similar observation applies to the Common Commercial Policy (CCP), which, unlike the more readily defined customs union, requires further clarification regarding its scope. The principles (meaning also the scope)[70] of the CCP are set out in Art. 207(1) TFEU, which includes "changes in tariff rates, the conclusion of tariff and trade agreements relating to trade in goods and services, and the commercial aspects of intellectual property, foreign direct investment, the achievement of uniformity in measures of liberalisation, export policy and measures to protect trade such as those to be taken in the event of dumping or subsidies". These measures are intended to serve the objectives set out in the preceding Art. 206, namely "the harmonious development of world trade, the progressive abolition of restrictions on international trade and on foreign direct investment, and the lowering of customs and other barriers".

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[69] For a detailed analysis of the measures required under the Convention and the 1994 to protect fishing resources, reference is made to R. CHURCHILL, D. OWEN, *The EC Common Fisheries Policy*, cit., in particular at 317-323.

[70] In this sense, M. CREMONA, *Defining the Scope of the Common Commercial Policy*, in M.J. HAHN, G. VAN DER LOO, *Law and practice of the common commercial policy: the first 10 years after the Treaty of Lisbon* (Leiden, Brill | Nijhoff, 2021) 47-70, at 47-48.

As noted in academic literature, the CCP under the TFEU is purpose-oriented: it does not define the instruments to be adopted, but rather the objectives to be pursued[71], resulting in a broad and somewhat vague formulation[72]. Further guidance on its scope has been provided by the ECJ, most recently in its Opinion 2/15[73], where the Court held that "the mere fact that an EU act, such as an agreement concluded by it, is liable to have implications for trade with one or more third States is not enough for it to be concluded that the act must be classified as falling within the common commercial policy. On the other hand, an EU act falls within that policy if it relates specifically to such trade in that it is essentially intended to promote, facilitate or govern such trade and has direct and immediate effects on it". Two cumulative criteria must therefore be met: the act must be intended to promote, facilitate, or govern international trade, and must produce direct and immediate effects on such trade[74].

Given the close connection between the CCP and the customs union, it is unsurprising that the 1998 declaration treats them jointly in relation to their relevance to (Part X and) Part XI of the Convention. As previously noted, their potential implementation – alongside the limitations arising from the Convention and other relevant international agreements – will be further developed in Chapter III.

Art. 3(1) TFEU lists two further exclusive competences: the establishment of competition rules necessary for the functioning of the internal market (Art. 3(1)(b)) and the monetary policy for Member States whose currency is the euro (Art. 3(1)(c)). The latter is evidently of limited relevance to activities in the Area; its omission from the 1998 declaration does not raise substantial concerns. By contrast, the former appears to be indirectly addressed in the third section of the declaration, which refers to the "possible impact [on the Convention] of other Community policies", specifically citing policies related to "control of unfair economic practices, government procurement and industrial competitiveness, as well as development aid". In particular, the reference to unfair economic practices can

[71] S. MANGIAMELI, *Article 3*, in H.-J. BLANKE, S. MANGIAMELI (eds.), *Treaty on the Functioning of the European Union – A Commentary*, cit., at 189.
[72] M. KOTZUR, *Treaty on the Functioning of the European Union, Article 3*, in R. GEIGER, D-E. KHAN, M. KOTZUR (eds.) *European Union Treaties: Treaty on European Union, Treaty on the Functioning of the European Union*, cit., at 207.
[73] European Court of Justice, Opinion of the Court (Full Court) 2/15 of 16 May 2017 on the *Free Trade Agreement between the European Union and the Republic of Singapore*. See especially paragraph 36.
[74] M. CREMONA, *Defining the Scope of the Common Commercial Policy*, cit., at 49.

plausibly be linked to the EU’s exclusive competence in competition policy, for reasons that will be discussed in more detail below.

The concept of the 'internal market' is defined in Art. 26(2) TFEU as comprising “an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaties”. In this regard, the Union’s exclusive competence under Art. 3(1)(b) is limited to the establishment of competition rules necessary for the functioning of the internal market, whereas the implementation of these rules remains largely decentralised and falls primarily within the responsibility of the Member States[75].

The rules governing the internal market, implementing Art. 3(1)(b) and Art. 26 TFEU, are primarily enshrined in the Treaty itself, particularly within the two sections[76] dedicated respectively to competition rules applicable to undertakings (Art. 101 to 106 TFEU) and to State aid (Art. 107 to 109 TFEU). These provisions are directly applicable and are typically formulated in broad and flexible terms, allowing their application to a wide range of non-predetermined situations[77].

An analysis of their wording reveals a recurrent reference to intra-EU implications: for instance, Art. 101 TFEU prohibits agreements, decisions, and concerted practices “that may affect trade *between Member States*”; Art. 102 TFEU prohibits “any abuse of a dominant position […] in so far as it may affect trade *between Member States*”; and Art. 107 TFEU declares incompatible with the internal market any form of State aid “in so far as it affects trade *between Member States*”. While this language suggests a primary focus on internal market dynamics, certain circumstances may give rise to an extraterritorial application of these provisions, in accordance with the so-called 'effects doctrine'. This principle, affirmed on multiple occasions by the ECJ[78], was most notably broadened and

[75] P.I. COLOMO, *The EU's Exclusive Competence in Competition Law*, in S. GARBEN, I. GOVAERE, *The Division of Competences between the EU and the Member States*, cit., 112-132, at 114.
[76] These two sections are part of Chapter 1 (Rules on competition) of Title VII (Common Rules on Competition, Taxation and Approximation of Laws) of the TFEU.
[77] Reference is made to the provisions of the TFEU included in Title VII (Common Rules on Competition, Taxation and Approximation of Laws). For further details on the such provisions and on Art. 26 TFEU, reference is made to R. BÖTTNER, H-J. BLANKE (eds.), *Treaty on the Functioning of the European Union – A Commentary* (Volume II, Springer, 2024), 85-118, at 87.
[78] See for instance European Court of Justice, judgment of 27 September 1988, Joined cases C-89, 104, 114, 116, 117 and 125 to 129/85, *A. Ahlström Osakeyhtiö and others v Commission of the European Communities*, ECLI:EU:C:1988:447. See in particular paragraph 16 of the judgment: “If the applicability of prohibitions laid down under competition law were made to depend on the place where the agreement, decision or concerted practice was formed, the result would obviously be to give undertakings an easy means of evading those prohibitions. The decisive factor is therefore the place where it is implemented”.

reinforced[79] in the *Intel Corp. v. European Commission* case[80]. In that context, the Court, relying on the overall language of Art. 101 and 102 TFEU[81], reaffirmed that "the fact that an undertaking participating in an agreement is situated in a third country does not prevent the application of that provision if that agreement is operative on the territory of the internal market" [82].

Based on the above, it can be concluded that conduct by companies established in non-member States that contravenes the obligations set out in the Treaty may trigger the extraterritorial application of internal market rules. Nevertheless, considering the language of Art. 101 and following of the TFEU, such conduct would likely occur at the stage of marketing the minerals extracted from the Area. Referring also to the 2011 ITLOS advisory opinion[83], it appears that the marketing phase cannot be considered part of the "activities in the Area" and would therefore fall outside the scope of the Authority's mandate. Accordingly, despite the generality of the reference to unfair economic practices in the 1998 declaration, this reference accurately reflects the Union's competence and does not undermine its lawful exercise.

4.2. Shared competences

Shared competences are currently governed by Art. 4 TFEU[84], which lists them in its second paragraph. Among these, the 1998 declaration refers only to "maritime transport, safety of shipping and the prevention of marine pollution contained inter alia in Parts II,

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[79] M. MARTYNISZYN, *Extraterritoriality in EU Competition Law*, in N.C. RODRIGUES, *Extraterritoriality of EU Economic Law – The Application of EU Economic Law Outside the Territory of the EU* (Springer, 2021), 29-57, at 29-30.
[80] European Court of Justice, judgment (Grand Chamber) of 6 September 2017, Case C-413/14 P., Intel Corp. v European Commission, ECLI:EU:C:2017:632.
[81] The Court reminded that "the EU competition rules set out in Articles 101 and 102 TFEU are intended to prevent collective or unilateral conduct of undertakings limiting competition within the internal market. While Article 101 TFEU prohibits agreements and practices which have as their object or effect the prevention, restriction or distortion of competition 'within the internal market', Article 102 TFEU prohibits the abuse of a dominant position 'within the internal market or in a substantial part of it'".
[82] *Ibidem*, paragraph 43.
[83] See Chapter I, footnote 6.
[84] The competences listed in paragraph (2) are the following: (a) internal market; (b) social policy, for the aspects defined in this Treaty; (c) economic, social and territorial cohesion; (d) agriculture and fisheries, excluding the conservation of marine biological resources; (e) environment; (f) consumer protection; (g) transport; (h) trans-European networks; (i) energy; (j) area of freedom, security and justice; (k) common safety concerns in public health matters, for the aspects defined in the TFEU. The competence on the internal market will not be analysed, in light of the discussion made in this respect in paragraph 4.1. As for the competence on fisheries under subparagraph (d), it is easy to note that this competence does not concern conservation of marine biological resources (covered by Art. 3(1)(d) TFEU, but it would only deal with different aspects of the fishery industry. As such it is unlikely to overlap with the provisions of Part XI.

III, V, VII and XII of the Convention". In other words, only, the competences envisaged in Art. 4(2)(e) and 4(2)(g) – i.e. environment and transport – are mentioned. While most of the remaining competences enumerated in Art. 4(2) appear at first glance unrelated to Part XI of the Convention, the same does not hold for the competence on energy, which may potentially overlap with it. In addition, parallel competences under Art. 4(3) must also be taken into account.

Accordingly, this paragraph will be structured in four parts. The first subparagraph, dedicated to environmental competence, will examine why this area was included in the declaration and whether it may also affect the application of Part XI of the Convention, despite the absence of an express reference. This assessment will not address the substance of the Union's environmental policies, which will be the focus of Chapter III but will nevertheless form the basis for such analysis. The second subparagraph will analyse the transport competence – specifically "maritime transport and safety of shipping". The third will address the competence on energy, assessing whether its omission from the declaration remains justified. In this context, the historical development of the energy competence will not be considered, as the analysis will focus exclusively on the current legal framework. Finally, the fourth subparagraph will be dedicated to the parallel competences of the Union.

4.2.1. Shared competence on the environment

Without retracing the full history of the Union's environmental policies[85], it is worth noting that environmental protection was not originally envisaged in the EEC Treaty. It was only after 1972 that the idea emerged that the objectives of the EEC – particularly the aim of improving the quality of life of its citizens – should encompass the development of a common policy for environmental protection[86].

Since then, the Union's interest and engagement in environmental matters have steadily increased. To date, the EU has adopted over 250 legally binding acts, in addition to

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[85] For which reference is made to D. LANGLET, S. MAHMOUDI, *EU Environmental Law and Policy* (Oxford University Press, 2016) in particular at 27-68.
[86] In this respect, see the statement of Willy Brandt, Chancellor of the Federal Republic of Germany, after the First Summit Conference of the Enlarged Community held in Paris in 1972 (in Bulletin of the European Communities Vol. 5, No. 11, 1972) at 30.

hundreds of soft law instruments[87]. At the internal level, alongside the three Environment Action Programmes adopted between 1973 and 1983[88], several legally binding instruments were enacted prior to 1984 addressing various aspects of environmental protection, including the marine environment. As stated in the appendix to the 1984 declaration made upon signature of the Convention, these instruments included for instance Directive 76/464/EEC on pollution caused by certain dangerous substances discharged into the aquatic environment of the Community[89]; Directive 75/439/EEC on the disposal of waste oils[90]; and Directive 79/923/EEC on the quality required of shellfish waters[91]. The three Directives are currently no longer in force; nevertheless, they illustrate the Union's early attention to environmental matters prior to 1984.

Given that the EEC Treaty did not provide an explicit legal basis for adopting environmental measures, the above acts were adopted under Art. 100(1) and Art. 235[92] – neither of which was entirely satisfactory. The former allowed the EEC Council, acting unanimously on a proposal from the Commission, to adopt directives aimed at approximating the legislative, regulatory, and administrative provisions of the Member States directly affecting the establishment or functioning of the common market. Through an expansive interpretation, it was held that divergent national environmental rules could create barriers to trade within the EEC[93]; accordingly, harmonisation measures in the field of environmental protection were deemed necessary for the development of the common (now internal) market.

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[87] S. MALJEAN-DUBOIS, *Regional Organizations the European Union*, in L. RAJAMANI, J. PEEL (eds.), *The Oxford Handbook of International Environmental Law* (2nd Ed., Oxford University Press, 2021) 650-665, at 655.
[88] D. LANGLET, S. MAHMOUDI, *EU Environmental Law and Policy*, cit., at 28-30. It is highlighted that – being essentially declarations – the Environment Action Plans were not legally binding. However, from the political viewpoint, they clearly underscore the intention of the Community to engage in such matter.
[89] Council Directive 76/464/EEC of 4 May 1976 on pollution caused by certain dangerous substances discharged into the aquatic environment of the Community.
[90] Council Directive 75/439/EEC of 16 June 1975 on the disposal of waste oils.
[91] Council Directive 79/923/EEC of 30 October 1979 on the quality required of shellfish waters.
[92] L.J. BRINKHORST, *European Environmental Law: an Introduction*, in N.S.J. KOEMAN, *Environmental Law in Europe* (The Hague, Kluwer Law International, 1999) 1-18, at 3-4.
[93] *Ibidem*, at 3. The two articles were not unfrequently used in combination, as for instance in the three directives mentioned in the footnotes 147, 148 and 149.

Art. 235 – often described as the 'flexibility clause'[94] or the 'safety valve'[95] of the EEC Treaty – allowed the Council, acting unanimously on a proposal from the Commission and after consulting the Assembly, to adopt appropriate measures when action by the Community was deemed necessary to attain, within the functioning of the common market, one of the objectives of the Community, in cases where the Treaty had not provided the necessary powers of action. The provision was used on several occasions to expand the competence of the Union[96], including to adopt legally binding acts in areas concerning the protection of the marine environment.

The Community's external competence in this field developed in parallel with its internal one and relied on the same legal basis. As reported in the second annex to the declaration made upon signature of UNCLOS in 1984, the Community at that time had already concluded several international agreements relating to the prevention of different forms of marine pollution[97]. Each of these agreements was concluded pursuant to a Council decision referring to Art. 235 as the appropriate legal basis. Accordingly – based also on the *ERTA* doctrine – it can be considered that the EEC already possessed a (non-exclusive) external competence in environmental matters in 1984.

Furthermore, the legal framework for the Community's environmental competence evolved significantly between the signature and the formal confirmation of the Convention. The Single European Act of 1987[98] introduced (Art. 25) a new Title VII in the EEC Treaty, explicitly conferring competence on environmental protection to the Community – a development later confirmed by the Treaty of Maastricht[99]. At present, the TFEU sets out the Union's environmental policy in Arts. 191 to 193. In particular, Art. 191 not only defines the Union's internal competence in this field, but also – at paragraph (4) – its external dimension. It provides that: "[w]ithin their respective spheres of

[94] L.S. ROSSI, *Does the Lisbon Treaty Provide a Clearer Separation of Competences between EU and Member States?*, in A. BIONDI, P. EECKHOUT, S. RIPLEY, *EU law after Lisbon* (Oxford University Press, 2012), 85-106, at 86.
[95] T. KONSTADINIDES, *Division of Powers in European Union Law: The Delimitation of Internal Competence between the EU and the Member States* (Kluwer Law International, 2009) at 20
[96] T. KONSTADINIDES, *Division of Powers in European Union Law*, cit., at 21, which also provides some examples of such expansion of competences through the invocation of Article 235 EEC Treaty. See also D. HANF, T. BAUME, *Vers une clarification de la répartition des compétences entre l'Union et ses États Membres? Une analyse du projet d'articles du Présidium de la Convention*, in *Cahiers de Droit Européen*, 2003, 135-156, at 140.
[97] See 344.
[98] The Single European Act (Document 11986U/TXT) was adopted in 1987 with the aim of amending the Treaties. See M. KANIEL, *The Exclusive Treaty-Making Power of the European Community up to the period of the Single European Act* (Brill | Nijhoff, 1996).
[99] In particular Art. 130(r) of the Treaty.

competence, the Union and the Member States shall cooperate with third countries and with the competent international organisations. The arrangements for Union cooperation may be the subject of agreements between the Union and the third parties concerned. The previous subparagraph shall be without prejudice to Member States' competence to negotiate in international bodies and to conclude international agreements".

To conclude, since in 1998 the Community's competence on environmental matters had been encapsulated in the EC Treaty, the reference made in the declaration can be considered appropriate. While the language of the declaration does not explicitly extend this competence to Part XI of the Convention, it arguably nevertheless applies also to it. As highlighted in Chapter I, Art. 145 and 209 of UNCLOS establish a substantive link between Part XI and Part XII, which lays down the general principles of environmental protection. Accordingly – and subject to the further considerations to be made in Chapter III – it can be broadly concluded that, in order to adopt environmental protection measures in relation to activities in the Area, the Union does not need to amend the 1998 declaration.

4.2.2. Shared competence on transport

While the competence on the protection of the marine environment was already included in the declaration of 1984, the same does not apply to the competence on transport, which was only introduced in the 1998 declaration. However, such competence was already foreseen in the original text of the Treaty of Rome (Arts. 74 to 84), which aimed from the outset to establish a 'common transport policy'. Therefore, the EEC Treaty provided a sufficient legal basis to justify its later inclusion in the declaration.

Currently set out in Title VI (Art. 90 to 100) of the TFEU, the EU's competence on transport is referenced in the declaration only in connection with Parts II, III, V, VII and XII of the Convention. Although Part XI is not expressly mentioned, it can be argued that the competence on transport may potentially overlap with the mandate of the International Seabed Authority (ISA), albeit in a very limited number of circumstances, as explained below.

Starting from its functional scope, the competence of the Union on transport can be exercised, pursuant to Art. 91(1) TFEU, in order to lay down "(a) common rules applicable to international transport to or from the territory of a Member State or passing across the territory of one or more Member States; (b) the conditions under which non-resident carriers may operate transport services within a Member State; (c) measures to improve transport safety; (d) any other appropriate provisions". Among these, particularly relevant is subparagraph (c), since the declaration of 1998 expressly refers to "safety of shipping".

Although Title VI TFEU mainly applies, pursuant to Art. 100(1), to rail, road, and inland waterway transport, the following paragraph allows the European Parliament and the EU Council – through the ordinary legislative procedure – to adopt provisions concerning maritime and air transport. Accordingly, the inclusion of 'maritime transport' in the declaration aligns with the scope of the Treaties.

However, any potential overlap with Part XI remains very limited in scope, if the ITLOS advisory opinion of 2011 on "activities in the Area"[100] is taken into account. Paragraph 96 of the opinion states that "[t]ransportation to points on land from the part of the high seas superjacent to the part of the Area in which the contractor operates cannot be included in the notion of 'activities in the Area,' as it would be incompatible with the exclusion of transportation from 'activities in the Area' in Annex IV, article 1, paragraph 1, of the Convention". Therefore, transportation typically falls outside the Authority's mandate and is generally governed by the common rules established under the framework of the International Maritime Organization (IMO).

The only case where such transportation may amount to an 'activity in the Area' is provided for by the same paragraph 96 of the advisory opinion, as the Tribunal stated that "transportation within that part of the high seas, when directly connected with extraction and lifting, should be included in activities in the Area. In the case of polymetallic nodules, this applies, for instance, to transportation between the ship or installation where the lifting process ends and another ship or installation where the evacuation of water and the preliminary separation and disposal of material to be discarded take place".

In such cases, this limited and temporally circumscribed phase of transportation could fall under both the Authority's mandate and the Union's competence. However, this overlap is more theoretical than practical. Typically, such transport activities are carried out by or under the responsibility of the Contractor. Annex III to the Convention expressly allows the sponsoring State to impose "environmental or other laws and regulations more

[100] See Chapter I, footnote 6.

stringent than those in the rules, regulations and procedures of the Authority", which are considered compatible with Part XI. Consequently, if the Union were to adopt a legally binding instrument requiring its member States, in their capacity as sponsoring States, to impose stricter standards during this transportation phase, such rules – limited to contractors sponsored by EU member States – would remain consistent with Part XI, and would moreover apply in the pre-contractual phase, i.e. the conclusion of the sponsorship agreement, which precedes the approval of the plan of work by the Authority.

To conclude, this measure would appear to produce effects only at the internal level and would likely be limited to the imposition of stricter environmental (or other) requirements on Contractors established in EU member States. Nonetheless, *stricto sensu*, in these limited cases the Union's competence would indeed be exercised with respect to an aspect already falling within the mandate of the Authority – and, in other words, within the scope of Part XI of the Convention. However, as already noted in relation to the competence on environmental protection, the Union's declaration of competence refers to Part XII of the Convention, which is functionally linked to Part XI through Art. 209. In particular, paragraph (2) of that provision states that "[s]ubject to the relevant provisions of this section, States shall adopt laws and regulations to prevent, reduce and control pollution of the marine environment from activities in the Area undertaken by vessels, installations, structures and other devices flying their flag or of their registry or operating under their authority, as the case may be".

This language appears to explicitly encompass the transportation phase – given the reference to "vessels" – when conducted in the context of activities in the Area. Accordingly, the reference to Part XII in the declaration seems sufficient to cover this phase, particularly in view of the limited instances in which it may occur.

4.2.3. Shared competence on energy

The link between the EU competence on energy and Part XI of the Convention is subtle but nevertheless deserves some analysis. The competence on energy is listed among the shared ones under Art. 4(2) TFEU and is further elaborated in Art. 194 TFEU. The latter clarifies the objectives of the energy policy of the Union, by requiring the Union, in the context of the establishment and functioning of the internal market and with regard for the need to preserve and improve the environment, to: "(a) ensure the functioning of the energy market; (b) ensure security of energy supply in the Union; (c) promote energy efficiency and energy saving and the development of new and renewable forms of energy; and (d) promote the interconnection of energy networks". Of particular relevance is subparagraph (c), relating to the promotion of renewable energy sources, an objective to which the Union has been particularly committed in recent years[101].

As mentioned in Chapter I, the material scope of 'activities in the Area' refers to the extraction of minerals located in the seabed and subsoil beyond national jurisdiction and, as such, does not directly involve the production of energy. Nonetheless, the resources found in the Area – namely polymetallic nodules, polymetallic sulphides, and cobalt-rich ferromanganese crusts – contain so-called 'critical raw materials'[102], which are essential for the transition from fossil to renewable sources of energy[103]. In this respect, the Union has already taken regulatory steps to secure the supply of such materials, most recently with the adoption of Regulation (EU) 2024/1252[104]. Although this regulation is formally based on Art. 114 TFEU[105], relating to the internal market, its content – particularly the second recital[106] – explicitly identifies critical raw materials as essential for strategic sectors such as renewable energy, thus revealing a close link with the objectives laid out in Art. 194 TFEU, particularly concerning the promotion of renewable energy sources.

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[101] This aspect also relates to the environmental policy of the Union, and as such it will be dealt with in Chapter III. In the present context it can be mentioned, as an example of the Union's commitment to renewable energies, Directive (EU) 2018/2001 of the European Parliament and of the Council of 11 December 2018 on the promotion of the use of energy from renewable sources (Document 02018L2001-20240716).

[102] For a comprehensive list of what constitute 'critical raw materials' (or, according to other sources, 'critical minerals') for the Union, reference is made to the website of the European Commission at the following link: https://single-market-economy.ec.europa.eu/sectors/raw-materials/areas-specific-interest/critical-raw-materials_en.

[103] For the importance of critical raw materials for the purpose of the 'green transition', reference is made to the report of the International Energy Agency on The Role of Critical Minerals in Clean Energy Transitions, available at the following link: https://iea.blob.core.windows.net/assets/ffd2a83b-8c30-4e9d-980a-52b6d9a86fdc/TheRoleofCriticalMineralsinCleanEnergyTransitions.pdf. When comparing this report with the studies conducted on – for instance – polymetallic nodules (for which see the Report on Polymetallic Nodules of the International Seabed Authority available at the following link: https://www.isa.org.jm/wp-content/uploads/2022/06/eng7.pdf) it can be noted several minerals contained in the nodules are essential for the purpose of transitioning to renewable resources.

[104] Regulation 2024/1252/EU of the European Parliament and of the Council of 11 April 2024 establishing a framework for ensuring a secure and sustainable supply of critical raw materials and amending Regulations (EU) No 168/2013, (EU) 2018/858, (EU) 2018/1724 and (EU) 2019/1020 (Document 02024R1252-20240503).

[105] Art. 114 concerns the approximation of national laws and regulations that have as their object the establishment and functioning of the internal market. For further details, reference is made to R. BÖTTNER, H-J. BLANKE, *Article 114*, in R. BÖTTNER, H-J. BLANKE (eds.), *Treaty on the Functioning of the European Union – A Commentary*, cit., 371-410.

[106] Despite their non-binding force, recitals are often useful to clarify the scope or purpose of an EU act.

The potential impact of Regulation 2024/1252 on activities in the Area emerges clearly in several of its provisions. For instance, Art. 24 requires large companies operating in the Union and using strategic raw materials for the manufacture of equipment related *inter alia* to renewable energy generation to "carry out a risk assessment of their raw materials supply chain of strategic raw materials, including: a mapping of where the strategic raw materials they use are extracted, processed or recycled […]", as well as to assess potential vulnerabilities that could cause supply disruptions. In turn, Art. 24(4) stipulates that "[i]f significant vulnerabilities to supply disruptions are detected as a result of the risk assessment referred to in paragraph 2, large companies […] shall take efforts to mitigate those vulnerabilities, including by assessing the possibility to diversify [their] raw materials supply chains or to substitute the strategic raw materials". The relevance to activities in the Area becomes evident when considering the potential identification by the Commission – entrusted with monitoring under Art. 20 – of vulnerabilities linked to the sourcing of critical raw materials from seabed mining.

On the other hand, the close interrelations between the Union's competence on energy and those on the functioning of the internal market and on environment cannot be underestimated: Art. 194 expressly requires energy policies to be developed "[i]n the context of the establishment and functioning of the internal market and with regard for the need to preserve and improve the environment". Two examples can be made in this respect. First, as mentioned, Regulation 2024/1252 was adopted under Art. 114 TFEU, which provides for the approximation of national laws necessary for the achievement of the objectives set out in Art. 26 (i.e., the establishment and functioning of the internal market).

As for the link with the EU competence on the protection of the environment, mention must be made of Regulation (EU) 2023/1542[107], which concerns, *inter alia*, "requirements on sustainability, safety, labelling, marking and information to allow the placing on the market or putting into service of batteries within the Union", as well as "minimum requirements for extended producer responsibility, the collection and treatment of waste batteries and for reporting". In this case too, the legal basis is not Art. 194 TFEU, but rather Art. 192 TFEU, which provides for the procedure to achieve the

[107] Regulation (EU) 2023/1542 of the European Parliament and of the Council of 12 July 2023 concerning batteries and waste batteries, amending Directive 2008/98/EC and Regulation (EU) 2019/1020 and repealing Directive 2006/66/EC (Document 02023R1542-20240718).

objectives set out in Art. 191, concerning the environmental policies of the Union. Nonetheless, the battery sector undeniably has an impact on the Union's energy policies. This is confirmed in the second recital of the Regulation, which refers to batteries as "an important source of energy and one of the key enablers for sustainable development, green mobility, clean energy and climate neutrality", thereby illustrating once more the close interrelationship between energy and environment, and hence between Art. 194 and Art. 192 TFEU.

In both the cases discussed above, the choice of legal basis (Art. 114 and Art. 192 TFEU, respectively) is consistent with the settled case-law of the ECJ. The Court has repeatedly held that "[i]f examination of a measure reveals that it pursues two aims or that it has two components and if one of those aims or components is identifiable as the main one, whereas the other is merely incidental, the measure must be founded on a single legal basis, namely that required by the main or predominant aim or component" [108]. Given that the measures adopted by the two Regulations primarily concern, respectively, the internal market and the environment, the absence of a reference to Art. 194 TFEU is not surprising. This does not preclude, however, that the energy sector may nonetheless be affected by such measures.

This analysis serves to frame the following question: is the inclusion of the competence on energy in the declaration of 1998 necessary or even required? The answer is not straightforward. On the one hand, energy policy under Art. 194 TFEU includes the regulation of critical raw materials upon which the energy transition depends. In this respect, the Union has a legitimate and functionally relevant interest in the conditions under which such materials are sourced – including from the Area. This functional relationship may support the decision to include energy within the scope of a potential revision of the Union's declaration. On the other hand, it may be noted that most aspects of the Union's energy policy that are relevant to activities in the Area are already covered by other competences – namely those relating to the internal market and environmental protection – which are already mentioned in the declaration.

[108] See, *inter alia*, European Court of Justice, judgment of 6 September 2012, Case C-490/10, European Parliament v Council of the European Union, ECLI:EU:C:2012:525, paragraph 45; in the same terms European Court of Justice, judgment of 6 November 2008, Case C-155/07, European Parliament v Council of the European Union, ECLI:EU:C:2008:605, paragraph 35.

Accordingly, while it is not currently possible to provide a conclusive answer to the question, it may nevertheless be argued that, given the existence of a material link between the Union's energy policies and Part XI of the Convention, an update of the declaration to include this competence might be advisable. At the same time, such an update cannot be considered legally required under UNCLOS, since the relevant measures are presently grounded in legal bases already recognised in the declaration.

4.2.4. Parallel competences

As mentioned, parallel competences are provided for by Art. 4(3) TFEU, under which "[i]n the areas of research, technological development and space, the Union shall have competence to carry out activities, in particular to define and implement programmes; however, the exercise of that competence shall not result in Member States being prevented from exercising theirs", thus resulting in shared competences that do not entail the mechanism of preemption. Among these, the declaration understandably mentions only the first two domains, excluding space, which is clearly unrelated to the scope of the Convention. In this respect, the declaration states that "[w]ith regard to the provisions of Parts XIII and XIV of the Convention, the Community's competence relates mainly to the promotion of cooperation on research and technological development with non-member countries and international organizations", and that "[t]he activities carried out by the Community here complement the activities of the Member States".

Starting with the first domain – cooperation on research – the exclusion of a reference to Part XI does not appear to be fully justified. It is certainly appropriate to refer to Part XIII of the Convention (Arts. 238–265), which governs marine scientific research in general. It is also true that Art. 143(1), located in Part XI, provides that marine scientific research in the Area shall be carried out "exclusively for peaceful purposes and for the benefit of mankind as a whole, in accordance with Part XIII". In this regard, (similarly to what was previously said with respect to the link between Art. 145 and Part XII of the Convention), Art. 143 effectively connects Part XI with Part XIII.

The reason why the same conclusion as for the protection of the environment cannot be drawn in this case derives from the further provisions included in paragraph (3) of Art. 143, which imposes further obligation upon State Parties (and, given the competence of the Union in this sense, on the latter too). In particular, Parties are required to promote international cooperation in marine scientific research in the Area by "(a) participating in international programmes and encouraging cooperation in marine scientific research by personnel of different countries and of the Authority; (b) ensuring that programmes are developed through the Authority or other international organizations as appropriate for the benefit of developing States and technologically less developed States with a view to strengthening their research capabilities, training their personnel and the personnel of the Authority in the techniques and applications of research, and fostering the employment of their qualified personnel in research in the Area; (c) effectively disseminating the results of research and analysis when available, through the Authority or other international channels when appropriate".

These obligations apply exclusively to research in the Area and therefore are not covered by Part XIII[109]. Accordingly, in light of the overall language of the Convention, the omission of any reference to research under Part XI appears unjustified and may affect (subject to the considerations set out in paragraph 5) the Union's capacity to cooperate with the Authority in this domain, as required by Art. 143(3). Nor such exclusion finds a *raison d'être* based on the relevant provisions of the TFEU on research (Title XIX, Art. 179 to 190), which do not limit the geographical scope of research activities.

By contrast, different considerations apply to the competence on transfer of technology. As previously noted, the provisions of the Convention on this matter lost much of their innovative content following the adoption of the 1994 Agreement. Nonetheless, despite these changes, the obligations imposed on States to participate in programmes aimed at transferring technology to developing countries and the Enterprise – as set out in Art. 144(2) – remain unchanged.

Given that such obligations continue to exist, it is worth noting that Part XIV of the Convention (Art. 266 to 278) still requires Member States – and the EU, to which this Part unquestionably applies – to "cooperate actively with competent international organizations and the Authority to encourage and facilitate the transfer to developing States, their nationals and the Enterprise of skills and marine technology with regard to activities in the Area" (Art. 273). This provision is essentially a duplication of Art. 144[110], thereby establishing a clear link between Part XI and Part XIV. For this reason, including

[109] See S. VÖNEKY, F. BECK, *Article 143*, in A. PROELß, A.R. MAGGIO, E. BLITZA, O. DAUM, cit., 989-1001, at 996-997.
[110] S. HANAMOTO, *Article 273*, in *ibidem*, 1796-1797.

a reference to Part XI in connection with transfer of technology would not affect the scope of the Union's competence. At the same time, given the structure of the 1998 declaration – which refers jointly to research and technology transfer – if amendments were made to include a reference to Part XI in connection with the aspect of research, there would be no reason to separate the provision to avoid such reference in connection with transfer of technology. Including both within the same amended provision would be consistent with the Union's competences and would not entail any substantive modification of their scope.

4.3. Complementary competences

Complementary competences[111] are subject to strict limitations, as they do not entail the mechanism of pre-emption[112], nor allow for the harmonisation of national measures[113]. Especially the latter aspect carries significant consequences from the perspective of external competences: as noted above, complementary competences cannot, in principle, give rise to an external competence under the *ERTA* doctrine.

It has been observed that in these areas, substantive rule-making powers remain primarily with the Member States[114], while the Union may support their action, for example through the adoption of guidelines, best practices, or legally binding acts – though the latter cannot override national measures. Moreover, the Union's discretion in choosing the means to be adopted is limited: the TFEU specifies, for each complementary competence, the types of powers the Union may exercise.

The 1998 declaration does not mention any complementary competences – a choice that is unsurprising, given their overall limited impact on Union policy. Among all such

[111] As noted in S. MANGIAMELI, *Article 2*, in in H.-J. BLANKE, S. MANGIAMELI (eds.), *Treaty on the Functioning of the European Union – A Commentary*, cit., at 161, this category of competence is not defined in the Treaties. The term 'complementary competence' has been created by the academic literature. On the complementary competences, reference is made to P. CRAIG, *The Lisbon Treaty* (Oxford University Press, 2010), at 174-178.
[112] Pursuant to Article 2(2) TFEU and Protocol (No. 25) on the exercise of shared competence (document 12008M/PRO/25), the exercise of shared competences is governed by the principle of pre-emption. Under this principle, while Member States retain the ability to act in areas of shared competence, their competence ceases to exist to the extent that the Union has exercised its own.
[113] See this Chapter, paragraph 4.2.1.
[114] S. MANGIAMELI, *Article 6*, cit., at 244.

competences[115], moreover, only one appears to have a potential *ratione materiae* link to activities in the Area, namely the competence on industry. In this field, the Union may act to pursue the objectives set out in Art. 173(1) TFEU, i.e. facilitating the adjustment of industry to structural changes; promoting an environment favourable to initiative and the development of undertakings throughout the Union, particularly small and medium-sized enterprises; encouraging cooperation between undertakings; and fostering the better exploitation of the industrial potential of innovation, research and technological development policies.

To that end, two types of measures are envisaged under Art. 173. First, paragraph (2) empowers the Commission to take "any useful initiative to promote such coordination", including the establishment of guidelines and indicators, the organisation of exchanges of best practices, and the preparation of elements for periodic monitoring and evaluation. The language employed here leaves no doubt as to the non-binding nature of such initiatives. Second, under the second sentence of paragraph (3), the European Parliament and the Council may adopt specific (including legally binding) measures in support of Member State action aimed at achieving the objectives of paragraph (1), explicitly excluding any harmonisation of national laws or regulations. In this scenario, the legal basis of the act would be Art. 173 alone, provided that its predominant purpose is industrial in nature[116].

It is also worth noting that, pursuant to the first sentence of Art. 173(3), these objectives may be pursued through "the policies and activities [the Union] pursues under other provisions of the Treaties". This so-called 'horizontal character'[117] of the industrial competence means that acts adopted on another legal basis must nevertheless take into account the objectives listed in paragraph (1).

At first glance, this complementary competence may appear irrelevant to Part XI of the Convention; however, an examination of its past practical implementation leads to different conclusions. Reference may be made in particular to Regulation

[115] Art. 6(1) TFEU lists the following complementary competences: (a) protection and improvement of human health; (b) industry; (c) culture; (d) tourism; (e) education, vocational training, youth and sport; (f) civil protection; (g) administrative cooperation.
[116] M. KELLERBAUER, *Article 173 TFEU*, in M. KELLERBAUER, M. KLAMERT, J. TOMKIN (eds.), *The EU Treaties and the Charter of Fundamental Rights*, cit., at 2037.
[117] M. KOTZUR, *Treaty on the Functioning of the European Union, Article 173*, in R. GEIGER, D-E. KHAN, M. KOTZUR (eds.) *European Union Treaties: Treaty on European Union, Treaty on the Functioning of the European Union*, cit., at 691.

2021/523/EU[118], which established the InvestEU Programme. Adopted primarily on the basis of Art. 173, the regulation created a fund providing an EU financing and investment operations carried out by the implementing partners that contribute to objectives of the Union's internal policies, by *inter alia* supporting financing and investment operations related to the areas referred to Art. 8(1)(a) and (b)[119].

Based on the above, it cannot be *a priori* excluded that the Union may adopt similar measures in relation to the mineral exploitation industry – or even, more specifically, to the exploitation of mineral resources on the seabed. Such measures could, at least in theory, have implications for Part XI of the Convention and for the policies of the Authority. Reference may be made, for instance, to Art. 150 of the Convention, which states that activities in the Area shall be conducted "in such a manner as to foster healthy development of the world economy and balanced growth of international trade". These objectives could arguably be compromised if EU-based private entities were to gain a competitive advantage through Union-level funding programmes. On this basis, it may be useful for a future revision of the declaration of competence to include a reference to the Union's industrial policy. However, such a reference cannot be considered legally necessary: as explained, formal competence (and – in line with what will be said in paragraph 5 – the corresponding international responsibility) in this area remains with the Member States. Furthermore, past experience (such as that of Regulation 2021/523) suggests that measures adopted under Art. 173 may be readily grounded in alternative legal bases – as for instance the Union's competences on energy or the environment – both of which are already covered in the 1998 declaration.

The inclusion of this competence in the 1998 declaration would moreover need to be extremely careful, since – as noted – the constraints surrounding this type of competence are significant. Any reference would for example need to clarify that the Union's action

[118] Regulation (EU) 2021/523 of the European Parliament and of the Council of 24 March 2021 establishing the InvestEU Programme and amending Regulation (EU) 2015/1017 (Document 32021R0523).

[119] Out of all the different areas listed in those provisions, reference is made for instance to "supply and processing of raw materials, space, oceans, water, including inland waterways, […] nature and other environment infrastructure, […] the deployment of innovative technologies that contribute to the environmental or climate resilience or social sustainability objectives of the Union" (paragraph (a)); or "research, innovation and digitisation policy window which comprises research, product development and innovation activities, the transfer of technologies and research results to the market to support market enablers and cooperation between enterprises, the demonstration and deployment of innovative solutions and support for the scaling up of innovative companies, as well as digitisation of Union industry" (paragraph (b)).

in this field is purely supportive of that of the Member States, and that – pursuant to the *ERTA* doctrine – no external competence arises from it.

Based on the above, the analysis that will be conducted in the next paragraph on the nature of the obligation to update the 1998 declaration and on the consequences of failure to do so will only take into account exclusive and shared competences.

5. DOES THE UNION NEED TO UPDATE THE DECLARATION OF COMPETENCE?

In the preceding paragraphs, the possible interactions between the Union's exclusive and shared competences and Part XI of the Convention – as well as with the mandate of the International Seabed Authority – have been analysed. It was found that certain competences, although not expressly included in the 1998 declaration, may nevertheless be relevant to the implementation of Part XI. In such cases, the inclusion of these competences in a revised declaration may be considered appropriate. The present paragraph addresses a further and more nuanced question: whether an update of the declaration is legally required under either the Convention or EU law, or whether such an update would be merely advisable, without prejudice to the Union's ability to exercise the relevant competences. Put differently, this section investigates whether the Union may validly exercise the competences identified above – even in the absence of their express inclusion in the declaration of competence.

The question – whose relevance is increased by the difficulties that would surround the negotiation, at the EU level, of a revision of the declaration[120] – can be positively answered quite easily, but only from the formal viewpoint: Art. 5(4) states that the international organization Party to the Convention (as well as its member States) "shall" promptly notify any changes to the distribution of competence, including new transfers of competence, specified in the declarations, thus admitting no discretion and clearly imposing a legal obligation upon the Union to update its declaration whenever a relevant change occurs.

More complex, however, is the assessment of the consequences of a failure to comply with this obligation. This issue must be examined from two distinct but interrelated

[120] As noted in L. LIJNZAAD, *Declarations of Competence in the Law of the Sea, a Very European Affair*, in M.W. LODGE (eds.), M.H. NORDQUIST, *Peaceful Order in the World's Oceans: Essays in Honor of Satya N. Nandan* (Brill | Nijhoff, 2014), 186-207, at 203-204, such difficulties have led in the past to an "inherent desire to let sleeping dogs lie".

perspectives. From the standpoint of EU law, the focus lies on the internal validity of Union measures: specifically, whether acts adopted pursuant to competences not reflected in the declaration would be valid within the Union legal order. The second perspective is that of international law, which concerns not only the exercise of *competence* but also the attribution of international *responsibility*: in other words, whether the exercise by the Union of competences not included in the declaration could entail its responsibility *vis-à-vis* non-member States.

Both dimensions will be analysed in turn – starting, for logical and methodological reasons, with the internal (EU law) perspective. It is also clarified that the present analysis is limited to the competence relating to the implementation of the Convention through the adoption of Union acts. A separate issue – namely, the potential for the Union to substitute member States in the organs of the Authority – will be addressed in Chapter III.

5.1 The EU law perspective

Assessing the consequences of a failure to update the declaration of competence under EU law is not straightforward, as the matter has not been directly addressed by the case-law of the ECJ, nor is it clarified by the Convention or any EU legal instrument. Nonetheless, some observations can be made, drawing both from the limited practice developed in recent years and from broader principles established by the Court in similar contexts.

From a practical standpoint, it is worth noting that the Union has already exercised competences not explicitly listed in the 1998 declaration. One example concerns enforcement at sea in the framework of anti-piracy operations off the coast of Somalia[121]. Within the Common Foreign and Security Policy, the Union launched an operation (so-called 'operation Atalanta') for the purpose of deterrence, prevention and repression of such forms of piracy[122]. Without addressing the full context of the operation[123], it is sufficient to observe that the competence underpinning it was not initially reflected in the

[121] See footnote 126.
[122] Council Joint Action 2008/851/CFSP of 10 November 2008 on a European Union military operation to contribute to the deterrence, prevention and repression of acts of piracy and armed robbery off the Somali coast (Document 02008E0851-20241216).
[123] For which reference is made, together with the details reported in the previous footnote, to H-G. EHRHART, K. PETRETTO, *The EU, the Somalia Challenge, and Counter-piracy: Towards a Comprehensive Approach?*, in *European Foreign Affairs Review*, 2012, 261-283.

declaration, so that in principle it was upon member States to exercise it. Nevertheless, the Union proceeded without apparent legal objection, and the operation's scope – both geographical and substantive – was extended over time[124], suggesting that the absence of a formal reference in the declaration was not considered a legal barrier.

Support for this interpretation can also be found in the judgment of the ECJ in Case C-29/99 (*Commission v Council*)[125], where the Court ruled on a declaration of competence. In that context, the ECJ held that a declaration annexed to a Council decision authorising the conclusion of an international agreement forms an integral part of that decision: as such, it can be subject to the scrutiny of the Court itself, which will even have the power to annul it[126]. In that case, the Court annulled a paragraph of the declaration made by the European Atomic Energy Community in relation to the Nuclear Safety Convention, on the grounds that it failed to refer to all relevant competences under the Treaty.

Although the ruling did not concern a failure to update a declaration, the Court's reasoning may still assist in drawing some conclusions. Before doing so, however, a key distinction between that case and the context of UNCLOS must be made concerning the timing: the Nuclear Safety Convention declaration was deficient at the moment of its adoption, whereas the 1998 declaration has become incomplete over time due to the subsequent development of EU competences. Despite this difference, a subtle remark can be made, which is also applicable to that case. In analysing the relationship between the competences of the Union as deriving from the Treaty and those set out in the declaration, the Court – by annulling the decision – appears, in essence, to have taken for granted the pre-existence of the Treaty-based competences over those contained in the declaration.

In other words, it can be inferred from the judgment that the Union's competences derive from the Treaties and are not dependent on their enumeration in a declaration. The latter merely describes competences, which however exist before and are not created or limited by it: put it differently, the declaration is not legally constitutive of such competences.

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[124] Lastly, with Council Decision 2024/3186/CFSP of 16 December 2024 amending Joint Action 2008/851/CFSP on a European Union military operation to contribute to maritime security in the West Indian Ocean and in the Red Sea (EUNAVFOR ATALANTA) (Document 32024D3186).
[125] European Court of Justice, judgment of 10 December 2002, Case C-29/99, Commission of the European Communities v Council of the European Union, ECLI:EU:C:2002:734.
[126] *Ibidem*, at paragraph 40.

It follows that, from the perspective of EU law, the Union may continue to exercise competences acquired or clarified in their scope after 1998, even if they are not explicitly reflected in the original declaration. This conclusion, however, rests on the assumption that no institutional challenge is brought before the Court. In theory, the Commission could seek the annulment of the declaration for failing to include the Union's full set of competences. Yet, in the absence of such a challenge, this remains a highly hypothetical scenario rather than a present legal constraint.

5.2 The international law perspective

As noted in legal doctrine[127] and as recalled above, declarations of competence represent a compromise[128]: while non-member States accept that the internal legal order of the Union may determine how rights and obligations under a treaty are allocated between the Union and its member States, they do so on the condition that such allocations are set out clearly, authoritatively, and transparently[129]. The function of the declaration is thus to allow third States to ascertain *ex ante* which subject matters fall within the Union's competence, and which remain within that of the member States. It is in light of this rationale that the consequences of a failure to update the declaration must also be assessed from the standpoint of international law – not only in terms of the Union's responsibility for non-compliance, but also in terms of the legal capacity to exercise its competences.

Turning first to the issue of responsibility, Art. 6(1) of Annex IX to the Convention provides that "Parties which have competence under article 5 of this Annex shall have responsibility for failure to comply with obligations or for any other violation of this Convention". The provision adopts a formalistic approach: responsibility is attributed exclusively to the Party (be it a State or an international organisation) that is formally competent in the matter. This interpretation was explicitly confirmed by the ITLOS in its advisory opinion of 2015[130], where the Tribunal stated that "the liability of an

[127] E. PAASIVIRTA, *The European Union and the United Nations Convention on the Law of the Sea*, in *Fordham International Law Journal*, 2015, 1045-1072, at 1047-1048.
[128] As noted by A.D. CASTELEIRO, *EU Declarations of Competence to Multilateral Agreements: A Useful Reference Base?*, in *European Foreign Affairs Review*, 2012, 491-509, at 494, "[t]here are no cases in which the EU (or any other IO) has made a declaration of competence without the agreement expressly requiring it to do so".
[129] P.M. OLSON, *Mixity from the Outside: the Perspective of a Treaty Partner*, in C. HILLION, P. KOUTRAKOS (eds.), *Mixed Agreements Revisited: The EU and its Member States in the World*, cit., 331-348, at 335.
[130] International Tribunal for the Law of the Sea, Case no. 21, *Request for an Advisory Opinion submitted by the Sub-Regional Fisheries Commission (SRFC) (Request for Advisory Opinion submitted to the Tribunal)*, opinion rendered on 2 April 2015.

international organization for an internationally wrongful act is linked to its competence. This is clearly spelled out in article 6, paragraph 1, of Annex IX to the Convention, which provides that parties which have competence under article 5 of that Annex have responsibility for failure to comply with obligations or for any other violation of the Convention. It follows that an international organization which in a matter of its competence undertakes an obligation, in respect of which compliance depends on the conduct of its member States, may be held liable if a member State fails to comply with such obligation and the organization did not meet its obligation of 'due diligence'" (paragraph 168).

Apart from this reference in the 2015 advisory opinion, no further precedent exists clarifying the practical implications of this principle[131]. However, the rigid attribution of responsibility based on formal declarations gives rise to concerns – especially in scenarios where the Union exercises a competence not expressly included in its declaration. In such cases, it is unclear who would be internationally responsible for a breach of the Convention. Following the logic of Annex IX, responsibility would formally lie with the member States[132]. Therefore, a question may arise on which member State (all of them?) should be brought before an international Court to see their responsibility declared. In practice, it is plausible that it would be easier and more straightforward for the non-member State(s) offended by action of the EU to directly bring the latter before an international tribunal, *de facto* recognising its competence and responsibility even in the lack of a reference in the declaration.

The second dimension concerns the impact that the lack of formal reference in the declaration may have on the exercise of the Union's external competences under international law. This issue is even more difficult to assess, particularly given the almost complete lack of precedents. As argued in the previous paragraphs, under EU law the omission of a competence from a declaration does not prevent its exercise by the Union – whether the competence is internal or external in nature. However, in the international

[131] In the past, a case has been brought before the ITLOS between the EU and Chile, namely ITLOS case no. 7 concerning the Conservation and Sustainable Exploitation of Swordfish Stocks in the South-Eastern Pacific Ocean (*Chile/European Union*). While the case would have most likely investigated the scope of the competence of the Union relevant for that case – as well as, potentially, the role of the declaration and the scope of the Union's responsibility under the latter – it was however dismissed after the involved parties reached an agreement.
[132] S. BOELAERT-SUOMINEN, *The European Community, the European Court of Justice and the Law of the Sea* (2008) *23 The International Journal of Marine and Coastal Law* 643–713, at 672-673.

context, such omission may influence, or be influenced by, the reactions of third States, in the terms that will be outlined below.

The 1998 declaration not only lists the competences attributed to the Union at the time, but also includes an Appendix enumerating relevant internal acts and international agreements adopted in the fields covered. As noted above (paragraph 3), this inclusion reflects the logic of the *ERTA* doctrine, also implicitly acknowledged in the text of the declaration itself, which affirms that "[a] list of relevant Community acts appears in the Appendix. The extent of Community competence ensuing from these acts must be assessed by reference to the precise provisions of each measure, and in particular, the extent to which these provisions establish common rules". The link between the declaration (and the Appendix) and the *ERTA* doctrine was later confirmed by the ECJ in the so-called *Mox Plant* case[133], where it held that the Appendix "while not exhaustive, constitutes a useful reference base" for determining whether a shared competence has become exclusive. This approach is furthermore consistent with the declaration's own language stating that "[t]he scope and the exercise of such Community competence are, by their nature, subject to continuous development", which also seems to confirm the evolutionary nature of EU competences.

While this formulation clearly reflects the evolving nature of EU competences, it also underscores a tension: such evolution, though acknowledged internally, may not be opposable to third States. Indeed, non-member States could reasonably expect the Union to exercise only those competences explicitly included in the declaration. This possibility raises doubts about the full international effectiveness of competences that have developed after 1998 in accordance with the *ERTA* doctrine but are not yet reflected in the declaration.

Arguably, such evolution cannot be opposed to third States, which may reasonably expect the Union to only exercise the competences which formally belong to it under the declaration of 1998, thus impairing the full exercise of newly developed competences in

[133] European Court of Justice, Judgment of 30 May 2006, Case C-459/03, Commission of the European Communities v Ireland, ECLI:EU:C:2006:345. The judgment – part of a broader controversy involving different international and EU jurisdictions – is considered a cornerstone on the matter of the relation between international law (specifically, international law of the sea) and EU law. Since the fourth Chapter will deal with dispute settlement and conflicting jurisdictions, the findings of the judgment and the relevance for Part XI of the Convention will be debated there.

line with the *ERTA* doctrine[134]. To date, this issue appears not to have generated any controversy. On the contrary, there is at least one precedent in which the Union exercised a competence not included in the declaration – as mentioned above, enforcement at sea in the context of counter-piracy operations – without any objection from non-member States, as the EU activities in Somali waters were also commended by the UN Security Council[135].

Therefore, in the absence of any precedent, the potential behaviour of non-member States is extremely difficult to assess. Based however on the *raison d'être* of Annex IX to the Convention and of the declaration, the danger that non-member States may be hostile to the exercise by the Union of a competence not formally included in the declaration cannot be completely excluded.

5.3. Concluding remarks

Drawing some conclusions from the above analysis, it can be stated that the Union is – in purely theoretical terms – under a legal obligation to update the 1998 declaration. As noted, this is a requirement expressly laid down in Art. 5(4) of Annex IX to the Convention. It can also be considered a matter of convenience, since updating the 1998 declaration would bring more clarity as to which competences have been developed in the past two (almost three) decades by the Union.

This result would not however come without challenges: as widely noted, updating a declaration of competences requires a debate within the Union that would not otherwise take place[136], thus representing what has been defined as an "externalization of an internal matter"[137]. In this respect, the willingness of EU member States to engage in a process ultimately leading to explicitly acknowledge the loss of competences in certain areas might also be questioned.

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[134] J. HELISKOSKI, *EU Declarations of Competence and International Responsibility*, in M.D. EVANS, P. KOUTRAKOS (eds.), *The International Responsibility of the European Union: European and International Perspectives* (London, Hart Publishing, 2013), 189-212, at 207, failure of the Union to update the declaration may have an impact on "the evolving character of the EU's competence, including the AETR", which "risks having no effect at the level of international law".

[135] See UN Security Council, Resolution 1838 (2008) adopted at its 5987th meeting, on 7 October 2008 (document S/RES/1838 (2008)).

[136] L. LIJNZAAD, *Declarations of Competence in the Law of the Sea, a Very European Affair*, cit., at 190.

[137] A.D. CASTELEIRO, *EU Declarations of Competence to Multilateral Agreements: A Useful Reference Base?*, cit., at 492.

At the same time, any clear consequences arising from a failure to comply with this obligation are likely to emerge predominantly at the international level, given the limited legal implications of such failure under EU law. The only scenario in which a consequence might arise internally would concern the adoption of an updated but still incomplete declaration: in that case, a legal challenge could lead to its annulment by the ECJ, in line with the precedent established in *Commission v Council*.

By contrast, at the international level, potential consequences may relate both to the question of responsibility – of the Union and/or its member States – and to practical obstacles in the Union's ability to exercise external competences in line with the *ERTA* doctrine. However, the reaction of non-member States cannot be anticipated with certainty, as they may also simply accept the newly developed competences of the Union.

In light of the foregoing, the third Chapter will, where relevant, also take into account competences not expressly listed in the 1998 declaration, particularly in view of the non-constitutive nature of the declaration in respect of the Union's competences.

CHAPTER III

THE IMPLEMENTATION OF PART XI OF THE CONVENTION AND OF THE RULES, REGULATIONS AND PROCEDURES OF THE AUTHORITY BY THE EUROPEAN UNION

1. INTRODUCTION

In the previous Chapter, the analysis has focused on clarifying the scope and nature of the European Union's competences in relation to activities in the Area. It was shown that, although the Union does not possess a general competence in the law of the sea, it nonetheless enjoys a significant set of powers relevant to deep seabed mining – including exclusive competences in the fields of customs and the CCP and shared competences in matters such as environmental protection, energy, and transport. The analysis also highlighted how the Lisbon Treaty strengthened the EU's exercise of its external competence, consolidating the principle of parallelism with internal ones and enabling it to participate fully in the framework established under the Convention. As a result, the Union was able to accede to the Convention as the only international organization party to it, and to exercise rights and obligations within the Authority alongside its Member States.

As will be further examined in the present Chapter, the Union's presence in the ISA is likely to evolve beyond a merely formal role. The Union has, for instance, already expressed its interest in the negotiations of the Mining Code on Exploitation and in advocating for a moratorium on activities in the Area.

Building on this foundation, the present chapter turns to the implementation of Part XI and of the rules, regulations and procedures adopted by the ISA. Whereas Chapter II explained what the Union can do in terms of legal capacity, this Chapter investigates how those competences are – or might be – exercised in practice. The analysis will first examine the direct obligations incumbent upon the Union under Part XI of UNCLOS, with particular attention to Art. 137 and 139, which regulate fundamental aspects such as the non-appropriation of the Area, the duty not to recognize claims arising from activities conducted in breach of the Convention and the role and responsibilities of sponsoring

States. Second, it will consider the Union's role in relation to the ongoing negotiation and future implementation of the Mining Code on Exploitation, where both shared and exclusive competences are involved.

2. Direct obligations of the European Union under Part XI of the Convention

In addressing the obligations to which the Union is subject pursuant to Part XI of the Convention, it must be borne in mind that they are not necessarily the same as the ones identified by the ITLOS in its 2011 advisory opinion, which only concern sponsoring States. While the present Chapter will also focus on the possibility for the Union to act as sponsor (see paragraph 2.2.), the current paragraph will only concern obligations binding *ipso facto* upon all Parties. These obligations are primarily found in Section 2 of Part XI, dedicated to the principles, which has already been partly analysed in Chapter I.

To avoid repetition, the present analysis will focus solely on those obligations that are distinct from those incumbent upon Member States. Accordingly, it will concentrate on Art. 137 and 139 of the Convention, with due consideration for the current situation involving the executive order of the United States authorising exploitation of the Area, as previously noted in paragraph 2.2. of Chapter I. on the contrary, it will not consider obligations arising under Art. 140 to 144, which do not differ from those applicable to other members of the Authority. Nor will it address other potential obligations of the Union, such as the duty to respect the legal personality, privileges and immunities of the Authority, as set out in Art. 176 and the provisions that follow.

Before turning to the specific obligations arising under the Convention, some preliminary remarks must be made on their applicability to the Union, given that most provisions refer to 'States', thereby raising the question of whether international organisations are similarly bound. The relevance of the question emerges from Art. 4(1) of Annex IX to the Convention, pursuant to which the declaration of competence "shall contain an undertaking to accept the rights and obligations of States under this Convention *in respect of matters relating to which competence has been transferred to it* by its member States which are Parties to this Convention" (emphasis added)[1]. Put differently, under this

[1] Also the 1998 declaration states that "[b]y depositing [the instrument of formal confirmation], the Community has the honour of declaring its acceptance, in respect of matters for which competence has been transferred to it by those of its Members States which are parties to the Convention, of the rights and

provision, the Union is bound only to the extent that its competences are included in the declaration[2]. Since the Union's competences listed with respect to Part XI are overall limited, one might question whether the general obligations set out in that Part also apply to the Union.

Two observations can be made in this regard. On the one hand, although limited, the Union's competences under Part XI – most notably in relation to environmental protection, customs and the CCP – are established, as shown in the previous Chapter. As a result of these competences, the Union enjoys the rights conferred by Part XI; most significantly, it is a member of the Authority (though, in terms of voting rights, the considerations set out in paragraph 3 below must be kept in mind). Arguably, its participation in the rights granted under Part XI entails participation in the corresponding obligations.

Furthermore, even if such obligations were not directly applicable to the Union by virtue of their inclusion in the Convention, several of them are – according to the majority of legal doctrine – of a customary nature[3], which generally informs the action of the Union[4]. It follows that the Union is arguably bound to respect them, in the terms that will be analysed below.

Following the order set out in the Convention, the first obligation is, put simply, to respect the principle of the common heritage of humankind, as established in Art. 136. However, since that provision does not itself impose immediate obligations upon the Parties, the specific articles that give substance to the principle will be analysed in the sections that follow.

obligations laid down for States in the Convention and the Agreement", therefore limiting the scope of the declaration itself.

[2] E. FRANCKX, M. BENATAR, D. CAMBOU, K. JANSSEN, E. MAMPAEY, N. SCOTCHER, T. VAN TRAN, *Annex IX*, in A. PROELß, A.R. MAGGIO, E. BLITZA, O. DAUM, cit., at 2530.

[3] See Chapter I, footnote 34. See also S. VÖNEKY, A. HÖFELMEIER, *Article 137*, in *ibidem*, 963-964.

[4] See European Court of Justice, Judgment of 16 June 1998, Case C-162/96, A. Racke GmbH & Co. v Hauptzollamt Mainz (*Racke*), ECLI:EU:C:1998:293, paragraph 45, according to which "[…] the European Community must respect international law in the exercise of its powers. It is therefore required to comply with the rules of customary international law […]". While it is acknowledged that the relationship between the legal system of the Union and customary international law is more complicated, in the context of the present dissertation it will not be possible to deal with it in detail. Reference is therefore made to F. LUSA BORDIN, A.T. MÜLLER, F. PASCUAL-VIVES, *The European Union and Customary International Law* (Oxford, Oxford University Press, 2022).

2.1. Obligations pursuant to Article 137 of the Convention

The first set of direct obligations under Part XI of the Convention is provided in Art. 137, which, however, contains different provisions. For reasons of clarity, the analysis will be divided into two subparagraphs: the first addressing Art. 137(1), and the second focusing on paragraphs (2) and (3) of the same article.

2.1.1. Non-appropriation and the exclusion of sovereignty over the Area

The first paragraph of Art. 137 prohibits any claim, exercise of sovereignty or sovereign rights over, or appropriation of any part of the Area or its resources, as well as any recognition of any such claim.

As its wording makes clear, the obligation has a twofold character. On the one hand, the EU must refrain from asserting any rights over or appropriating resources from the Area. While it is difficult to envisage a scenario in which the Union itself would appropriate the Area, given that it lacks territory of its own, this does not exclude, however, at least from a theoretical standpoint, the possibility that the Union could unilaterally initiate an operation to extract mineral resources from the Area, even without asserting sovereignty over a specific portion of the seabed. This possibility remains purely hypothetical and unlikely, and is mentioned here only to underscore that such conduct would in any event be prohibited under Art. 137(1).

The second side of the obligation concerns the duty not to recognise unilateral claims, exercises of sovereignty or sovereign rights, or acts of appropriation made by other States or entities. Unlike the first case, this duty is directly applicable to the EU, which – by virtue of its international legal personality – can be considered bound by the active obligation of non-recognition, widely acknowledged in legal doctrine as having customary status[5].

As discussed in paragraph 2.2. of Chapter I, the obligation of non-recognition acquires practical significance in the context of the recent decision of the United States to authorise deep seabed mining beyond national jurisdiction, which is likely to shape the Union's position in the near future.

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[5] S. VÖNEKY, A. HÖFELMEIER, *Article 137*, cit., at 964.

The duty of non-recognition under Art. 137(1) entails further consequences, such as the prohibition of trade in minerals recovered in violation of Part XI of the Convention[6]. These aspects will be addressed in greater detail below, when examining paragraphs (2) and (3) of Art. 137. For now, it may be observed that the first paragraph can be complied with, *inter alia*, through political statements – a form of action that the Union, as a Party to UNCLOS, is fully entitled to undertake. At the time of writing, however, the Union has yet to issue any formal statement on the position adopted by the United States[7], despite having actively advocated for a moratorium on deep seabed mining – an approach that clearly conflicts with the U.S. decision to initiate such activities[8].

2.1.2. Rights in the resources of the Area and conditions to their alienability

Two further obligations arise under paragraph (2) and (3) of Art 137. Paragraph (2) prohibits the alienation of resources of the Area, providing however that minerals recovered[9] may only be alienated in accordance with Part XI and the rules, regulations and procedures of the Authority. Paragraph (3) complements this provision by prohibiting any claim, acquisition or exercise of rights with respect to the minerals recovered from the Area, except when in accordance with Part XI.

As with paragraph (1), the obligations incumbent upon the Union under these provisions are twofold. First, under paragraph (2), the Union must be regarded as equally subject to the obligation not to recover or alienate minerals of the Area. Unlike the case of territorial claims, it is not inconceivable that the Union might be directly involved in recovery activities – for example, through projects financed at the EU level. Such initiatives, however, would be permissible only if fully compliant with Part XI and the relevant legal framework established by the Authority, and would otherwise be in breach of Art. 137(2).

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[6] *Ibidem*, at 962.
[7] The only position in this respect was expressed by the EU Commission to the news channel Eurovision in the context of an interview. See Euronews, '*European Commission questions legality of US seabed mining plans*' of 28 April 2025, available at the following link: https://www.euronews.com/my-europe/2025/04/28/european-commission-questions-legality-of-us-seabed-mining-plans. The Commission merely declared in that occasion that it "deeply regrets" the United States decision.
[8] See infra, paragraph 4.1.1.
[9] As noted in S. VÖNEKY, A. HÖFELMEIER, *Article 137*, cit., at 963, the use of the term 'minerals' in Art. 137(2) and (3) is a consequence of the extraction, which "marks the terminological conversion of 'resources' into 'minerals'", given that "[t]he passing of a title over the minerals to the miners is based on the legal fiction that separates the legal status of the seabed from its resources". In other words, only 'minerals' can be alienated, insofar as they have been extracted in accordance with Art. 137, while rights over 'resources', meaning unrecovered minerals, are not subject to alienation as they are part of the Area.

The second obligation, enshrined in paragraph (3), deserves more detailed consideration, particularly in light of its practical implications following the recent unilateral decision of the United States to authorise exploitation of the Area.

As Art. 137(3) UNCLOS prohibits States from acquiring rights minerals extracted in noncompliance with Part XI, this prohibition can be interpreted as implying an obligation not to permit the importation or acquisition of such minerals. As such, its implementation would fall into the Union's exclusive competence in the field of the Common Commercial Policy (CCP), pursuant to Art. 3 and 207 TFEU[10]. As the EU is a Party to the Convention, such measure would arguably be legally required for two main reasons. First, the language of Art. 137(3) does unequivocally not leave any discretion on the Parties, which "shall not" recognise any claim, acquisition or exercise of rights over minerals recovered from the Area in violation of the Convention. Second, under an EU law perspective, Art. 207(1) TFEU provides that the CCP "shall be conducted in the context of the principles and objectives of the Union's external action" and that must therefore adhere to the international obligations binding upon the Union[11]. These obligations include, in the present context, ensuring compliance with both general international law and the Convention[12].

However, implementing a prohibition on the importation of minerals extracted from the Area in breach of Part XI may potentially create inconsistencies with other international legal frameworks to which the Union is subject – notably, those arising under the World Trade Organization (WTO) system[13], of which the Union has been a member since 1995[14]. More specifically, obligations under the Art. 137(3) of the Convention could overlap with existing trade commitments undertaken pursuant to the General Agreement

[10] See Chapter II, paragraph 4.1.
[11] D-E. KHAN, *Article 217 TFEU*, in R. GEIGER, D-E. KHAN, M. KOTZUR (eds), *European Union Treaties: Treaty on the European Union and Treaty on the Functioning of the European Union* (London, Hart Publishing, 2015), 756-765, at 757.
[12] This is moreover consistent with the more general obligation provided for under Art. 3(5) TEU, according to which the Union "shall contribute to […] the strict observance and the development of international law, including respect for the principles of the United Nations Charter".
[13] In the context of the present dissertation, it will not be possible to deal with the entirety of the system established under the WTO agreement, to which only essential references will be made. For further details, see J.H. JACKSON, *The World trade Organisation – Constitution and Jurisprudence* (Royal Institute of International Affairs, 1998); see also A.K. KOUL, *Guide to the WTO and GATT – Economics, Law and Politics* (6th ed., Springer Nature Singapore Pte Ltd., 2018).
[14] Ratification of the Agreement was authorised at the EU level through Council Decision 94/800/EC of 22 December 1994 concerning the conclusion on behalf of the European Community, as regards matters within its competence, of the agreements reached in the Uruguay Round multilateral negotiations (1986-1994).

on Tariffs and Trade (GATT)[15] and the Agreement on Technical Barriers to Trade (TBT)[16], both of which were negotiated under the WTO framework, as such potentially triggering dispute settlement procedures provided for under the WTO[17]. In the following section, a specific approach will be proposed to illustrate how the Union might implement measures in compliance with Art. 137(3) UNCLOS while ensuring compatibility with WTO law.

The proposed model for implementing the obligations arising under the Convention consists in a ban on resources extracted from the Area in violation of Part XI. To this end, the discussion will be divided in two parts. First, the legal basis for such a ban will be examined in order to assess whether it could be justified under the GATT. Second, attention will turn to the practical implementation of the ban, specifically through the introduction of a certificate of origin. Since this second component would effectively entail the imposition of technical requirements on mineral resources more broadly, its compatibility with both the GATT and the TBT will be considered. In this context, the potential role of the Authority will also be analysed.

Finally, the concluding section will evaluate whether the proposed model is adequate to achieve its intended objectives, and will identify possible flaws, shortcomings or limitations.

[15] The current version of the GATT is the General Agreement on Tariffs and Trade of 1994 (GATT 1994), annexed to the Marrakesh Agreement Establishing the World Trade Organization (Marrakesh, 15 April 1994, in force 1 January 1995) 1867 UNTS 187. The provisions of the GATT 1994 are in turn based on those of the General Agreement on Tariffs and Trade of 1947 (Geneva, 30 October 1947, in force 30 May 1950) 64 UNTS 187 (GATT 1947), further supplemented by other instruments listed in Art. 1 of GATT 1994. Unless where otherwise specified, general reference t the GATT in the present dissertation shall be deemed to refer the GATT 1994.

[16] Agreement on Technical Barriers to Trade (15 April 1994, in force 1 January 1995) 1868 UNTS 120.

[17] The dispute settlement procedures under the WTO system are provided for under the Understanding on Rules and Procedures Governing the Settlement of Disputes (the 'DSU') annexed as Annex II to the Marrakesh Agreement (see footnote 15). In extremely simplified terms, there are two alternative dispute settlement procedures: on the one hand, the classical one, which envisages – following unsuccessful consultation between the concerned Parties – the establishment of a Panel, which delivers a report. If the report of the Panel is challenged, a second report is delivered by the Appellate Body. The reports are then adopted by member States, unless a decision is taken not to report it. In the context of the present dissertation (and unless otherwise specified) reference will be mainly made to adopted reports.
Alternatively, Parties may decide to resort to the expeditious arbitration provided for under Art. 25 of the DSU, which however has scarce application. Reference to dispute settlement organs in the present dissertation must be intended as to include the Panel, the Appellate Body and – if relevant – the arbitral tribunal. Since it will not be possible to analyse in detail these procedures, reference is made to P.C. MAVROIDIS, *The WTO Dispute Settlement System – How, Why and Where?* (Edward Elgar Publishing, 2022).

2.1.2.1. The ban over resources of the Area extracted in noncompliance with Part XI

As mentioned above, the first component of the proposed mechanism for implementing the obligations under Art. 137(3) of the Convention would consist in a comprehensive ban on resources extracted from the Area without the authorisation of the Authority. It was previously noted that such a measure would fall within the scope of Art. 207 TFEU, which empowers the Union to impose prohibitions on imports and exports[18]. In the present situation, the proposed measure would imply a total ban on the importation of all mineral resources originating from the Area, given that the ISA has not yet granted any exploitation licences pending the adoption of the Mining Code.

However, the implementation of an import ban must also comply with the provisions of the GATT, which – as made clear in its Preamble – seeks to eliminate discriminatory practices in international trade relations[19]. To this end, the agreement establishes several obligations, including the so-called 'Most-Favoured-Nation' treatment set out in Art. I, which will be analysed in more detail below in paragraph 2.1.2.2.1.

For the purposes of this section, it is sufficient to recall Art. XI of the GATT, which prohibits any measures – other than duties, taxes, or other charges – that result in prohibitions or restrictions on imports from other contracting parties, whether imposed through quotas, licences, or other mechanisms. A complete ban on minerals extracted from the Area would fall within the scope of such quantitative restrictions and would therefore, in principle, be inconsistent with Art. XI.

Nonetheless, Art. XX of the GATT provides for general exceptions to the obligations established in the agreement, including those under Art. XI[20]. As such, even if a ban on minerals extracted from the Area were inconsistent with the latter, it could still be justified under one of the exceptions listed in Art. XX.

In this regard, Art. XX establishes a 'two-tiered test'[21] for the applicability of exceptions. First, under the chapeau of Art. XX, the measure must not "applied in a manner which

[18] D-E. KHAN, *Article 217 TFEU*, in R. GEIGER, D-E. KHAN, M. KOTZUR (eds), cit., at 762.
[19] R. WOLFRUM, P-T. STOLL, A. SEIBERT-FOHR, *General Agreements on Tariffs and Trade*, in R. WOLFRUM, P-T. STOLL, A. SEIBERT-FOHR, *WTO - Technical Barriers and SPS Measures* (Series: Max Planck Commentaries on World Trade Law, Volume 3, Brill | Nijhoff, 2007) 1-166, at 5.
[20] While also Art. XI itself provides for some exceptions at paragraph (2), they are not relevant in the context of this dissertation and will therefore not be analysed.
[21] R. WOLFRUM, *Article XX GATT [Chapeau]*, in R. WOLFRUM, P-T. STOLL, A. SEIBERT-FOHR (eds.), *WTO – Technical Barriers and SPS Measures* (Leiden, Brill | Nijhoff, 2007), 66-79, at 72-73.

would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail", nor be a "disguised restriction on international trade". Second, the rationale for the measure must fall under one of the categories enumerated in subparagraphs (a) through (j). The conditions set out in the chapeau must be satisfied in all cases, regardless of which subparagraph is invoked.

For the purposes of this analysis, four exceptions may be of particular relevance and will therefore be investigated below, namely: (a) measures necessary to protect public morals; (b) measures necessary to protect human, animal, or plant life or health; (d) measures necessary to secure compliance with laws or regulations that are not inconsistent with the GATT; and (g) measures relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption.

With regard to the chapeau, it is relatively straightforward to argue that the proposed ban would not constitute ab arbitrary or unjustifiable discrimination. Although the measure would, in practice, affect only one State at present, it would apply equally to all resources extracted from the Area in non-compliance with Part XI. In other words, if other States were to follow the United States in unilaterally authorising exploitation in the Area, they too would be subject to the ban.

More difficult to assess is whether the measure could be considered a disguised restriction on international trade, given the ambiguity of this concept, which has not been definitively interpreted by any WTO dispute settlement body[22]. Nevertheless, some guidance may still come from the general reflections on the chapeau of Art. XX developed in the case-law of the WTO dispute settlement bodies in the context of the case *US – Shrimp*[23]. As first noted in the report[24] of the Panel[25], "when invoking Article XX, a Member invokes the right to derogate to certain specific substantive provisions of GATT 1994"; however "in doing so, it must not frustrate or defeat the purposes and objects of the General Agreement

[22] G. ADINOLFI, *Article XX GATT [Chapeau]*, in P-T. STOLL, H. HESTERMEYER, G. MESSENGER, *Commentaries on World Trade Law - Volume 2: Trade in Goods* (2nd online edition, Brill | Nijhoff, 2023), at paragraph 30.
[23] *United States - Import Prohibition of Certain Shrimp and Shrimp Products*, procedure DS58, documents available at the following link: https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds58_e.htm.
[24] WTO, report of the Panel of 15 May 1998, *US – Shrimp*, document WT/DS58/R, paragraph 7.40.
[25] See footnote 17.

and the WTO Agreement or its legal obligations under the substantive rules of GATT by abusing the exception contained in Article XX”.

This conclusion was echoed by the Appellate Body[26] in the same case, which held that “[t]he chapeau of Art. XX is, in fact, but one expression of the principle of good faith”[27]. In doing so, the Appellate Body linked the principle of good faith to the doctrine of *abus de droit*, stating that “[a]n abusive exercise by a Member of its own treaty right thus results in a breach of the treaty rights of the other Members and, as well, a violation of the treaty obligation of the Member so acting”[28]. In other words, compliance with the chapeau – including the requirement that a measure not constitute a disguised restriction on international trade – requires that measures be adopted in good faith and not amount to an abuse of right.

This interpretation aligns with the findings of the Panel in *EC – Asbestos* case[29], which observed that “what is covered by 'disguised restriction on international trade' is not so much the word 'restriction', inasmuch as, in essence, any measure falling within Art. XX is a restriction on international trade, but the word 'disguised'”, and further held that “a restriction which formally meets the requirements of Art. XX(b) will constitute an abuse if such compliance is in fact only a disguise to conceal the pursuit of trade-restrictive objectives”[30].

In the present case – without prejudice to the forthcoming analysis on whether the proposed EU ban would fall within the scope of one of the exceptions under Art. XX(a), (b), (d), or (g) – it may be argued that the proposed measure would represent a good faith implementation of obligations arising under the Convention. Of course, this presupposes that EU member States themselves refrain from initiating exploitation activities in the Area. As no member State has indicated an intention to follow the United States in this regard, this condition appears to be fulfilled. It would therefore be difficult to maintain that such a ban constitutes an *abus de droit*. Moreover, as the ban would be a clear – and

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[26] See footnote 17.
[27] WTO Appellate Body, report of 12 October 1998, *US - Shrimp*, document WT/DS58/AB/R.
[28] *Ibidem*, at paragraph 158.
[29] Panel on *European Communities – Measures Affecting Asbestos and Asbestos Containing Products*, 18 September 2000, document WT/DS135/R.
[30] *Ibidem*, at paragraph 8.236. While in that context reference was made to Art. XX(b), these considerations can be extended to the rest of the letters of the Article.

thus not disguised – restriction on trade, the final element of the chapeau would likewise not apply.

Turning to the four relevant exceptions under Art. XX(a), (b), (d), and (g), it is worth noting that the GATT does not expressly list either compliance with international law (whether treaty-based or customary) or general environmental protection as grounds for derogation. Nonetheless, a potential EU ban could still fall within the scope of one or more of these exceptions through interpretative means developed by WTO dispute settlement bodies. In this respect, it should also be noted that a measure need only satisfy one of the listed exceptions to qualify as justified under the GATT.

2.1.2.1.1. Trade exceptions necessary to protect public morals

The first exception, contained in subparagraph (a), concerns measures necessary to protect public morals. As a preliminary remark, it is worth noting that the concept of 'public morals' is inherently vague[31], as it varies across time and between States invoking the clause, leading part of the legal doctrine to consider it "prone to an interpretation as a catch-all provision […], opening the door to the incorporation of human rights, core labour standards and eventually also environmental issues"[32]. Precisely for this reason, WTO dispute settlement bodies have traditionally adopted a deferential standard of review, meaning that they refrain from inquiring into the substance of what constitutes the public morals of a State[33]. Rather, their task is limited to assessing the plausibility of the assertion that a particular product or production method contravenes such morals[34]. In performing this assessment, they must, in accordance with their established case-law,

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[31] The Panel established in the context of the case *US – Gambling* defined public morals as "standards of right and wrong conduct maintained by or on behalf of a community or nation". See the report delivered by the Panel on 10 November 2004 in the context of the case *United States — Measures Affecting the Cross-Border Supply of Gambling and Betting Services* ('*US – Gambling*'), document WT/DS285/R, paragraph 6.465. On the uncertainties surrounding this definition, reference is made to O. SUTTLE, *What Sorts of Things are Public Morals? A Liberal Cosmopolitan Approach to Article XX GATT* (2017) 80 *The Modern Law Review* 4, 569-599.

[32] D. JENNY, *Article XX(a) GATT*, in P-T. STOLL, H. HESTERMEYER, G. MESSENGER, *Commentaries on World Trade Law - Volume 2: Trade in Goods*, cit., at paragraph 1.

[33] N. WENZEL, *Article XX lit. a GATT*, in R. WOLFRUM, P-T. STOLL, A. SEIBERT-FOHR (eds.), *WTO – Technical Barriers and SPS Measures*, cit., 80-95, at 84, according to which this process must "defer to the way Members determine the material content of their moral standards of conduct. As a consequence, panels may only examine the plausibility of the assertion that certain conduct contravenes public morality as understood by the Member invoking the exception".

[34] *Ibidem*, "[a]n assertion will generally not be plausible if, for example, the Member relies on the public morality exception as a basis for the prohibition of the import of pornographic material, but at the same time does not take any action against trade in pornographic material within its territory".

"take account of all evidence put before it in this regard", including "the texts of statutes, legislative history, and other evidence regarding the structure and operation" of the measure at issue[35].

Within the framework of EU law, this rationale underpins, for instance, Regulation 2024/3015/EU[36], which broadly prohibits the importation of products manufactured through forced labour. In this context, the link between the regulation and standards of public morals is relatively straightforward – especially considering the alignment between the Union's standards and those recognised at the international level on the same matter[37].

By contrast, three main aspects make it particularly challenging to demonstrate that the exploitation of resources in the Area, where carried out in violation of the Convention, infringes the public morals of the Union. The following analysis will address each of these in turn and examine whether potential counterarguments may be found.

A first aspect requiring clarification concerns which elements of the United States' unilateral conduct would be deemed contrary to the Union's public morals. Put differently, the question arises as to what 'legal interest' a potential EU ban would seek to protect. Arguably, two distinct answers may be given. First, the respect for international law as such can be regarded as a value that the Union promotes: Art. 3(5) TEU expressly includes "the strict observance and the development of international law" among the values that the Union promotes. Furthermore, as shown by recent practice, the Union has adopted measures – including trade sanctions – aimed at addressing breaches of international law[38]. Second, even if the legal regime of the Area under the Convention is not viewed as an end in itself, it may still be regarded as a means to ensure high environmental standards and the equitable use of its resources. In this light, the protected

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[35] WTO Appellate Body, report of 16 May 2012, *United States – Measures concerning the importation, marketing and sale of tuna and tuna products* ('*US – Tuna II (Mexico)*'), document WT/DS381/AB/R (unadopted). This aspect has been confirmed in the context of the *EC – Seals* case (see footnotes 41 and 43).

[36] Regulation (EU) 2024/3015 of the European Parliament and of the Council of 27 November 2024 on prohibiting products made with forced labour on the Union market and amending Directive (EU) 2019/1937 (Document 32024R3015).

[37] As noted in N. WENZEL, *Article XX lit. a GATT*, cit., at 83-84, in case of human rights and social standards it might be easy to find identical national and international standards.

[38] It is the case, for instance, of the sanctions adopted against the Russian Federation following the invasion of Crimea in 2014. See Council Decision 2014/145/CFSP of 17 March 2014 concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine (Document 32014D0145).

value could be environmental protection, a field in which the Union's longstanding commitment is well established through a range of legislative acts[39].

A second issue of relevance concerns the nature of the measure as a 'non-product-related process and production method'[40]. In essence, the measure adopted by the Union would not relate to the product itself (i.e. the minerals extracted from the Area), which do not inherently violate public morals, but rather to the method of their extraction, which is deemed noncompliant with Part XI of the Convention. However, the jurisprudence of WTO dispute settlement bodies, and particularly the *EC – Seals* case[41], has recognised that the public morals exception may also apply to such measures[42].

Finally, a third objection to the application of subparagraph (a) stems from the technical and relatively 'niche' nature of the issue at stake, which remains largely unknown to the general public. Nevertheless, this argument may be overcome by recalling that, according to WTO case-law – again, notably *EC – Seals* case[43] – the EU is not required to provide survey evidence to justify reliance on Art. XX(a), since the public morals exception can be invoked taking account of the text of the relevant regulations and their legislative history[44]. In other words, if the act itself refers to ethical concerns or values as its motivation, this may suffice to demonstrate that it falls within the scope of Art. XX(a). In the present case, it would arguably be sufficient for the Union to invoke concerns about the breach of international law and the environmental degradation resulting from the unilateral exploitation of the Area. As noted, the Union's legislative history consistently reflects its interest in the effective implementation of international law and in the protection of the marine environment.

Concluding the discussion on Art. XX(a), it can therefore be argued that this exception – despite probably not being the strongest legal basis – may still apply to the situation at

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[39] While some aspects of the environmental policy of the Union will be dealt with in more detail below, for a general discussion on EU environmental measures – especially those taken in the last few years – reference is made to L. KRÄMER, C. BADGER, *Krämer's EU environmental law* (Hart Publishing, 2024).

[40] For the difference between 'product related process and production methods' and 'non-product related process and production methods', reference is made to B. COOREMAN, *Global Environmental Protection through Trade – A Systematic Approach to Extraterritoriality* (Edward Elgar Publishing Limited, 2017), at 24-26.

[41] WTO Appellate Body, report of 22 May 2014, *European Communities – Measures prohibiting the importation and marketing of seal products* ('*EC - Seals*'), document WT/DS400/AB/R-WT/DS401/AB/R.

[42] D. JENNY, *Article XX(a) GATT*, cit., at paragraph 22.

[43] WTO Panel, report of 25 November 2013, *European Communities – Measures prohibiting the importation and marketing of seal products* ('*EC - Seals*'), document WT/DS400/R-WT/DS401/R.

[44] P. CONCONI, T. VOON, *EC–Seal Products: The Tension between Public Morals and International Trade Agreements* (2016) 15 *World Trade Review*, 211–234, at 232.

stake and could be a suitable way to implement a ban over resources of the Area extracted in noncompliance with Part XI of the Convention.

2.1.2.1.2. Trade exceptions necessary to protect human, animal or plant life or health

The exception provided for in Art. XX(b) allows measures "necessary to protect human, animal or plant life or health". As noted in the legal doctrine[45], this provision dates back to the original text of GATT 1947 and does not therefore explicitly refer to the protection of the marine environment, which was not a matter of particular interest at the time of its adoption.

For this reason in particular, relying on this exception to justify a potential ban on resources extracted in contravention of Part XI of the Convention may be problematic. Arguably, the concepts of environmental protection and the protection of human, animal or plant life or health may today partially overlap. This also appears to be the Union's understanding, as reflected in some of its recent proposals for Free Trade Agreements (FTAs). For example, the EU's proposal for the EU-Australia FTA[46] includes its interpretation of the general exceptions under Art. XX(b) and (g). In relation to subparagraph (b), which is under examination here, the Union explicitly stated that "the measures referred to in point (b) of Art. XX of GATT 1994 […] include environmental measures, which are necessary to protect human, animal or plant life or health", and that "measures taken to implement multilateral environmental agreements can fall under points (b) or (g) of Art. XX of GATT 1994 […]".

However, this interpretation is not universally shared. Subparagraph (b) is generally understood as not encompassing broad environmental threats – such as loss of habitat[47] – or general protection of global commons[48], which notably includes the Area.

This would not be the only controversial point in case the Union invoked subparagraph (b) as a legal basis for a ban on resources extracted from the Area in noncompliance with

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[45] P-T. STOLL, L. STRACK, *Article XX (b) GATT*, in P-T. STOLL, H. HESTERMEYER, G. MESSENGER, *Commentaries on World Trade Law - Volume 2: Trade in Goods*, cit., at paragraph 23.
[46] Available at the following link: https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/australia/eu-australia-agreement/documents_en. Among the initial text proposals tabled by the EU side, see the document "General Exceptions" of 20 June 2019.
[47] *Ibidem*, at paragraph 26.
[48] *Ibidem*.

Part XI. As clarified by the Panel in the *EC – Asbestos* case[49], a specific and identifiable risk must be demonstrated to invoke this provision; a mere hypothetical threat is not sufficient. In the present case, the Union would need to rely on sufficiently robust data to show that the activities in question pose a threat to animal or plant life or health.

Put differently, the Union would be required to demonstrate that the proposed measure is necessary specifically to protect animal or plant life or health, rather than being aimed at the broader goal of marine environmental protection. In line with the WTO Panel's findings in the *China – Raw Materials* case[50], the EU would need to show how the measure would "fulfil the objective it claims to address" [51].

In the particular context of this issue, an additional evidentiary burden arguably arises, namely, the Union would have to demonstrate that the harm caused by the unilateral exploitation activities undertaken by the United States stems from a deviation from the environmental standards adopted – if any – by the Authority. The reason is evident: suppose, for instance, that the Mining Code were to be adopted and that the United States complied fully with its environmental requirements. In such a case, the environmental impact of the activities would be equivalent to that of other projects potentially authorised by the Authority. Since the Union is involved in the decision-making process leading to the adoption of the rules, both indirectly – through member States in the Council – and directly – in the Assembly – it would be difficult to argue that it may subsequently ban the import of resources that, despite being extracted outside the legal framework of the Convention, follow the same standards adopted by the Authority. In such a (for now hypothetical) scenario, banning the importation of minerals extracted in conformity with ISA environmental standards – even if not formally authorised under Part XI – would likely amount to a disguised restriction on trade, and would therefore fail the test set out under the chapeau of Art. XX.

In conclusion, given the limitations surrounding the application of this subparagraph, it is likely not the most effective legal basis at the Union's disposal. Nonetheless, it might still be invoked to address specific situations where activities conducted in violation of Part XI pose actual – and fully demonstrable – threats to animal or plant life or health.

[49] See footnote 27.
[50] WTO Panel, report of 5 July 2011, *China – Measures related to the exportation of various raw materials* ('*China – Raw Materials*'), documents WT/DS394/R-WT/DS395/R-WT/DS398/R
[51] *Ibidem*, paragraph 7.511.

2.1.2.1.3. Trade exceptions necessary to secure compliance with laws or regulations not inconsistent with the GATT

Subparagraph (d) of Art. XX permits measures "necessary to secure compliance with laws or regulations which are not inconsistent with the provisions" of the GATT, "including those relating to customs enforcement, the enforcement of monopolies operated under paragraph 4 of Art. II and Art. XVII, the protection of patents, trade marks and copyrights, and the prevention of deceptive practices".

According to the Appellate Body in *Korea – Various Measures on Beef*[52], two conditions must be met to invoke subparagraph (d): first, "the measure must be one designed to 'secure compliance' with laws or regulations that are not themselves inconsistent with some provision of the GATT 1994"; and second, "the measure must be 'necessary' to secure such compliance". The burden of demonstrating that these two requirements are satisfied lies clearly with the party invoking the application of Art. XX(d).

In the context of the present discussion, assessing whether this exception may apply requires answering several preliminary questions – first and foremost, whether the "laws and regulations" mentioned in the subparagraph include relevant international obligations deriving from legal instruments such as the Convention.

This question was partially addressed by the Appellate Body in *Mexico – Taxes on Soft Drinks*[53], where it held that the terms "laws and regulations" under Art. XX(d) generally refer "to rules that form part of the domestic legal system of a WTO Member"[54], the exception thus applying, in principle, only to domestic legal instruments. However, the same report further clarified that domestic rules may also include "rules deriving from international agreements that have been incorporated into the domestic legal system of a WTO Member or have direct effect according to that WTO Member's legal system".

This interpretation was further elaborated in *India – Solar Cells*[55], where the Appellate Body confirmed that "[r]ules deriving from international agreements may thus become

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[52] WTO Appellate Body, report of 11 December 2000, *Korea – Measures affecting imports of fresh, chilled and frozen beef* ('*Korea – Various measures on beef*'), document WT/DS161/AB/R-WT/DS169/AB/R, paragraph 157.
[53] WTO Appellate Body, report of 6 March 2006, *Mexico – Tax measures on soft drinks and other beverages* ('*Mexico – Taxes on Soft Drinks*'), document WT/DS308/AB/R.
[54] *Ibidem*, at paragraph 70.
[55] WTO Appellate Body, report of 16 September 2016, *India – Certain measures relating to solar cells and solar modules* ('*India – Solar Cells*'), document WT/DS456/AB/R.

part of the domestic legal system of a Member in at least two ways. For example, Members may incorporate such rules, including through domestic legislative or executive acts intended to implement an international agreement; and, certain international rules may have direct effect within the domestic legal systems of some Members without specific domestic action to implement such rules" – with such an assessment being made on a case-by-case basis[56].

It is therefore necessary to assess whether the Convention forms part of the domestic legal system of the Union. In this regard, the findings of the ECJ in the *Mox Plant* case[57] are particularly relevant. The Court held that provisions of the Convention falling within the scope of Union competence "are rules which form part of the Community legal order"[58]. Since Art. 137(3) relates to the Union's CCP, it arguably falls within the scope of EU competence and therefore may be considered part of the Union's legal system – thus serving as a valid basis for invoking Art. XX(d).

Regardless of the above, a different question is whether legal instruments – such as the Convention – whose noncompliance is not clearly sanctioned may still be considered "laws and regulations" within the meaning of the provision. On this point, the Appellate Body in *India – Solar Cells* clarified that the phrase "laws or regulations" must be interpreted broadly and is not limited "to instruments that are legally enforceable (including, e.g. before a court of law), or that are accompanied by penalties and sanctions to be applied in situations of non-compliance". Rather, the concept "is broader and may include rules in respect of which a Member seeks to 'secure compliance', even when compliance is not coerced, for example, through the imposition of penalties or sanctions"[59].

The Appellate Body also identified the criteria to determine whether a legal instrument can be included among laws and regulations, namely: "(i) the degree of normativity of the instrument and the extent to which the instrument operates to set out a rule of conduct or course of action that is to be observed within the domestic legal system of a Member; (ii) the degree of specificity of the relevant rule; (iii) whether the rule is legally enforceable, including, e.g. before a court of law; (iv) whether the rule has been adopted

[56] *Ibidem*, at paragraph 5.140.
[57] See Chapter II, footnote 184.
[58] *Ibidem*, paragraphs 120-121.
[59] WTO Appellate Body, *India – Solar Cells* (see footnote 55), paragraph 5.109.

or recognized by a competent authority possessing the necessary powers under the domestic legal system of a Member; (v) the form and title given to any instrument or instruments containing the rule under the domestic legal system of a Member; and (vi) the penalties or sanctions that may accompany the relevant rule”[60].

As the Convention does not provide any immediate sanction for violation of Art. 137(3) (which would moreover be enforceable only upon recourse to the dispute settlement procedures envisaged in Part XI), the first five criteria are clearly crucial in order to invoke the exception provided for in Art. XX(d). Especially the first three appear to support a positive conclusion: the legal normativity of the Convention among its Parties is undeniable, many of its provisions being even self-executing; at the same time, the relevant rule (Art. 137(3)) leaves no room for discretion and may be regarded as sufficiently specific. Regarding the third requirement, the findings of the ECJ in the above-mentioned *Mox Plant* case seem to confirm that the rule might be enforceable within the legal system of the Union. It may also be argued that the fourth and fifth criteria are fulfilled: as for the former, the Convention – and thus Art. 137(3) – was indeed adopted by a competent authority, with the then EEC having participated in the negotiations. As for the latter, its satisfaction would primarily depend on the form of the legal instrument implementing the measure, which arguably could be likely to be a classic EU Regulation.

A third – and more straightforward – question arising from the wording of subparagraph (d) concerns whether the list of matters included is exhaustive. As widely noted[61], the use of the word “including” seems to suggest a negative answer, implying that matters other than those expressly listed may also fall within the scope of the 'laws and regulations' referred to in Art. XX(d).

Lastly, an analysis must be conducted to assess whether, in this specific case, the laws and regulations are “not inconsistent with the provisions” of the GATT, as required by Art. XX(d). In this respect, it should be stressed that the subparagraph requires the law or regulation (here, the Convention) not to be inconsistent with the GATT – not the measure adopted under it (i.e. the Union’s potential ban on resources from the Area extracted in noncompliance with Part XI). For instance, in its report on the *Thailand—Cigarettes*

[60] *Ibidem*, at paragraph 5.133.
[61] R. NICCOLO, *Article XX(d) GATT*, in P-T. STOLL, H. HESTERMEYER, G. MESSENGER, *Commentaries on World Trade Law - Volume 2: Trade in Goods*, cit., at paragraph 11.

(Philippines) case[62], the Panel found that the law enacted by Thailand subjected imported cigarettes to less favourable treatment than like domestic products through VAT-related administrative requirements imposed only on resellers of imported cigarettes, and was thus inconsistent with GATT provisions[63].

In the present case, the Convention cannot be considered to entail discriminatory treatment: the language of Art. 137(3) is neutral, not directed at any specific State, and requires action against all States failing to comply with Part XI. Moreover, while the suggested measure would be in principle contrary to Art. XI GATT, nothing precludes that the provision may be implemented in different ways, some of which may well be consistent with the agreement. Consequently, the Convention *itself* cannot be considered contrary to the provisions of the GATT. Rather, only one of its potential implementation – the ban over the importation of resources of the Area extracted in noncompliance with Part XI – would be contrary to provisions of Art. XI of the GATT – despite being potentially justifiable under Art. XX(a), (d) and, as will be seen below, (g).

This conclusion appears to be supported by the findings of the Appellate Body in the already mentioned *US – Shrimp* case, which, after referring to Art. 62 of the UNCLOS, recognised "the recent acknowledgement by the international community of the importance of concerted bilateral or multilateral action to protect living natural resources", and the "explicit recognition by WTO Members of the objective of sustainable development in the preamble of the WTO Agreement"[64]. Despite being expressed in a different context, this reasoning seems to imply that the objectives of the Convention and the GATT are not in conflict[65].

In conclusion, based on the analysis of the various elements of the provision, Art. XX(d) appears to offer a suitable and relatively robust legal basis for the Union to implement a ban on resources from the Area extracted in breach of Part XI.

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[62] WTO, report of the Panel of 15 November 2010, Thailand – Customs and fiscal measures on cigarettes from the Philippines ('*Thailand—Cigarettes (Philippines)*'), document WT/DS371/R.
[63] *Ibidem*, at paragraph 7.738.
[64] WTO Appellate Body, *US – Shrimp*, at paragraph 131.
[65] This analysis of the Appellate Body was made to delimit the scope of the exception provided for in Art. XX(g) GATT.

2.1.2.1.4. Trade restrictions relating to the conservation of exhaustible natural resources

Art. XX(g) of the GATT allows measures "relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption".

From a historical perspective, the provision originates from a 1946 US proposal. While the precise reasons behind its adoption remain unclear, most of the doctrine agrees that it was motivated by reasons of national interest, particularly to limit the export of oil[66]. Although it has been suggested that the provision was originally intended to justify export restrictions adopted in connection with domestic conservation measures – rather than import measures concerning natural resources[67] – its broad wording, referring generally to "measures", allows for the inclusion of import restrictions as well[68].

The subparagraph does not explicitly specify the rationale for invoking it. While reasons of national interest may clearly fall within its scope, consistent with its origins, this does not exclude that other objectives – such as environmental protection – may also be compatible with it. This appears especially true in the context of multilateral environmental agreements[69], and in particular the Convention, which imposes the same limitations – compliance with Part XI and with the rules of the Authority – upon all Parties. As such, it satisfies the requirement under Art. XX(g) that measures be adopted "in conjunction with restrictions on domestic production or consumption". This also seems to be the position of the European Union, which, for instance, in its proposal for the EU–Australia FTA[70], stated that "measures taken to implement multilateral environmental agreements can fall under points (b) or (g) of Art. XX of GATT 1994".

This broad interpretation was endorsed by the Appellate Body in the already mentioned *US – Shrimp* case. Diverging significantly from the approach taken by the Panel in the same case[71], the Appellate Body found that the measures adopted by the United States –

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[66] N. MATZ-LÜCK, *Article XX (g) GATT*, in P-T. STOLL, H. HESTERMEYER, G. MESSENGER, *Commentaries on World Trade Law - Volume 2: Trade in Goods*, cit., at paragraph 5.
[67] *Ibidem*.
[68] *Ibidem*, at paragraph 6.
[69] *Ibidem*, at paragraphs 48 to 51.
[70] See footnote 46.
[71] For an overall analysis of the case from this viewpoint, reference is made to A.R. MAGGIO, *Environmental Policy, Non-Product Related Process and Production Methods and the Law of the World Trade Organization* (Springer international Publishing AG, 2017), at 143-160.

though ultimately failing the chapeau test of Art. XX – were provisionally justified under subparagraph (g), given that they were motivated by environmental concerns.

Still on the scope of subparagraph (g), the *US – Shrimp* case also led to a broader understanding of the term 'resources', with the Appellate Body recognising that measures may also be adopted to protect living ones[72]. This could open an alternative path for the Union, which might argue that the ban seeks to preserve fragile deep-sea species. However, this approach also presents challenges.

First, as previously discussed in relation to Art. XX(b), it would require evidence that the activities carried out by the United States in breach of Part XI cause a level of environmental harm that could be avoided under ISA standards. Second, the use of living resources as the object of the conservation measure would require a demonstration that the ban is fit to achieve the conservation goal, in line with the "close and genuine relationship of ends and means" standard set out by the Appellate Body in the *China – Rare Earths* case[73].

By contrast, linking the measure to the conservation of the mineral resources of the Area would avoid both issues. In this scenario, the ban would serve to ensure compliance with the objectives of the Convention, particularly the intertemporal dimension of the principle of the common heritage of humankind[74]. The measure would clearly be fit for its purpose, as it would aim to reduce as far as possible the marketability of minerals extracted in breach of the Convention.

On this basis, Art. XX(g) may arguably provide a solid justification for the adoption of a Union ban on resources from the Area extracted in noncompliance with Part XI. As noted, since the provision does not restrict the nature of permissible measures, an import ban would likely fall within its scope. Nor does the rationale behind the adoption of such a measure appear inconsistent with the exception, which contains no limitations in this regard.

Lastly, the requirement that the measure be "made effective in conjunction with restrictions on domestic production or consumption" seems to be met *ipso facto* through

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[72] On the scope of this term, see M. CHI, *"Exhaustible Natural Resource" in WTO Law: GATT Article XX (g) Disputes and Their Implications* (2014) 48(5) *Journal of World Trade*, 939–966.
[73] WTO Appellate Body, report of 7 August 2014, *China – Measures related to the exportation of rare earths, tungsten, and molybdenum* ('*China – Rare Earths*'), documents WT/DS431/AB/R-WT/DS432/AB/R-WT/DS433/AB/R.
[74] See Chapter I, paragraph 1.2.1.

compliance with Part XI of the Convention, which, at present, results in a complete absence of exploitation activities.

It may also be noted that even if the Authority were to adopt the Mining Code and EU member States were to commence exploitation activities under its framework, the provision would remain applicable to States not complying with Part XI. In such a (currently hypothetical) scenario, the requirement concerning restrictions on domestic production or consumption would still be met, as EU member States would limit production to activities conducted in accordance with the Authority's rules.

2.1.2.2. The imposition of a certificate of origin over mineral resources

As mentioned above, rules on the certification of origin for minerals are essential to the effective implementation of the ban. Inappropriate origin rules would risk classifying resources extracted from the Area in noncompliance with Part XI as originating from the United States, thereby rendering the ban essentially ineffective. For this reason, and as further detailed below, an amendment to the current rules of origin may be crucial to ensure the ban's full effectiveness.

Current rules on origin in the European Union are set out in Regulation 952/2013/EU[75] (the so-called 'Union Customs Code', hereinafter also the 'UCC'), which – in line with the WTO Agreement on the Rules of Origin[76] – distinguishes between preferential and non-preferential origin[77]. Since there is no specific agreement on minerals between the Union and the US – although negotiations are ongoing[78] – US minerals are considered of non-preferential origin, and Art. 59 to 63 of the UCC therefore apply. Under Art. 60(1), goods

[75] Regulation (EU) 952/2013 of the European Parliament and of the Council of 9 October 2013 laying down the Union Customs Code (Document 02013R0952-20221212).
[76] WTO Agreement on Rules of Origin, listed among the document annexed as Annex 1A to the Marrakesh Agreement (see footnote 15).
[77] While there is no official definition of 'preferential origin' or 'non-preferential origin', the former can be conferred on goods from particular countries when they fulfil the rules of origin provided for in the relevant preferential arrangement. In this case, the goods could benefit from a reduced customs duty or even free of duty. All goods which do not benefit from specific agreements between countries are those of non-preferential origin, this classification being used "for the application of all kinds of non-preferential commercial policy measures, like, for instance, the most-favoured-nation treatment, anti-dumping duties and countervailing duties, trade embargoes, safeguard measures, origin marking requirements, quantitative restrictions or tariff quotas, government procurement and trade statistics". For further detail, reference is made to the Report of the European Commission of March 2022, on *Guidance on Non-Preferential Rules of Origin*, available at the following link: https://taxation-customs.ec.europa.eu/document/download/2fddb411-361d-4b25-9286-a9318125ee2a_en.
[78] See the Legislative Train Schedule on the EU-US Critical Minerals Agreement, available at the following link: https://www.europarl.europa.eu/legislative-train/theme-a-stronger-europe-in-the-world/file-eu-us-critical-minerals-agreement.

wholly obtained in a single country or territory shall be regarded as having their origin in that country or territory. Paragraph (2) further clarifies that "goods the production of which involves more than one country or territory shall be deemed to originate in the country or territory where they underwent their last, substantial, economically-justified processing or working, in an undertaking equipped for that purpose, resulting in the manufacture of a new product or representing an important stage of manufacture".

The provisions of Art. 60 are further specified by Delegated Regulation 2015/2446/EU[79] (so-called 'UCC Delegated Act', hereinafter 'UCC-DA'), which in Art. 31 defines the rules for identifying goods wholly obtained in a single country or territory. Of particular relevance for the present discussion is subparagraph (h), which states that the following are considered wholly obtained in a single country or territory: "products taken from the seabed or subsoil beneath the seabed outside the territorial waters provided that that country or territory has exclusive rights to exploit that seabed or subsoil", arguably including the resources of the Area.

The current wording of this provision, however, presents several challenges for the implementation of potential banning measures. First, it fails to clarify what is considered the origin of a product when such exclusive rights to exploit the seabed and subsoil do not exist. More importantly, the provision relies on a subjective criterion, which depends on the interpretation of each State as to whether such exclusive rights exist. In particular, given the United States' interpretation of the Convention – as also expressed in its statement during the second part of the 30th Session of the Authority[80] – it could plausibly argue that it possesses exclusive rights over the portion of the Area it exploits, based on the principle of the freedom of the high seas[81].

Accordingly, in order to enable the adoption of measures against the unilateral exploitation of the Area, Art. 31 of the UCC-DA would likely require amendments, incorporating two elements in particular.

First, the amendment should clarify the rules of origin for minerals by introducing more specific and objective criteria. One approach could be to provide that all minerals

[79] Commission Delegated Regulation (EU) 2015/2446 of 28 July 2015 supplementing Regulation (EU) No 952/2013 of the European Parliament and of the Council as regards detailed rules concerning certain provisions of the Union Customs Code (Document 02015R2446-20230314).
[80] Available at the following link: https://www.isa.org.jm/wp-content/uploads/2025/02/USA-statement-for-ISA-Assembly-July-2025.pdf.
[81] See the Introduction to the present dissertation, paragraph 2.

extracted from a State's territorial sea, exclusive economic zone, or continental shelf are to be considered as originating from that State. Conversely, minerals extracted from the seabed beyond national jurisdiction should not be attributed to any State, but rather be deemed as originating from the Area through a specific exporting State. Notably, both the UCC and the UCC-DA refer to a "country or territory", which suggests that the Area could, in principle, be treated as a standalone territory for the purposes of origin certification. From a practical perspective, however, the exporting State would still need to be identified as the channel through which resources from the Area enter the Union.

Quite evidently, this rule would only apply to raw minerals as extracted from the seabed, not to their subsequent processing. This limitation could severely undermine the effectiveness of any measure aimed at ensuring compliance with Part XI of the Convention, especially considering that resources from the Area – such as polymetallic nodules – normally consist of aggregated minerals and typically require initial processing or transformation before export. To address this flaw, a possible solution would be to require that, where minerals originate from the Area, this fact be indicated even after early-stage processing. For practical reasons, it is clear that this requirement could only be used for refined products obtained in the early stages of processing, but not in the final ones involving their use in more complex equipment. For instance, the certificate could cover not only potentially imported polymetallic nodules, but also the cobalt bars obtained by melting and processing such nodules. It would be however complicated to apply this to the computer chip built using such cobalt, or to the computer using such chip. The amendment should therefore relate only to specific transformations, to be specified by making reference to the provisions of Annex 22-01 to the UCC-DA (the "Introductory notes and list of substantial processing or working operations conferring non-preferential origin").

Second, the amendment should require that minerals extracted from the Area (including, where applicable, their processed forms) be certified by the International Seabed Authority. This requirement would align with the current draft of the draft Regulations on Exploitation[82], which includes a proposed regulation 29ter on "Certification of origin". According to its first paragraph, "[t]he Authority, upon the receipt of an application from the Enterprise or the Contractor, shall certify the origin for the Minerals removed from

[82] See Chapter I, footnote 151.

the Area, in accordance with the applicable Standard". Although the final version of the draft Regulations is still pending, it is likely that this provision will be retained, considering the broad support it received during the first part of the 30th Session[83].

Requiring a certificate of origin issued by the Authority would thus be consistent with the treatment expected to be applied to Parties to the Convention once the Regulations on Exploitation are finalised and adopted.

Since this certification would amount to a technical requirement imposed on imported goods, its compatibility with the relevant provisions of the GATT and the TBT will be examined in the following section.

2.1.2.2.1. Compliance with the GATT

While the primary obligations applicable to technical barriers to trade are found in the TBT Agreement, provisions of the GATT remain relevant as well. Although the latter primarily regulates tariff measures, it also extends to certain non-tariff barriers. In such instances, both agreements may simultaneously apply to the same measure.[84].

This is particularly true for Art. I(1) and Art. III(4) of the GATT[85], both of which may apply to technical barriers to trade, as will be explained below. For practical reasons, the analysis begins with Art. III(4), which provides that "[t]he products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use" [86].

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[83] See the Statement of the President on the work of the Council of the International Seabed Authority during the first part of the thirtieth session (document ISBA/30/C/5) at paragraph 11.

[84] See WTO, The WTO Agreements Series - Technical Barriers to Trade (WTO, 3rd. Ed., 2021), available at the following link: https://www.wto.org/english/res_e/publications_e/tbt3rd_e.htm. In particular, under the section dedicated to the relationship of the TBT with other WTO agreements (p. 16), it is stated that "[f]or example, in accordance with Article III:4 of the GATT, members' 'regulations and requirements' on products cannot discriminate against imports in favour of like domestic products. This relationship between the TBT Agreement and the GATT stems from the fact that, as stated in its preamble, the TBT Agreement is intended to "further the objectives of the GATT". This means that, sometimes, the consistency of a regulation can be examined under both the TBT Agreement and the GATT".

[85] It is underscored that Art. I(1) and III(4) GATT essentially overlap to some degree with Art. 2(1) TBT. Discussion on such overlap will be carried out when dealing with the scope of the latter provision.

[86] For a comprehensive commentary on Art. III(4) GATT, see H. HESTERMEYER, *Article III GATT - National Treatment on Internal Taxation and Regulation*, in P-T. STOLL, H. HESTERMEYER, G. MESSENGER, *Commentaries on World Trade Law - Volume 2: Trade in Goods*, cit.

Since the certification of origin may arguably qualify as a 'requirement affecting' the internal sale of imported minerals – consistent with the findings of the Panel appointed under the GATT 1947 in the *EEC – Measures on Animal Feed Proteins* case[87] – its compatibility with Art. III(4) must be assessed. As previously noted, the UCC and UCC-DA already establish requirements for determining the origin of imported minerals. An amendment to include the Area among the recognised territories of origin would therefore not alter the structure of the existing regime and should not raise concerns in this regard.

By contrast, the requirement for certification of minerals extracted in the Area by the Authority might prove more problematic, as it would introduce a new condition not currently foreseen. The compliance of this second measure against Art. III(4) must therefore be specifically checked. In this respect, it can be argued that the measure would be likely to be contrary to the wording of the subparagraph: as stated by the Panel appointed in the *Japan – Film* case[88], Art. III(4) protects against *de jure* discrimination (i.e. measures that explicitly discriminate based on origin) and *de facto* discrimination (i.e. measures that, in practice, alter the competitive conditions between domestic and imported products). In the present case, no *de jure* discrimination appears to arise. Indeed, minerals extracted from the Area by EU-based companies would most likely also be subject to the same certification requirement by the Authority, in accordance with draft regulation 29ter of the current version of the draft Regulations on Exploitation. Since ISA member States would be required to implement this rule to comply with the Authority's regulations, the same certification obligation would apply to EU operators. As such, the treatment accorded to foreign and domestic products would remain formally equal for the purposes of Art. III(4) GATT.

On the other hand, it is clear that the measure would *de facto* confer a competitive advantage in terms of access to the internal market to Union-origin products, thus resulting in a violation of Art. III(4).

Before assessing whether such a violation may nevertheless be justified under the GATT, it is worth turning briefly to Art. I(1) GATT, since the legal basis to justify the violation of both provisions is the same. Art. I(1) requires WTO member States, "with respect to

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[87] GATT 1947 Panel, report of 2 December 1977, *EEC – Measures on Animal Feed Proteins*, document L/4599. In the context of such case, the Panel considered that a 'protein certificate' could be considered a requirement affecting the sale and distribution of imported products for the purposes of Art. III(4) GATT.
[88] WTO Panel, report of 31 March 1998, *Japan – Measures Affecting Consumer Photographic Film and Paper* ('*Japan – film*'), document WT/DS44/R, at paragraph 10.380.

all matters referred to in paragraphs 2 and 4 of Article III", to accord "immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties any advantage, favour, privilege or immunity granted to any product originating in or destined for any other country". This provision sets out the so-called Most-Favoured-Nation (MFN) treatment[89], which is typically interpreted broadly by the WTO dispute settlement bodies. For example, in the already mentioned *EC – Seals* case[90], the Appellate Body found that the principle "prohibits discrimination among like imported products originating in, or destined for, different countries" in any case in which a measure grants an advantage to one or more specific member States, but not to others.

Furthermore, in line with the Appellate Body's findings in the *Canada – Autos* case[91], the MFN treatment encompasses both *de jure* and *de facto* discrimination[92]. Arguably, the requirement for a certificate of origin for minerals extracted from the Area would fall within the latter, since it would allow only ISA member States to export such minerals to the Union.

The existence of these violations does not, however, preclude the adoption of the measure, as it may still be justified under the GATT. While neither Art. I nor Art. III provide themselves for provide grounds for derogation from their provisions, Art. XX offers a set of general exceptions which, as discussed above (paragraphs 2.1.2.1.1. to 2.1.2.1.4.), apply also to the ban on minerals extracted in noncompliance with Part XI of the Convention.

Arguably, at least one of the four subparagraphs analysed above may also provide a sound legal basis to justify the certification requirement under both Art. I(1) and Art. III(4). In particular, subparagraphs (d) and (g) appear especially pertinent: the former offers a solid legal basis, especially given that the Convention can likely be regarded as "not inconsistent" with the GATT; as for Art. XX(g), the reasoning applied in the context of the ban remains valid here. The certification of origin could be justified by reference to the principles of equitable benefit sharing and, more generally, the common heritage of

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[89] For a more detailed analysis of the MFN treatment, reference is made to P.C. MAVROIDIS, *Most Favoured Nation and Exceptions*, in P.C. MAVROIDIS, *Trade in Goods* (2nd Ed., Oxford University Press, 2012), 129-230.
[90] See footnote 41.
[91] WTO Appellate Body, report of 31 May 2000, *Canada – Certain measures affecting the automotive industry* ('*Canada - Autos*'), document WT/DS139/AB/R-WT/DS142/AB/R.
[92] *Ibidem*, at paragraph 78.

humankind, both of which are core to the Convention and directly relate to the conservation of the resources of the Area.

As such, although the measure may in principle breach both the MFN clause and the principle of non-discrimination *vis-à-vis* national products, these breaches can be deemed justified under the general exceptions of Art. XX and therefore compatible with the GATT.

2.1.2.2.2. Compliance with the TBT

Having examined the compatibility of the certification of origin validated by the Authority with the GATT, it is now necessary to assess its consistency with the TBT, given that such a measure would most likely constitute a 'technical regulation' as defined in Annex I to the TBT. According to that definition, a technical regulation is a "[d]ocument which lays down product characteristics or their related processes and production methods, including the applicable administrative provisions, with which compliance is mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a product, process or production method". As affirmed by the Appellate Body in the *EC – Asbestos* case[93], the terminology used in the second sentence clarifies that "'product characteristics' include, not only features and qualities intrinsic to the product itself, but also related 'characteristics', such as the means of identification, the presentation and the appearance of a product" which are regulated by the technical regulation "in a binding or compulsory fashion"[94].

The elements of the so-called 'three-tier test'[95] for identifying a technical regulation were further elaborated by the Appellate Body in the *EC – Sardines* case[96]. According to this test, the measure must: 1) apply to an identifiable product or group of products; 2)

[93] WTO Appellate Body, *European Communities – Measures Affecting Asbestos and Products Containing Asbestos* ('*EC – Asbestos*'), document WT/DS135/AB/R, at paragraph 67.
[94] *Ibidem*, at paragraph 68.
[95] A. KUDRYAVTSEV, *The TBT Agreement in context*, in T. EPPS, M.J. TREBILCOCK, *Research Handbook on the WTO and Technical Barriers to Trade* (Research Handbooks on the WTO series, Edward Elgar Publishing Limited, 2013), 17-80, at 27-28.
Edited by
[96] WTO Appellate Body, report of 26 September 2002, *European Communities – Trade description of sardines* ('*EC – Sardines*'), document WT/DS231/AB/R, at paragraph 176.

establish one or more characteristics (whether intrinsic or related) of the product; and 3) be mandatory.

In the present case, all three criteria appear to be satisfied. The certification of origin, along with its validation by the Authority, would apply in a binding manner only to minerals extracted from the Area, insofar as their identification is concerned. The measure may therefore be characterised as a technical regulation for the purposes of the TBT and, as such, it would be subject to the requirements laid down in particular in paragraphs (1), (2), and (4) of Art. 2 of the TBT, which will be analysed below.

Art. 2(1) provides that "Members shall ensure that in respect of technical regulations, products imported from the territory of any Member shall be accorded treatment no less favourable than that accorded to like products of national origin and to like products originating in any other country". As noted in the legal doctrine, this provision consolidates both the MFN clause and the principle of non-discrimination *vis-à-vis* domestic products[97], resulting in a certain degree of overlap with Art. I(1) and III(4) GATT.

In the context of this dissertation, both sets of provisions are examined, notwithstanding the fact that Art. 2(1) arguably constitutes a *lex specialis* applicable to technical regulations in relation to Art. III(1) and (4) GATT. This choice is supported by the findings of the Panel in the *EC – Seals* case, which held that the legal standard applicable under Art. 2(1) of the TBT does not automatically extend to claims under Art. I(1) and III(4) GATT[98], and that separate assessments under each provision are therefore required. Although the Appellate Body later reversed the Panel's finding on whether the measure in question qualified as a technical regulation[99], the Panel's reasoning remains pertinent in the present case, where the certificate of origin concerning resources from the Area is understood to constitute a technical regulation[100].

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[97] M. MATSUSHITA, T.J. SCHOENBAUM, P.C. MAVROIDIS, M. HAHN, *The World Trade Organization: Law, Practice, and Policy* (3rd. Ed, Oxford University Press, 2015), at 181.
[98] WTO Panel, *EC – Seals*, at paragraph 7.586.
[99] WTO Appellate Body, *EC – Seals*, at paragraph 5.70. According to the Appellate Body, the measures at stake could not be considered 'technical regulations'; as such, compliance with Art. 2(1) did not need to be checked.
[100] On the overlap between Art. 2(1) TBT and Art. I(1) and III(4) GATT, reference is made to H.H. JIA, *Entangled Relationship between Article 2.1 of the TBT Agreement and Certain Other WTO Provisions* (2013) 12(4) *Chinese Journal of International Law*, 723–769.

As previously observed, the requirement of a certificate of origin validated by the Authority would result in a *de facto* disadvantage for domestic products, as well as a *de facto* violation of the MFN clause. While these effects may be justified under the general exceptions of Art. XX GATT, a distinct line of reasoning is necessary under Art. 2(1) of the TBT. First, because this provision relies on different legal standards[101]; and second, because the TBT does not contain a general exceptions clause analogous to Art. XX GATT.

For this reason, WTO dispute settlement bodies have developed a two-step test to determine whether a violation of Art. 2(1) has occurred. This test requires, first, that the measure in question causes a detrimental impact on the competitive opportunities of like imported products. As clarified by the Appellate Body in the *US – COOL* case[102], such a detrimental effect may be established either *de jure* or *de facto* and must be determined on a case-by-case basis, taking into account "the totality of the facts and circumstances before it, including any implications for competitive conditions discernible from the design and structure of the measure itself, as well as all features of the particular market at issue that are relevant to the measure's operation within that market". It further explained that "any adverse impact on competitive opportunities for imported products *vis-à-vis* like domestic products that is caused by a particular measure" may be considered in evaluating a potential violation of Art. 2(1).

In the present case, such detrimental effect indeed appears to exist *de facto*. As already noted in relation to the GATT provisions, the measure would grant a competitive advantage to products originating in ISA member States (whether EU member States or not) within the EU market, while effectively excluding US-origin minerals extracted from the Area from accessing that same market.

The second requirement has been developed by the jurisprudence of the WTO dispute settlement bodies to compensate for the lack of general exceptions within the body of the TBT Agreement. While formally relying on Art. 2(1), the panels and the Appellate Body have also referred to the sixth recital of the TBT – which echoes the logic of Art. XX

[101] On the difference between GATT and TBT standards, see M. ALCOVER, A.M. GARCÉS, *The Interpretation of 'Treatment No Less Favourable' Under Article III:4 of the GATT 1994 and Article 2.1 of the TBT Agreement: A Comparative Analysis* (2016) 11(9) *Global Trade and Customs Journal*, 360-368.
[102] WTO Appellate Body, report of 29 June 2012, *United States – Certain Country Of Origin Labelling (COOL) requirements* ('*US – COOL*'), document WT/DS384/AB/R-WT/DS386/AB/R, at paragraph 286.

GATT[103] – and states that “no country should be prevented from taking measures necessary to ensure the quality of its exports, or for the protection of human, animal or plant life or health, of the environment, or for the prevention of deceptive practices, at the levels it considers appropriate, subject to the requirement that they are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail or a disguised restriction on international trade, and are otherwise in accordance with the provisions of this Agreement”.

In the view of the dispute settlement bodies, this recital clarifies that Art. 2(1) cannot be interpreted to mean that any 'less favourable treatment' automatically constitutes a violation. Instead, panels must apply the so-called 'even-handedness' test[104], which requires an examination of “whether the detrimental impact on imports stems exclusively from a legitimate regulatory distinction rather than reflecting discrimination against the group of imported products”[105]. In other words, the analysis must determine whether the differential treatment established by the technical regulation amounts to arbitrary or unjustifiable discrimination, or whether it can be objectively justified in light of the measure’s policy objective[106].

The scope of the 'even-handedness' test must be considered broader and conceptually distinct from the narrower notion of 'unjustifiable discrimination' as referred to in the sixth recital. As clarified by the Appellate Body in its report under Art. 21(5) of the DSU[107] in the *US – Tuna II* case[108], a finding of arbitrary or unjustifiable discrimination

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[103] L. TAMIOTTI, D. RAMOS, *Article 2 TBT: Preparation, Adoption and Application of Technical Regulations by Central Government Bodies*, in P-T. STOLL, H. HESTERMEYER, M. WAGNER (eds.), *Commentaries on World Trade Law - Volume 4: Technical Barriers and SPS Measures* (2nd online edition, Brill, 2022), at paragraph 19. It must also be underscored that the Appellate Body has cautioned against the use of Art. XX to assess compliance with Art. 2(1), despite the two provisions being similar. In the *EC – Seals* case (see footnote 41), the Appellate Body considered that the Panel had “erred in applying the same legal test to the chapeau of Article XX as it applied under Article 2.1 of the TBT Agreement” (paragraph 5.313). Art. XX might only be used as a reference, taking however into account the specificities of the test under the TBT. On the conflicting relationship between Art. XX GATT and Art. 2(1) TBT, see G.M. DURAN, *Measures with Multiple Competing Purposes after EC– Seal Products: Avoiding a Conflict between GATT Article XX-Chapeau and Article 2.1 TBT Agreement* (2016) 19 *Journal of International Economic Law*, 467–495.

[104] L. TAMIOTTI, D. RAMOS, *Article 2 TBT*, at paragraph 24.

[105] WTO Appellate Body, report of 4 April 2012, United States – Measures affecting the production and sale of clove cigarettes ('*US – Clove Cigarettes*'), document WT/DS406/AB/R, at paragraph 182.

[106] L. TAMIOTTI, D. RAMOS, *Article 2 TBT*, cit., at paragraph 23.

[107] According to Art. 21(5) DSU “[w]here there is disagreement as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings such dispute shall be decided through recourse to these dispute settlement procedures, including wherever possible resort to the original panel”.

[108] See footnote 35, at paragraph 7.94.

is only one possible way to demonstrate a lack of even-handedness. The analysis may also focus on the broader relationship between the regulatory distinctions introduced by the measure and its policy objectives, including an assessment of whether the measure's requirements are disproportionate to the goals pursued. In the same case, the Appellate Body explained that this analysis "involves consideration of the nexus between the regulatory distinctions found in the measure and the measure's policy objectives, including by examining whether the requirements imposed by the measure are disproportionate in the light of the objectives pursued"[109].

Similarly, in the *US – Clove Cigarettes* case[110], the Appellate Body held that "[i]n making such determination, a panel must carefully scrutinize the particular circumstances of the case, that is, the design, architecture, revealing structure, operation, and application of the technical regulation at issue, and, in particular, whether that technical regulation is even-handed, in order to determine whether it discriminates against the group of imported products".

From the above analysis, it can be argued that the 'even-handedness' test, as developed by the WTO dispute settlement bodies, does not confine the range of justifications to those listed in recital six of the TBT, given also the non-binding nature of that provision. Rather, the scope of acceptable rationales must be considered open-ended. In other words, the justification for the measure does not need to correspond strictly to the objectives expressly mentioned in the recital; instead, the decisive factor is whether the measure is grounded in a legitimate regulatory purpose or whether it amounts to an arbitrary or unjustifiable form of discrimination.

Given the case-by-case nature of such an assessment, it is difficult to determine *in abstracto* whether the certification of origin at issue would meet the requirements of Art. 2(1). While the various purposes pursued by the measure – *inter alia*, ensuring compliance with international law, protecting the marine environment of the Area, and promoting the conservation and sustainable use of its resources – appear to qualify as legitimate objectives, it remains to be assessed whether the measure is also proportionate in light of those aims.

[109] *Ibidem*, at paragraph 7.97
[110] See footnote 105, at paragraph 182.

In this regard, a particularly strong justification may be found in the objective of securing compliance with the Convention. As previously mentioned, Art. 137(3) UNCLOS stipulates that States "shall not" claim, acquire, or exercise rights with respect to minerals recovered from the Area except in accordance with Part XI, thereby leaving no margin of discretion to the Parties. The certification requirement, therefore, appears proportionate to achieving this objective and as such may be regarded as fully justifiable under Art. 2(1) of the TBT.

The second obligation relating to technical regulations is laid down in Art. 2(2) TBT. Given its importance for the present analysis, the full text of the provision is reproduced below:

2.2. Members shall ensure that technical regulations are not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade. For this purpose, technical regulations shall not be more trade-restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfilment would create. Such legitimate objectives are, inter alia: national security requirements; the prevention of deceptive practices; protection of human health or safety, animal or plant life or health, or the environment. In assessing such risks, relevant elements of consideration are, inter alia: available scientific and technical information, related processing technology or intended end-uses of products.

Two observations can be made in relation to this provision. The first is that, unlike Art. 2(1) – and despite the similar wording – Art. 2(2) does not focus on the discriminatory aspects of a technical regulation, but rather on the necessity and, most importantly, on the proportionality of the measure adopted[111].

Second, the provision sets out a number of conditions that must be met in order to justify the measure. According to the case-law of the WTO dispute settlement bodies, when applying Art. 2(2), a Panel – once it has established that the measure constitutes a technical regulation – must assess whether "the measure is 'more trade-restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfilment would create'". This assessment involves, first, identifying the objective that the Member seeks to achieve and determining whether that objective is legitimate; and second, evaluating

[111] A. SANCHEZ, K.S. ANENO, *Article 2.2 of the TBT Agreement: More Complicated than Necessary?* (2016) 11(9) *Global Trade and Customs Journal*, 369-377.

whether the technical regulation is more trade-restrictive than necessary to achieve that legitimate objective[112].

With regard to the concept of a legitimate objective, it may be noted that the second sentence of the paragraph provides a list of examples that clearly resemble those under Art. XX GATT[113]. However, as pointed out by the Appellate Body in the *US – Tuna II* case[114], the use of the phrase *inter alia* "suggests that the provision does not set out a closed list of legitimate objectives, but rather lists several examples of legitimate objectives" [115]. This has led, in past practice, to a rather broad interpretation, since no objective invoked by a member has ever been declared illegitimate[116]. Accordingly, the objectives pursued by the EU – such as, as previously discussed, compliance with international law, protection of the marine environment of the Area, and sustainable use of its resources – would likely be considered legitimate under Art. 2(2).

The next question is whether the technical regulation is more trade-restrictive than necessary to fulfil the legitimate objective, taking into account the risks that would arise from non-fulfilment. The wording of the provision – particularly the element of 'necessity' – indicates that three aspects must be analysed: 1) whether the technical regulation is trade-restrictive; 2) the degree to which it contributes to the achievement of the legitimate objective; and 3) the risks that would arise if the objective were not fulfilled[117]. As for the first assessment, clearly a measure adopted by the European Union would restrict trade with the United States, which – unlike States Parties to the Convention – would not be able to export minerals extracted from the Area to the Union.

As to the degree of contribution to the legitimate objective, the WTO dispute settlement bodies have clarified that the relevant test is not whether the measure fully achieves the objective or meets some threshold level of fulfilment[118], but simply whether it contributes to the objective. Therefore, a technical regulation cannot be found inconsistent with Art.

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[112] WTO Appellate Body, report of 9 June 2020, *Australia – Certain measures concerning trademarks, geographical indications and other plain packaging requirements applicable to tobacco products and packaging* ('*Australia – Tobacco Plain Packaging*'), document WT/DS435/AB/R-WT/DS441/AB/R, at paragraph 6.3.
[113] L. TAMIOTTI, D. RAMOS, *Article 2 TBT*, cit., at paragraph 36.
[114] See footnote 35.
[115] *Ibidem*, at paragraph 313.
[116] A. SANCHEZ, K.S. ANENO, *Article 2.2 of the TBT Agreement: More Complicated than Necessary?*, cit., at 370.
[117] *Ibidem*, at paragraph 318.
[118] WTO Appellate Body, *US – COOL* (see footnote 102), at paragraph 468.

2(2) merely because it makes a limited contribution[119]. In the case of the proposed EU measure, it may be argued that it contributes in particular to the objective of ensuring compliance with international law – both on the side of EU obligations under the Convention, and on the side of US obligations under general international law. The certification of origin would serve the (legitimate) purpose of ensuring that the Union does not acquire minerals extracted in breach of Part XI of the Convention, as required by Art. 137(3), and would reduce the marketability of such minerals, thereby contributing also to the objective identified in Art. 137(2). Accordingly, the measure would arguably make a meaningful contribution to the achievement of that legitimate objective.

Finally, it remains to be assessed what risk would arise from non-fulfilment. This criterion has rightly been regarded as the most ambiguous element of Art. 2(2)[120], as it requires a hypothetical evaluation of both the type of risk and the consequences deriving from such non-fulfilment. It has also been noted that the current case-law of WTO dispute settlement bodies tends to conflate this element with the one previously analysed, namely the legitimacy of the objective pursued by the measure[121].

This is particularly evident in the EC – Seals case, where the Appellate Body stated that "[g]iven that the objective of the EU Seal Regime is to address the EU public moral concerns with respect to seal welfare per se as well as EU public's wish to not purchase or be exposed to the products derived from seals killed inhumanely, the risks of non-fulfillment of such objective can be linked to these two specific aspects. Failing to achieve these two aspects of the measure's objective will thus expose the EU public to their existing moral concerns on seal welfare and to the products derived from seals that may have been killed inhumanely"[122].

While this approach has been criticised for essentially amounting to a second assessment of whether the objective is legitimate[123], it remains the prevailing position of WTO dispute settlement bodies. In the case at hand, it may therefore be considered that the

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[119] A. SANCHEZ, K.S. ANENO, *Article 2.2 of the TBT Agreement: More Complicated than Necessary?*, cit., at 373.
[120] *Ibidem*, at 373-374.
[121] *Ibidem*, at 374.
[122] WTO Appellate Body, *EC – Seals* (see footnote 41), at paragraph 7.465. It is also underscored that the quoted sentence makes reference to public morals as a legitimate objective under Art. 2(2) TBT. Given that Art. 2(2) TBT (contrarily to Art. XX(a) GATT) does not expressly make reference to public morals, this further confirms the open nature of the list of 'legitimate objectives' contained in Art. 2(2).
[123] A. SANCHEZ, K.S. ANENO, *Article 2.2 of the TBT Agreement: More Complicated than Necessary?*, cit., at 374-375.

primary risk of non-fulfilment would be, as previously discussed, EU noncompliance with the obligations laid down in the Convention, as well as implicit endorsement of US noncompliance with general international law. In conclusion, the measure adopted by the Union in this context would likely be justifiable under Art. 2(2) TBT.

The final provision to be analysed is Art. 2(4) TBT, which states that "[w]here technical regulations are required and relevant international standards exist or their completion is imminent, Members shall use them, or the relevant parts of them, as a basis for their technical regulations except when such international standards or relevant parts would be an ineffective or inappropriate means for the fulfilment of the legitimate objectives pursued, for instance because of fundamental climatic or geographical factors or fundamental technological problems".

This provision is relevant in light of the aforementioned draft regulation 29ter, currently included in the draft Mining Code, which requires the Authority, upon receiving an application from the Enterprise or the Contractor, to certify the origin of minerals recovered from the Area, in accordance with the applicable Standard, such certification being automatically accepted by member States of the Authority.

This regulation can arguably be considered an international standard whose completion is imminent. As such, it should be taken into account by the Union when adopting rules to regulate the import of minerals extracted from the Area. Moreover, certification by the Authority would ensure that such minerals are not imported if extracted in violation of Part XI and the Authority's rules. Based on the earlier analysis under Art. 2(2), the regulation appears suitable to achieve the legitimate objective of ensuring compliance with Part XI and can therefore be considered consistent with the requirements set out in Art. 2(4).

One final aspect must be noted: the regulation will be supplemented by a specific Standard[124] on certification of origin. Since the text of this Standard has not yet been developed by the LTC, it is currently not possible to assess its consistency with Art. 2(4). However, as it will be legally binding upon the Union, the test under Art. 2(4) will need to be repeated once the Standard is finalised and adopted.

[124] Standards are, in the context of the rules of the Authority, binding technical provisions that must be complied with and which further specify the provisions of the regulations. Further details can be found on the website of the Authority at the following link: https://www.isa.org.jm/the-mining-code/standards-and-guidelines/.

2.1.2.3. Concluding remarks

In closing the analysis of how the Union can secure compliance with the obligations provided for in Art. 137(3) of the Convention, it can be reiterated that – based on the above findings – conditioning market access to resources of the Area on compliance with certification issued by the International Seabed Authority appears consistent not only with UNCLOS, but also with the legal regime established under the WTO agreements. The measure proposed is designed to affect only minerals extracted in the Area in noncompliance with Part XI of the Convention, based on the assumption that the latter's core provisions – including the prohibition of appropriation of the Area and its resources – have become part of customary international law.

To this end, the ban on such minerals must be considered legally required under the Convention, even though it remains debatable whether this obligation would be enforceable through the dispute settlement provisions of Part XI or before the judicial organs of the Union. This issue will be further explored in the next Chapter, which will address conflicting jurisdictions among different courts.

By contrast, the certification of origin and its related validation by the Authority constitutes an appropriate means of ensuring proportionality in the implementation of the Convention's obligations within the context of international trade, but it cannot be considered as required under Art. 137(3) of the Convention. Without an amendment to the UCC (and UCC-DA) and without the inclusion of a validation mechanism by the ISA, the effectiveness of the ban would be significantly undermined, due to the legal uncertainties arising from the current wording of Art. 31 UCC-DA, which does not clarify how to determine the origin of a mineral extracted from the Area in noncompliance with Part XI. Although this measure has been proposed as the most appropriate means to fulfil the requirements of Art. 137(3), it remains uncertain whether the Union will adopt it or whether the political sensitivity of its institutions will suggest taking another direction.

As a final remark, it must be acknowledged that the proposed measure presents certain inevitable shortcomings in terms of practical implementation, which cannot be entirely avoided. As previously noted, it would be extremely difficult to trace minerals incorporated into complex products, such as electronic devices. Accordingly, the measure would necessarily be limited to raw minerals (e.g. polymetallic nodules) and their immediate transformations (e.g. a bar obtained from the cobalt extracted from such nodules). This limitation would inevitably reduce the overall effectiveness of the measure, as such minerals could be sold to third States – which may not adhere to the same level of compliance with the Convention – and processed there before being re-exported to the Union in the form of complex components or finished goods.

2.2. Obligations pursuant to Article 139 of the Convention: scope and applicability to the European Union

Art. 139 of the Convention has already been analysed in Chapter I of the present dissertation, in the context of the sponsorship mechanism. On that occasion, the potential role and responsibilities of sponsoring States were examined in light of the findings of ITLOS in its 2011 advisory opinion[125]. Given the introductory nature of those paragraphs, however, the scope of Art. 139 was not fully explored in relation to the European Union. The Union is nonetheless bound by this provision under two distinct perspectives, which will be addressed below.

First, the precise scope of Art. 139 will be examined, particularly to assess whether it could be invoked by the Union as a legal basis to oppose the unilateral claim recently advanced by the United States over the Area. Following that, the remaining elements of Art. 139 will be considered to determine whether, and to what extent, the Union could itself be regarded as a sponsoring State.

Starting from the first perspective, in a recently published blog article[126] it was suggested that States might be subject to a legal obligation – deriving from Art. 137(3) and Art. 139 of the Convention – to prohibit companies under their jurisdiction from providing services to entities conducting activities in the Area in violation of Part XI. Quite evidently, the article was published in response to the announcement by TMC and the decision of the United States to proceed with such activities despite not having ratified the Convention.

To support this conclusion, the article proposed a broad interpretation of Art. 139(1), according to which the obligation contained therein would not be limited to the sponsorship mechanism but would assume an "*erga omnes* character by virtue of the shared interest of all humankind in the responsible use and protection of the Area under

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[125] See Chapter I, footnote 6.

[126] T. FISHER, S. ROBB, *Untouchable metals: How the obligations of UNCLOS States Parties limit the commercial viability of unilateral deep sea mining* (23 June 2025) *EJIL:Talk! Blog of the European Journal of International Law*.

the [common heritage of humankind] principle" [127]. On this basis, the article contended that companies engaged *inter alia* in consultancy services, in the operation of vessels employed for exploitation, or in the processing of recovered minerals, must be prohibited by their respective States from providing such services to TMC-USA.

This position requires some analysis, since – if correct – the legal obligation would extend to the European Union, given that Art. 139(1) expressly refers to both States and international organizations. It is therefore necessary to determine the scope of the provision and assess whether it supports the expansive reading proposed in the article.

As a preliminary observation, it should be emphasised that nothing in the Convention precludes States or international organisations from voluntarily adopting the measures suggested in the article. The following analysis thus focuses exclusively on whether such measures are legally required under the UNCLOS.

To that end, it is helpful to examine the wording of Art. 139(1), which provides that "States Parties shall have the responsibility to ensure that activities in the Area, whether carried out by States Parties, or state enterprises or natural or juridical persons which possess the nationality of States Parties or are effectively controlled by them or their nationals, shall be carried out in conformity with this Part. The same responsibility applies to international organizations for activities in the Area carried out by such organizations". As noted above, the prevailing interpretation is relatively restrictive and links this provision to the sponsorship mechanism. According to this view, a State bears responsibility only for activities in the Area that are directly undertaken by its nationals or by entities under its effective control. On this basis, States are not considered responsible for ancillary services related to "activities in the Area" – such as consultancy or mineral processing – when those services fall outside the definition of that phrase as elaborated by ITLOS.

This seems to have always been the understanding also of the drafters of the Convention[128], as further confirmed by what can be considered the 'first draft' of Art. 139(1), namely paragraph 14 of the Declaration of Principles Governing the Sea-Bed and

[127] Such position is based on paragraph 180 of the 2011 ITLOS advisory opinion, which however refers to the entitlement of States to claim compensation "in light of the *erga omnes* character of the obligations relating to preservation of the environment of the high seas and in the Area".
[128] See M.H. NORDQUIST, S.N. NANDAN, S. ROSENNE (eds.), *United Nations Convention on the Law of the Sea 1982: A Commentary* (Vol. VI, Brill | Nijhoff, 2002), 118-128.

the Ocean Floor, and the Subsoil Thereof, beyond the Limits of National Jurisdiction of 1970[129], according to which "[e]very State shall have the responsibility to ensure that activities in the area, including those relating to its resources, whether undertaken by governmental agencies, or non-governmental entities or persons under its jurisdiction, or acting on its behalf, shall be carried out in conformity with the international régime to be established. The same responsibility applies to international organizations and their members for activities undertaken by such organizations or on their behalf".

While the first sentence of Art. 139(1) may now seem broader – given that it perhaps ambiguously omits whether the control exercised by each Party may extend also to activities conducted by other Parties – the drafters' original intent appears to remain reflected in the second sentence of the same paragraph, which clearly provides that "[t]he same responsibility applies to international organizations *for activities in the Area carried out by such organizations*" (emphasis added).

Arguably, in light of the above discussion, the traditional interpretation must be considered the correct one, especially in view of the criteria laid down by the Vienna Convention[130] for the interpretation of treaties. In particular, the current wording of Art. 139(1) – and especially its second sentence – sufficiently indicates the "object and purpose" of the provision, as required under Art. 31 of the Vienna Convention. Furthermore, following the adoption of the Convention, there has been consistent State practice in support of this restrictive interpretation, which may qualify as "subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation" within the meaning of Art. 31(3) of the Vienna Convention. Even leaving aside such practice, the intent of the drafters – as evidenced by the *traveaux préparatoires* and the 1970 Declaration – appears to confirm unequivocally that the provision refers only to the role of sponsoring entities, thereby satisfying also the interpretative criterion under Art. 32 of the Vienna Convention[131]. Accordingly, the remainder of the analysis of Art. 139 will not take into consideration the conclusions

[129] See Introduction, footnote 12.
[130] See Chapter I, footnote 30.
[131] According to which "[r]ecourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31 […]".

reached in the article referenced above, as the interpretation proposed therein does not seem fully convincing[132].

Turning to the application of Art. 139 to the European Union, it was already noted that paragraph (1) includes international organizations among the entities that may carry out or sponsor activities in the Area. Given that such organizations must be Parties to the Convention in order to undertake activities in the Area, the term 'international organizations' must be understood in the sense given in Annex IX to the Convention – that is, as referring to entities like the EU which meet the conditions for accession and ISA membership.

A further profile of interest arises from the comparison between the first and second sentences of paragraph (1): while the first refers to activities carried out by the State itself or through sponsorship, the second limits itself to activities conducted directly by the international organization. The rationale is evident and lies in the difficulty of establishing a link between private entities and international organizations, given the absence of territorial jurisdiction. Accordingly, in the case of the EU, activities in the Area could only be undertaken directly by the Union itself, and not by private entities under its sponsorship.

Despite the lack of territory, there might however be some instances where the assimilation of the Union to a State is necessary for the purposes of the Convention. This is the case, for instance, with respect to 'reserved areas' (see Chapter I, paragraph 1.3.4.1.), where activities can be exclusively carried out by the Enterprise or developing States. In such instances, a classification is essential to understand whether the Union might benefit from such areas, or if on the contrary it would be called to contribute to them. The answer arguably leans toward the latter: the Union should be considered, for these purposes, as a developed State. This classification is consistent with both the actual technical capacities

[132] As mentioned, this does not preclude States from taking more adopting the broader interpretation proposed in the article referred to in footnote 126. However, any measure adopted under such an interpretation of Art. 139 UNCLOS would need to be compliant with other relevant international obligations. Reference is made in particular to General Agreement on Trade in Services (GATS) adopted as part of the Marrakesh Agreement (for which see footnote 15). Since, however, the EU is under no legal obligation to adopt such measures – based on the discussion carried out in this paragraph – their compliance against the GATS and other potential relevant international agreements will not be checked.

of the Union and its member States and with the Union's recognition as a developed entity under other international legal regimes[133].

From a practical viewpoint, Art. 139 appears unlikely to have any immediate application in the present context, particularly given the Union's adverse position on deep seabed mining and its repeated calls for a moratorium on activities in the Area (see *infra*, paragraph 4.1.1.1.). Nonetheless, it cannot be excluded that the Union might, in the future, decide to engage in at least exploration activities, first because these generally entail limited environmental impact compared to exploitation; and second, because they could contribute to the advancement of scientific knowledge of deep seabed ecosystems, in line with the Union's competence on scientific research under Art. 4(3) TFEU. Should the Union undertake such activities, it would be subject to paragraphs (1) and (2) of Art. 139 – the former, as noted, addressing responsibility for entities conducting or sponsoring activities in the Area, and the latter concerning the liability arising from failure to meet such responsibility.

Finally, the role of paragraph (3) of Art. 139 – providing that "States Parties that are members of international organizations shall take appropriate measures to ensure the implementation of this article with respect to such organizations" – deserves some consideration. Due to the complete lack of practice of international organisations carrying out activities in the Area, the provision also almost completely lacks analysis from both the legal doctrine[134] and international courts and tribunals.

Nevertheless, some observations may be made. First, the paragraph is broadly drafted and applies to both responsibility and liability. Accordingly, if the Union were to engage in activities in the Area, member States would be required to adopt appropriate measures at both stages. This entails, in the first instance, cooperating to ensure that Union legislation is adequate to meet its responsibility to ensure compliance, as set out in paragraph (1). Should the Union fail to do so, member States would then bear the obligation to ensure that it meets the resulting liability under paragraph (2).

[133] See for instance the UN system of classification, available at the following link: https://www.un.org-/en/development/desa/policy/wesp/wesp_current/2014wesp_country_classification.pdf. See also the UN Trade and Development (UNCTAD) systems of classification, available at the following link: https://unctadstat.unctad.org/EN/Classifications.html.
[134] The only two exceptions being S. VÖNEKY, A. HÖFELMEIER, *Article 139*, in A. PROELß, A.R. MAGGIO, E. BLITZA, O. DAUM, cit., 976, and M.H. NORDQUIST, S.N. NANDAN, S. ROSENNE (eds.), *United Nations Convention on the Law of the Sea 1982: A Commentary* (Vol. VI, Brill | Nijhoff, 2002), at 126.

Second, while paragraph (3) is also relevant where activities are undertaken jointly by the Union and one or more member States, its primary utility lies in scenarios where such activities are conducted solely by the Union. In cases of joint action, Art. 139(2) would apply, establishing joint and several liability between the Union and the member States concerned. Given that liability may ultimately be attributed to either party, internal proceedings may arise to determine which entity failed to fulfil its obligations. As this issue falls within the purview of judicial mechanisms, it will be further addressed in Chapter IV.

3. The competence of the European Union to negotiate the Mining Code on Exploitation

Until now, the Chapter has examined the direct obligations that the European Union is required to implement as a direct consequence of its participation in the Convention. From this point forward, the focus will shift to its involvement in the International Seabed Authority[135]. Accordingly, the present paragraph will explore the Union's potential competence to negotiate the Mining Code on Exploitation and the related Standards[136] and Guidelines[137]. The subsequent paragraphs will address the Union's role in implementing the rules adopted by the Authority.

As already noted, the Union – by virtue of being a Party to the Convention – is also *ipso facto* a member of the Authority. However, its involvement in the ISA must be read in conjunction with the provisions of Annex IX, particularly Art. 4(4), which states that the participation of an international organisation "shall in no case entail an increase of the representation to which its member States which are States Parties would otherwise be entitled, including rights in decision-making". For this reason, the Union's role within the Authority's organs is extremely limited.

[135] The involvement of the Union in the Authority was already acknowledged in Council Decision 98/392/EC (see Chapter II, footnote 118), and in particular in the last recital stating that "the Community and its Member States are involved in the work of the International Seabed Authority and must therefore coordinate the positions they will take in that organisation". Given the non-binding nature of the recital, it is however difficult to argue that it might change the position expressed in the present paragraph.
[136] See footnote 124.
[137] Like Standards, Guidelines are also technical documents prepared by the Authority to guide the different phases of exploitation activities. Unlike Standards, they are however of a non-binding nature.

In the Council, the EU holds observer status and – absent an amendment to the Council's Rules of Procedure[138] – its potential election as a Council member would arguably be counterproductive. The reason lies in the complex decision-making procedure of the Council: as explained in Chapter I, when a decision on a substantive matter cannot be adopted by consensus, it may still be taken by a two-thirds majority, provided that there is no majority opposition within any of the groups established under Section 3(15) of the Annex to the 1994 Agreement. However, under Art. 4(4) of Annex IX, the Union's election to the Council would require avoiding any duplication of representation. In practice, this would mean that EU member States would have to renounce their seats[139]. Should those seats be filled by other States, the collective decision-making weight of EU members would be significantly reduced. It is therefore unlikely – unless the Rules of Procedure are amended to address these limitations – that the Union will seek or obtain Council membership.

In the Assembly, the voting procedure is more straightforward, with each member granted one vote. For the Union, however, Rule 60 of the Rules of Procedure of the Assembly[140] applies, stipulating that "[p]articipation in decision-making by entities referred to in article 305, paragraph 1(f), of the United Nations Convention on the Law of the Sea shall be in accordance with Annex IX of the Convention". While the provision is somewhat ambiguous as to the precise modalities of such participation, it can reasonably be interpreted as a reference to Art. 4(4) of Annex IX. Consequently – given the Union's limited competences over matters within the Assembly's remit – it is likely that the Union may not vote unless the decision falls within those competences. In such cases, the Union could arguably replace its member States in the vote, provided that non-member States raise no objection (also implicitly and without a formal decision).

The debate surrounding the Union's role in negotiating the Regulations on Exploitation is not new. In 2021, the Commission submitted a Proposal for a Council decision on the position to be taken on behalf of the European Union at meetings of the International Seabed Authority Council and Assembly[141] (hereinafter the 'Proposal'). The Proposal

[138] Rules of Procedure of the Council of the International Seabed Authority, Document ISBA/C/12.
[139] J. SACK, *The European Community's membership of International Organisations* (1995) 32 *Common Market Law Review*, 1227-1256, at 1250-1251.
[140] Rules of Procedure of the Assembly of the International Seabed Authority, document ISBA/A/6.
[141] Proposal for a Council Decision on the position to be taken on behalf of the European Union at the meetings of the International Seabed Authority Council and Assembly (Document 52021PC0001, also including the Annexes to the proposal).

envisaged a 'two-tier approach', whereby a Council decision would first establish the guiding principles and orientations of the Union's position. These would then be adjusted ahead of each meeting through non-papers prepared by the Commission and discussed within the relevant Council Working Party (i.e. the COMAR)[142]. The position thus defined would then be defended by EU member States within the Council of the Authority.

Cleverly, the Proposal did not seek to replace those latter States with a representative of the Union, in light of the above-outlined issues that such replacement would entail. Rather, it provides that the position "shall be expressed and upheld by the Member States of the Union that are members of the International Seabed Authority Council whenever the Union is limited in expressing its own position due to its limited observer status"[143].

Before addressing the outcome of the Proposal and its potential relevance for the future, it is worth considering its legal basis, identified by the Commission in Art. 218(9) TFEU from a procedural perspective, and in Art. 191 TFEU from a substantive one.

Starting with the procedural basis, Art. 218(9) TFEU states that "[t]he Council, on a proposal from the Commission […] shall adopt a decision […] establishing the positions to be adopted on the Union's behalf in a body set up by an agreement, when that body is called upon to adopt acts having legal effects, with the exception of acts supplementing or amending the institutional framework of the agreement"[144]. Clearly, this definition appears to correspond precisely to the nature of the Mining Code on Exploitation, which constitutes an act having legal effects adopted by a body established under an agreement, and which cannot amend the legal framework of the Convention and the 1994 Agreement,

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[142] The Council's Working Party on the Law of the Sea (COMAR) has been established through Council Decision 98/392/EC (see Chapter II, footnote 118), which in Annex III outlines its mandate. is composed of law of the sea experts from the member states and deals with preparing draft EU positions within bodies set up under the UNCLOS, drafting common positions on foreign policy issues of general interest concerning the development of the law of the sea and its repercussions on EU foreign policy, and with the examination of the consistency of projects and proposals submitted to the Council concerning the law of the sea, and in particular of the UNCLOS. See V. FRANK, *The European Community and Marine Environmental Protection in the International Law of the Sea – Implementing Global Obligations at the Regional Level*, cit., at 168-169.
[143] Proposal for a Council Decision (footnote 141), Art. 2.
[144] TFEU, Art. 218. On the procedure provided for in paragraph (9), see F. ERLBACHER, *Article 218 TFEU*, in M. KELLERBAUER, M. KLAMERT, J. TOMKIN (eds.), *The EU Treaties and the Charter of Fundamental Rights: A Commentary* (2nd Ed., Oxford University Press, 2024), 22448-2264, at 2259-2261.

being a form of secondary law subordinate to both[145]. As such, Art. 218(9) can indeed be regarded as a suitable procedural basis.

By contrast, the substantive legal basis – identified, as noted, in Art. 191 TFEU – has been subject to criticism by parts of the legal doctrine[146], as will be discussed below. According to paragraph (3) of the explanatory memorandum to the Proposal, the Union holds competence in respect of those parts of the regulations that concern the protection of the marine environment. On this basis, the Commission claims that "[f]ollowing the structure of Article 3(2) TFEU, on a case-by-case basis, the EU has external competence exclusive competence"[147]. The reasoning provided to justify this exclusive competence is threefold: "[i]n the first place because the provisions of UNCLOS related to the marine environment are provided for in the legislative act concluding UNCLOS on behalf of the Union. Secondly, because a Union action on the regulations is necessary to enable the Union to exercise its internal competence, such as in the case of acquired environmental competence. Lastly, the EU has external competence since some provisions of the regulations may affect common rules or alter their scope. Here, the EU *acquis* (particularly in relation to EU secondary legislation in the field of environment, and other international agreements to which the EU is a full party) is covered or may be affected by parts of the draft regulations (or of the related standards and guidelines), giving the EU competence on those specific parts, some of which is exclusive".

This explanation appears neither entirely clear nor wholly convincing. First, it has been observed that the explanatory memorandum does not precisely identify the *acquis* allegedly affected by the ISA Regulations[148]. Second, it leaves the scope of the Proposal ambiguous, as it fails to clarify whether the common position would cover only those parts of the Regulations addressing environmental matters. While certain elements of the Proposal seem to imply that the Union's position would concern the entirety of the Regulations, the explanatory memorandum nonetheless states that "[a]s a consequence, the EU is entitled to take position at the International Seabed Authority with respect *to the relevant parts of the regulations* that are presented in this statement, and the related standards and guidelines".

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[145] G. ARDITO, *The European Union at the International Seabed Authority: A Question of Competence on the Brink of Deep-Sea Mining* (2023) 16(4) *Maritime Safety and Security Law Journal*, 20-39, at 23.
[146] *Ibidem*, passim.
[147] For the discussion on Art. 3(2), see Chapter II, paragraph 2.2.2.
[148] *Ibidem*, at 24.

While one could reasonably argue that most of the Regulations are in some way connected to environmental considerations, it is equally evident that certain provisions are not. For instance, the aforementioned draft regulation 29ter on the certification of origin arguably relates more closely to the Union's exclusive competence on the CCP. However, since it does not concern environmental protection, and given the silence of the Proposal on this point[149], a positive answer to the above question would paradoxically imply that such matters – undeniably falling under the Union's exclusive competence – would paradoxically remain for States to discuss.

Perhaps due also to the negative reaction from member States[150], the procedure for the adoption of the Proposal stalled in 2021, and no decision on the Proposal has since been taken. However, since the Proposal has not been formally withdrawn and remains pending[151], a Council Decision may still be adopted in the future.

In practical terms, it seems unlikely that the Proposal will be adopted for the negotiation of the draft Regulations on Exploitation, for several reasons. First, the negotiations are already at an advanced stage, with a third version of the Consolidated Text to be released and negotiated next year during the 31st Session. Second, the Regulations – unlike the Standards and Guidelines – constitute a highly political text, in the context of which several delegations have introduced proposals perceived as favouring a moratorium or precautionary pause on deep seabed mining activities[152].

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[149] Such silence can be explained in light of timing: while the Proposal was presented by the Commission in 2021, regulation 29ter on the certification of origin was included for the first time in the so-called 'Revised Consolidated Text', meaning the version of the Mining Code discussed during the 30th Session of work of the Authority in 2025.

[150] As reported in G. ARDITO, *The European Union at the International Seabed Authority*, cit., at 22.

[151] As specified in the webpage dedicated to the procedure of the proposal, available at the following link: https://eur-lex.europa.eu/legal-content/EN/HIS/?uri=CELEX:52021PC0001.

[152] It is sufficient to look for instance at the two alternative versions of paragraph (3) of draft regulation two currently included in the Revised Consolidated Text. The first alternative version provides that "Exploitation in the Area shall not commence until the legal framework intended for the effective protection and preservation of the Marine Environment is adopted and scientific evidence demonstrates that the Exploitation will be conducted in such a manner as not to cause significant and harmful changes to the Marine Environment and its resources and to effectively protect and preserve the Marine Environment pursuant to article 145 and [article 209 of] Part XII of UNCLOS". The second one is more detailed, and provides that "Exploitation in the Area shall not commence until: (a) The legal framework intended for the effective protection and preservation of the Marine Environment has entered into force [and the Authority has adopted an environmental policy]; (b) The implementation of [Target 3 of] the Kunming-Montreal Global Biodiversity Framework is well on track in the area beyond national jurisdiction; and (c) Scientific evidence demonstrates that Exploitation will be conducted in such a manner so as: not to cause significant and harmful changes to the Marine Environment and its resources, [pursuant to Article 196 of the Convention, and] to effectively protect and preserve the Marine Environment, [including biological diversity and ecosystem integrity] pursuant to Article 145 and Part XII of the Convention, [including biological diversity and ecosystem integrity], and not to impede the full implementation of [Target 3 of] the

In this respect, the Union's clear support for a moratorium (see *infra*, paragraph 4.1.1.1.) does not necessarily reflect the full spectrum of positions held by its member States. Although the Proposal does not explicitly refer to a moratorium, the general principles and orientations[153] laid down in Annex I arguably do not offer sufficient guarantees to member States that the Union would refrain from pursuing such an outcome. As not all of them formally support the idea of a moratorium[154], it is unlikely that they would be willing to entrust the Union with a unified negotiating position.

That said, the adoption of a Council Decision cannot be ruled out at a later stage. Once the draft Regulations are finalised, attention will move to the more technical elements of the Mining Code – namely, the Standards and Guidelines – which will also need to be adopted. In this phase, the focus will likely shift from political considerations to scientific and technical issues; hence, the Union may find it more feasible to adopt a common position to promote the highest environmental standards. Even then, however, it remains uncertain whether the Council will choose to endorse the Commission's Proposal, or whether it will prefer to leave responsibility for those discussions to the member States.

4. THE COMPETENCE OF THE EUROPEAN UNION TO IMPLEMENT THE MINING CODE ON EXPLOITATION

Regardless of the above discussion on the – currently inexistent – role of the Union in the negotiations of the Mining Code, a different and equally important question is whether the Union will have, once the Regulations are adopted by the Council and the Assembly, the power to implement them in the internal legal system. The answer must necessarily be positive: as it has been mentioned multiple times, the provisions of the Convention

Kunming-Montreal Global Biodiversity Framework in the area beyond national jurisdiction". This paragraph – which has no consensus in the Council and whose deletion has been requested by some States – would in essence introduce a precautionary pause through the Regulations. If this paragraph was upheld by the Union, this would probably not reflect the interest of all its member States.

[153] Especially the orientations reported in Annex I seem to recall the language used to describe the moratorium, since it provides that "[g]iven the limited scientific knowledge and the concerns about the inevitable, and likely irreversible, impacts on biodiversity and climate, it is crucial to ensure that the Union's position on deep seabed mining is fully in line with the European Union's commitment to sustainability and based on the best available science, the application of the precautionary principle and the ecosystem-based approach".

[154] Details of the position of most EU member States on deep seabed mining is reported report of Seas at Risk entitled *The changing seascape of deep-sea mining in Europe* of September 2024, available at the following link: https://seas-at-risk.org/wp-content/uploads/2024/09/EU-DSM-Report_September-digital-w-appendix.pdf.

"are rules which form part of the Community legal order"[155], which the Union is bound to respect in accordance with Art. 216(2). Since the Convention prescribes in turn the respect of the rules, regulations and procedures of the Authority, the Union can arguably implement the parts of the Mining Code that fall under its competence. The purpose of the present paragraph is exactly to assess the scope of the competence of the Union in implementing the Regulations – and potentially Standards and Guidelines – through the adoption of binding measures at the domestic level.

Three key differences between the negotiation and the implementation of the Mining Code must first be underlined. The first concerns the scope of the Commission's Proposal, which – as previously noted – failed to clarify whether the Union's common position was to cover the entire set of Regulations or only those relating to environmental protection. This ambiguity matters, as the Regulations are adopted as a single instrument: there is no separate procedure for their environmental and non-environmental components.

By contrast, the implementation does not need to follow this 'package deal' logic: in other words, it is easier to distinguish between different regulations in accordance with the division of competences between the Union and its member States. The Union may therefore implement only those aspects falling under its competence, such as those concerning customs and duties, the protection of the marine environment, or matters under the CCP.

The second distinction concerns the procedural framework. In the case of negotiations, a Commission proposal and a Council Decision were required under Art. 218(9) TFEU. By contrast, the implementation of the Mining Code would not follow a single procedure: each implementing act would rely on its specific legal basis. For example, implementing environmental provisions would fall under Art. 191 TFEU, with the relevant procedure governed by Art. 192, requiring the ordinary legislative procedure[156]. Acts concerning the import of minerals extracted from the Area would instead be based on the CCP or the Union's competence in customs and duties, falling under Art. 207 TFEU (also requiring the ordinary legislative procedure).

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[155] ECJ, *Mox Plant* case (see Chapter II, footnote 184).

[156] The ordinary legislative procedure is provided for by Art. 294 TFEU. In extremely limited terms, in such cases the proposal for the act is presented by the Commission and must be adopted both by the European Parliament and the EU Council. For further reference, see K. BRADLEY, *Legislating in the European Union*, in C. BARNARD, S. PEERS, *European Union law* (4th Ed., Oxford University Press, 2023) 100-149.

Third, once adopted the Mining Code will already establish international (in some cases minimum) standards applicable to the Union by virtue of its participation in the Convention. Accordingly, while the Union would have had broad discretion in the negotiations – subject only to the constraints of the Convention and the 1994 Agreement – its margin of discretion at the implementation stage is significantly narrower. This point will be developed further in relation to environmental matters, but it may already be observed that, since the Convention's provisions "are rules which form part of the Community legal order"[157], and since compliance with the Authority's rules is mandated under the Convention, the Union may not adopt lower standards for activities in the Area than those prescribed by the ISA.

Before addressing specific regulatory areas that the Union may seek to implement, one final clarification is required. In light of the findings of Chapter II, the Union is not, at the internal level, bound by the 1998 Declaration of Competences. When assessing the Union's relevant powers in relation to deep seabed mining, it was noted that other competences – such as those in the fields of energy or industry – may be relevant. However, as those competences remain largely theoretical and their implementation is less straightforward to foresee, the following paragraphs will focus only on those that are immediately applicable: namely, customs and duties and the CCP (exclusive competences under Art. 3(1) TFEU), and environmental matters (a shared competence under Art. 4(2) TFEU)[158]. For practical reasons, the analysis will begin with shared competences, in order to anticipate the discussion on the Union's position regarding the moratorium.

4.1. Shared competence on the protection of the marine environment

As mentioned in Chapter II, the Union holds a shared competence over the protection of the marine environment pursuant to Art. 191 TFEU. It was concluded in that context that such competence extends also to activities in the Area, in light of the reference to Part XII of the Convention included in the 1998 Declaration of Competence. This conclusion is further supported by Art. 209 UNCLOS, which establishes a link between Part XII and Part XI of the Convention and thereby empowers the Union to adopt legislative measures

[157] ECJ, *Mox Plant* case, see Chapter II, footnote 184.
[158] Given the limited role on the competence on transport, and given that rules adopted for this matter would in any case have to be consistent with the standards of the International Maritime Organization, in this context the competence on transports will not be discussed.

relating to the latter. Accordingly, the Union may implement the Mining Code from an environmental perspective by imposing binding requirements on activities in the Area conducted by its member States or by entities they sponsor. However, to determine the scope and modalities of such implementation, it is first necessary to examine the Union's position on deep seabed mining, which will be addressed in the following subparagraph[159].

Before turning to that discussion, it is worth noting that the environmental standards established by the Authority in the Mining Code may also bear relevance for the Union in relation to activities carried out in seabed areas under the national jurisdiction of its member States – that is, within territorial seas, exclusive economic zones, and continental shelves. This is due to Art. 208 UNCLOS – on *Pollution from Sea-Bed Activities Subject to National Jurisdiction* – which obliges States, under paragraph (1), to "adopt laws and regulations to prevent, reduce and control pollution of the marine environment arising from or in connection with seabed activities subject to their jurisdiction", and further requires under paragraph (3) that such measures "shall be no less effective than international rules, standards and recommended practices and procedures".

While Art. 208 has a broader scope than Art. 209 – as it also encompasses non-extractive operations such as the laying of cables and pipelines[160] – it nonetheless includes extractive activities. In this context, the relevant international standards would arguably be those adopted by the Authority, which the Union would thus be required to take into account when regulating environmental aspects of seabed operations within national jurisdictions. However, although some of the positions analysed below may indirectly bear on such domestic activities, the present dissertation focuses on the relationship between the Authority (and its normative framework) and the European Union. For this reason, the implementation of Art. 208 UNCLOS will not be further addressed herein.

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[159] It is underscored that the next paragraph on the position of the Union on the moratorium will build on a previously published work. For completeness, reference is therefore made to M. BEDENDI, L. SCHIANO DI PEPE, *A New Chapter of Ocean Governance and the European Union: Codification Efforts and Prospects of a Moratorium at the International Seabed Authority* (2025) 40(2) *The International Journal of Marine and Coastal Law*, 403-422, especially at 413-417.
[160] For an analysis of the scope of Art. 208 see F. WATCH, *Article 208*, in A. PROELß, A.R. MAGGIO, E. BLITZA, O. DAUM, cit., 1391-1400.

4.1.1. The Union's position on deep seabed mining activities

In recent years, scientific uncertainty surrounding deep seabed mining has prompted growing calls to delay such activities until their consequences are fully understood, or – in some instances – to prohibit them entirely. The principal concerns relate to the potential impact on vulnerable ecosystems, including not only fragile deep-sea habitats but also, potentially, the superjacent water column, particularly due to sediment plumes generated by mining operations[161].

The suggestion of a moratorium or a precautionary pause[162] has gained momentum in the last few years, to the point that is now supported by 38 States[163] and several non-governmental organizations. Calls for a moratorium intensified following the adoption of the Regulations on Exploration, which made clear that the next phase would concern exploitation.

Since 2018, the idea has also been endorsed by some institutions of the European Union – most notably the Parliament and the Commission. That year, the European Parliament first called for a moratorium in its resolution[164] entitled *International ocean governance: an agenda for the future of our oceans in the context of the 2030 Sustainable Development Goals*[165]. While the document addresses broader issues of ocean governance, paragraph

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[161] Traditionally, deep seabed mining operations require transportation of minerals extracted from the installation used to collect them to a vessel located on the water surface. Once the minerals are on the vessel, they are normally separated from water and the adhering sediments, which are subsequently re-ejected in the water column. See A. AHNERT, C. BOROWSKI, *Environmental risk assessment of anthropogenic activity in the deep sea* (2000) *7 Journal of Aquatic Ecosystem Stress and Recovery*, 299–315, in particular at 305. It is stressed that why extraction methods may vary in light of technological development, they for now still produce sediment plumes and represent therefore the traditional concern on the environmental aspects of deep seabed mining.

[162] While the moratorium involves a formally adopted decision indicating conditions and timeframe for the beginning of exploitation activities, the precautionary pause occupies "the middle ground between de facto and de jure moratoria", being more a "a shared understanding that could be collectively upheld and reviewed, perhaps through a standing council agenda item, or a decision by the Council or Assembly" of the Authority. On the difference between the two terms, see P.A. SINGH, A. JAECKEL, J.A. ARDRON, *A Pause or Moratorium for Deep Seabed Mining in the Area? The Legal Basis, Potential Pathways, and Possible Policy Implications* (2025) 56(1) *Ocean Development & International Law*, 18-44, in particular at 28.

[163] For the full list of States supporting the moratorium on deep seabed mining activities is available on the website of the Deep Sea Conservation Coalition (DSCC, a non-governmental organization) at the following link: https://deep-sea-conservation.org/solutions/no-deep-sea-mining/momentum-for-a-moratorium/governments-and-parliamentarians/#:~:text=Moratorium%20Alliance%3A%20Fede-rated%20States%20of,U-%20Ocean%20Conference%20in%20Lisbon.

[164] Resolutions of the European Parliament are non-binding instruments but represent the view of the majority of the organ. For further details, reference is made to the briefing entitled "European Parliament's scrutiny of the European Council: The use of Parliament resolutions" available at the following link: https://www.europarl.europa.eu/RegData/etudes/BRIE/2024/757839/EPRS_BRI(2024)757839_EN.pdf.

[165] European Parliament resolution of 16 January 2018 on international ocean governance: an agenda for the future of our oceans in the context of the 2030 SDGs (Document 52018IP0004).

(42) specifically "[c]alls on the Commission and the Member States to support an international moratorium on commercial deep-sea mining exploitation licences until such time as the effects of deep-sea mining on the marine environment, biodiversity and human activities at sea have been studied and researched sufficiently and all possible risks are understood".

This approach was later echoed by the Commission in its Communication[166] entitled *EU Biodiversity Strategy for 2030 – Bringing nature back into our lives*[167], which stated that "[i]n international negotiations, the EU should advocate that marine minerals in the international seabed area cannot be exploited before the effects of deep-sea mining on the marine environment, biodiversity and human activities have been sufficiently researched, the risks are understood and the technologies and operational practices are able to demonstrate no serious harm to the environment [...]"[168].

That position was reaffirmed in a 2021 resolution of the Parliament – bearing the same title as the earlier document[169] – which observed that "deep-seabed mining is highly likely to cause inevitable and permanent biodiversity loss [...]", and therefore called "on the Commission and the Member States to promote a moratorium, including at the International Seabed Authority, on deep-seabed mining until such time as the effects of deep-sea mining on the marine environment, biodiversity and human activities at sea have been studied and researched sufficiently and deep-seabed mining can be managed to ensure no marine biodiversity loss nor degradation of marine ecosystems"[170].

The sense of urgency surrounding this issue has only increased since the Republic of Nauru invoked the two-year rule[171], bringing the deadline for completing the Regulations on Exploitation – and the potential commencement of commercial exploitation – significantly closer. Accordingly, references to a moratorium have also appeared in later texts, including the 2022 Parliament resolution entitled *Towards a sustainable blue*

[166] Communications of the EU Commission can be included in the category of recommendations and opinions for the purposes of Art. 288(4) TFEU. As such, they have no binding force, even if they reflect the view of the Commission on specific issues.
[167] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: EU Biodiversity Strategy for 2030 – Bringing nature back into our lives (Document 52020DC0380, also including the Annex to the Communication).
[168] *Ibidem*, at 20.
[169] European Parliament resolution of 9 June 2021 on the EU Biodiversity Strategy for 2030: Bringing nature back into our lives (Document 52021IP0277).
[170] *Ibidem*, at paragraph 184.
[171] See Chapter I, paragraph 2.2.

economy in the EU: the role of the fisheries and aquaculture sectors[172] and the 2022 Joint Communication of the Commission and the EU's High Representative for Foreign Affairs and Security Policy entitled *Setting the course for a sustainable blue planet – Joint Communication on the EU's International Ocean Governance agenda*[173].

Before turning to the next paragraph concerning measures the Union may take to implement the environmental provisions of the Regulations, it is useful to offer further reflections on its position regarding the moratorium, particularly in light of recent developments.

First, it is worth noting that the Union's stance has evolved in parallel with a growing commitment among its member States. Nonetheless, some divergence persists concerning the form such commitment should take. For instance, until early 2025, France advocated for a total and permanent ban on deep seabed exploitation[174]. Although this remains its official position, a nuanced shift appears to have occurred during the Third United Nations Ocean Conference, held in Nice from 9 to 13 June 2025. In his opening statement, the President of the French Republic referred to a moratorium rather than a permanent prohibition[175]. A similar message was delivered during the second part of the 30th Session of the Authority, where "France called on other nations to join the coalition to adopt, at the very least, a precautionary pause on deep-sea mining"[176].

At the same time, other member States – such as Germany and Spain – support a precautionary pause in activities in the Area, intended to allow for a full understanding of their environmental impact and the adoption of all relevant regulations. Conversely, several States – for example Belgium and Italy – have yet to express a clear position,

[172] European Parliament resolution of 3 May 2022 toward a sustainable blue economy in the EU: the role of the fisheries and aquaculture sectors (Document 52022IP0135).

[173] Joint Communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Setting the course for a sustainable blue planet - Joint Communication on the EU's International Ocean Governance agenda (Document 52022JC0028).

[174] See in this respect the position of the current President of the French Republic Emmanuel Macron following the UN Ocean Conference in Lisbon in 2022, in which he declared that "[w]e have [...] to create the legal framework to stop high-sea mining and not to allow new activities putting in danger these ecosystems". See C. DEMONY, H. REID, *France's Macron says deep-sea mining must not go ahead*, in *Reuters*, available at the following link: https://www.reuters.com/business/environment/frances-macron-says-deep-sea-mining-must-not-go-ahead-2022-06-30/.

[175] Since there is no official transcript of the inaugural speech of the President of the French Republic Emmanuel Macron to the Third United Nations Ocean Conference of Nice, reference is made to the video of his intervention, available at the following link: https://youtu.be/N0y9bZwtH9A.

[176] See the summary of the 30th session of the International Seabed Authority (ISA) Assembly and Council (25 July 2025) on the website of the France Diplomacy, available at the following link: https://www.diplomatie.gouv.fr/en/french-foreign-policy/climate-and-environment/news/2025/article/30th-session-of-the-international-seabed-authority-isa-assembly-and-council-25.

while others – like Poland – appear more inclined to support the commencement of commercial exploitation.

This divergence in views among member States affects the Union's ability to take coherent action in support of a moratorium. It has already been noted that the Union's firm stance may have contributed to the EU Council's decision not to adopt the Commission Proposal for a common position within the Authority. Even the implementation of internal EU measures seeking to give effect to a moratorium would likely encounter obstacles stemming from the decision-making process. As discussed, the moratorium has been primarily championed by institutions representing the Union's general interest, notably the Parliament and the Commission. Yet the adoption of relevant measures would require the ordinary legislative procedure, which also involves the Council – composed of, and representing, the member States – some of which may not share the same position[177].

Despite a statement by the President of the EU Council, António Costa, during the Third United Nations Ocean Conference – in which, for the first time, he declared that "a moratorium on deep-sea mining is essential"[178] – it remains uncertain whether the Council will, in practice, be willing to endorse such a stance.

Moreover, the possibility of future political changes cannot be underestimated. The Union's current position reflects the environmental commitments of its institutions as presently constituted[179]; the same applies to those of the member States. However, it cannot be assumed that this alignment will persist over time, as political expectations and priorities may evolve both at Union and national levels.

In this respect – and as previously discussed in Chapter II, paragraph 4.2.3. – it is important to recall the strategic value of minerals found in the resources of the Area, including lithium, copper, cobalt and nickel, in the context of the so-called 'green

[177] Also in light of the fact that some of them – Belgium, Bulgaria, Germany, the Czech Republic, Poland, Slovakia and, paradoxically, the same France – sponsor entities carrying out exploration activities in the Area.
[178] See the Statement by President António Costa at the Ocean Pact side event at the 2025 UN Ocean Conference of 9 June 2025, available at the following link: https://www.consilium.europa.eu-/es/press/press-releases/2025/06/09/statement-by-president-antonio-costa-at-the-ocean-pact-side-event-of-the-2025-un-ocean-conference/pdf/.
[179] See M. BEDENDI, L. SCHIANO DI PEPE, *A New Chapter of Ocean Governance and the European Union*, cit., especially at 408-413.

transition'[180]. The potential contribution of these minerals to that transition was also emphasised by former European Central Bank President and former Italian Prime Minister Mario Draghi, in his September 2024 report on *The future of European competitiveness*[181], where he suggested that "[t]he EU should also carefully explore the potential of environmentally-sustainable deep sea mining: estimates suggest that the sea bed holds large multiples of the known land-based reserves for example for copper, titanium, manganese, cobalt, nickel and rare earth elements".

The immediate response of the Commission – prompted by a joint letter of several non-governmental organisations to the President of the Commission[182], as well as by a question for written answer from a member of the European Parliament[183] – was to reaffirm that "[t]he Commission will continue to advocate for prohibiting deep-sea mining until scientific gaps are properly filled, it can be demonstrated that no harmful effects arise from mining and, as required under the United Nations Convention on the Law of the Sea (UNCLOS), the necessary provisions in the exploitation regulations for the effective protection of the marine environment are in place"[184]. However, this arguably constitutes a further example of how shifting priorities may affect the position of the Union and the measures that the latter and its member States may be willing to adopt.

4.1.2. The implementation of the environmental provisions of the Mining Code

The discussion in the previous paragraph is essential to understand the approach that the Union is likely to adopt in implementing the environmental provisions of the Regulations. Given its commitment to the protection of the marine environment and its efforts to

[180] J.R. HEIN, K. MIZELL, A. KOSCHINSKY, T.A. CONRAD, *Deep-ocean mineral deposits as a source of critical metals for high – and green – technology applications: Comparison with land-based resources* (2013) *51 Ore Geology Reviews*.
[181] See The future of European competitiveness: Report by Mario Draghi, available at the following link: https://commission.europa.eu/topics/eu-competitiveness/draghi-report_en.
[182] See the joint letter submitted to the President of the Commission on *NGOs' Concerns Regarding References to Deep Sea Mining in Mario Draghi's Report: The Future of European Competitiveness*, available at the following link: https://ejfoundation.org/resources/downloads/Draghi_Report_Joint_NGO_-Letter.pdf.
[183] See the question for written answer by Carola Rackete, in which it was requested to clarify "[w]hat effect, if any, has the Draghi report had on the Commission's position on deep-sea mining, as stated in the 2022 EU agenda on international ocean governance". The question for written answer is available at the following link: https://www.europarl.europa.eu/doceo/document/E-10-2024-002038_EN.html.
[184] See the written response to the question referred to in the previous footnote, available at the following link: https://www.europarl.europa.eu/doceo/document/E-10-2024-002038-ASW_EN.html.

promote a moratorium on activities in the Area, it is reasonable to anticipate a similarly cautious position in the implementation phase.

In doing so, the Union must in any case respect a clear threshold, namely the provisions of the Regulations themselves, in accordance with Art. 209 of the Convention. As already noted, paragraph (1) of this provision links Part XI and Part XII by stating that "[i]nternational rules, regulations and procedures shall be established in accordance with Part XI to prevent, reduce and control pollution of the marine environment from activities in the Area". Paragraph (2) governs the implementation of this obligation by requiring that "States shall adopt laws and regulations to prevent, reduce and control pollution of the marine environment from activities in the Area undertaken by vessels, installations, structures and other devices flying their flag or of their registry or operating under their authority, as the case may be". The second sentence of paragraph (2) then establishes the applicable threshold, providing that "[t]he requirements of such laws and regulations shall be no less effective than the international rules, regulations and procedures referred to in paragraph 1". In other words, when implementing the environmental requirements of the Regulations, the Union cannot adopt standards that are less stringent than those adopted by the Authority.

While the Mining Code thus represents the minimum level of protection that must be respected, the wording of Art. 209 also appears to allow for the adoption of higher environmental standards. This interpretation seems to be shared by ISA member States, as evidenced by the current version of the draft Regulations on Exploitation (the 'Revised Consolidated Text'), which explicitly permits such possibility.

Specifically, reference may be made to draft regulation 44, paragraph (3), which provides in its current wording that "[n]othing in these Regulations shall be interpreted as preventing States from applying environmental or other laws and regulations, or the Enterprise and Contractors from taking measures that are more stringent than those in the rules, regulations and procedures of the Authority relating to the protection of the Marine Environment" [185]. While the wording may still be revised, the inclusion and general

[185] The text provided here is the clean wording of the paragraph based on the suggested inclusions and deletions of the Revised Consolidated Text.

substance of the provision appear to enjoy broad support among delegations, and no proposals for its removal have thus far been advanced[186].

As such, the Union does have the power to adopt environmental standards that are more stringent than those contained in the Mining Code on exploitation. This would also be consistent with the objectives of the Union's environmental policy under Art. 191(1) and (2) TFEU, including the obligation to "aim at a high level of protection", based on "the precautionary principle and on the principles that preventive action should be taken, that environmental damage should as a priority be rectified at source and that the polluter should pay". From a procedural perspective, such action would require the ordinary legislative procedure under Art. 192(1) TFEU, as the matter does not fall within the scope of paragraph (2), which allows for a special procedure involving only the Council.

A further question is whether the Union may endorse a moratorium on activities in the Area by exercising its environmental competence. In practice, this could occur in two ways: either by formally adopting a legal act explicitly establishing a moratorium, or by setting environmental standards so stringent as to render such activities effectively impossible.

From the standpoint of international law, neither approach appears to be precluded. As previously mentioned, the Convention requires respect for the minimum standards adopted by the Authority but does not impose an obligation to limit national standards to those levels, nor does it compel States to sponsor or conduct activities in the Area. Accordingly, provided that the Authority's standards are met, the choice of whether to adopt more stringent environmental requirements or whether to engage in or sponsor activities remains entirely at the discretion of each member of the Authority.

At the internal level, the matter might be more complex. A moratorium applicable to EU member States would arguably also rely on Art. 191 TFEU as its legal basis, as it concerns the protection of the environment and the living resources of the Area and the high seas[187]. Therefore, both the formal adoption of a moratorium and the imposition of *de facto*

[186] This can be inferred from the document compiling all the proposals made by States and observers since the first version of the Consolidated Text was issued, available at the following link: https://www.isa-.org.jm/wp-content/uploads/2024/12/Compilation_of_Proposals.pdf. Looking at draft regulation 44(3), it can be noted that no request for the deletion of the paragraph was made.

[187] In this respect, it is reminded – as already mentioned in Chapter II, paragraph 4.1. – that the exclusive competence of the Union on the conservation of marine biological resources relates to the common fisheries policy and would therefore not be a suitable legal basis in the present case.

prohibitive environmental requirements fall under the scope of Arts. 191 and 192 TFEU and can thus be addressed jointly.

As noted, Art. 192(1) TFEU prescribes the ordinary legislative procedure, requiring the joint approval of both the Parliament and the Council. Given that the Parliament has already adopted several resolutions (for which reference is made to the previous paragraph) supporting a moratorium, it is reasonable to expect that it would approve a legislative proposal introducing it – either explicitly or implicitly – for member States. In contrast, the Council would need to adopt such a proposal by a qualified majority, as required under Art. 16(3) TEU, which provides that "[t]he Council shall act by a qualified majority except where the Treaties provide otherwise". Pursuant to Art. 16(4) TEU, a qualified majority means "at least 55 % of the members of the Council, comprising at least fifteen of them and representing Member States comprising at least 65 % of the population of the Union".

In the current context, there is considerable uncertainty as to whether such measures would obtain the required qualified majority. Several EU member States have expressed support for a moratorium or a precautionary pause – namely (in alphabetical order) Austria, Croatia, Cyprus, Denmark, Finland, France, Germany, Greece, Ireland, Latvia, Luxembourg, Malta, Portugal, Slovenia, Spain, and Sweden[188] – that is, more than the fifteen States required to meet the first condition under Art. 16(4) TEU. However, based on Eurostat data on the population of the European Union[189], these States represent only 59.7% of the total population, thus falling short of the 65% threshold[190].

Naturally, this projection is highly hypothetical and rather reductive. It assumes, for instance, that all the States supporting a moratorium would vote in favour within the Council, while the others would either vote against or abstain – bearing in mind that abstentions are counted as votes against[191]. In practice, the outcome may be more

[188] See the webpage of the Deep Sea Conservation Coalition (DSCC, a non-governmental organisation) on the moratorium, available at the following link: https://deep-sea-conservation.org/solutions/no-deep-sea-mining/momentum-for-a-moratorium/governments-and-parliamentarians/.
[189] Available at the following link: https://ec.europa.eu/eurostat/databrowser/view/TPS00001/default-/table?lang=en.
[190] The estimate was made on the website https://euvote.eu/, which using the Eurostat data allows to assess whether the majority in the Council is reached.
[191] See the webpage of the EU Council dedicated to the voting system, available at the following link: https://www.consilium.europa.eu/en/council-eu/voting-system/qualified-majority/, according to which "[a]n abstention under qualified majority voting counts as a vote against. Abstention is not the same as not participating in the vote. Any member can abstain at any time".

nuanced: some additional States might ultimately support the measure, and others might opt not to participate in the vote at all. This latter case, which differs from abstention, would trigger the application of Art. 238(3)(a) TFEU rather than Art. 16(4). According to that provision, "where, under the Treaties, not all the members of the Council participate in voting, a qualified majority shall be defined as follows: (a) A qualified majority shall be defined as at least 55 % of the members of the Council representing the participating Member States, comprising at least 65 % of the population of these States". Under this scenario, it would be sufficient for one or more States representing over 5.3% of the EU population – for example, Italy, or Romania and the Netherlands combined – to tip the balance in favour of the measure[192].

The purpose of this projection is not to exhaustively analyse all possible voting configurations in the Council, but rather to underscore the high level of uncertainty surrounding the outcome. It also helps to illustrate the potentially divisive nature of a measure designed to endorse – *de jure* or *de facto* – a moratorium, which could give rise to challenges, including legal action, from those States favouring the commencement of exploitation activities.

Given the speculative nature of this discussion for the time being, the matter will not be addressed in the following Chapter on judicial remedies and conflicting jurisdictions. Nonetheless, it may be briefly noted that those member States could seek the annulment of such a Union act before the ECJ under Art. 263 TFEU, on the basis that the Regulations of the Authority are already intended to comply with Art. 145 UNCLOS – and thereby to ensure "effective protection for the marine environment from harmful effects which may arise" from activities in the Area. Consequently, the adoption of measures by the Union that go significantly beyond those international rules could arguably be challenged as a breach of the principle of proportionality[193].

Another important aspect of this discussion concerns the willingness of EU-based companies to comply with a moratorium on exploitation activities. As noted in Chapter I, paragraph 3.2, each private entity intending to operate in the Area must be sponsored by

[192] In such case, it can also be noted that the provisions on the 'blocking minority' the purposes of Art. 238(3)(a)(second sentence) TFEU would have no relevance. The provision states that "[a] blocking minority must include at least the minimum number of Council members representing more than 35 % of the population of the participating Member States, plus one member, failing which the qualified majority shall be deemed attained".

[193] For which see Chapter II, paragraph 2.1.1.3.

the State of its nationality or by the State under whose jurisdiction or control it falls. That analysis also highlighted how the notion of 'effective control' has traditionally been interpreted, the “new models of business arrangements” that private entities have developed on this basis, and the ongoing debate within the Council of the Authority about strengthening the link between States and sponsored entities. If the current interpretation of effective control remains unchanged in the final Regulations, EU companies might still be able to engage indirectly in activities in the Area, without carrying them out directly.

As previously discussed, this could be done, for instance, by establishing full control over a company based in a non-EU State that conducts such activities. Alternatively, companies might form joint ventures to support activities undertaken by a third entity, this model being for instance currently employed by the Belgian company GSR.

While these scenarios remain subject to the outcome of current negotiations within the Council of the Authority regarding the interpretation of effective control, the implications of a Union-level prohibition on participation in exploitation activities should not be underestimated. In particular, overly restrictive rules may have the unintended effect of encouraging *forum shopping*, thereby weakening the Union’s capacity to monitor or influence such operations and increasing the risk of circumvention or abuse of the legal framework.

A final point worth noting before moving forward is that the Union’s implementation of the Mining Code’s environmental provisions does not preclude individual member States from adopting more stringent requirements applicable to entities they sponsor. This possibility is recognised both in international law and in EU law.

At the international level, the Convention expressly allows sponsoring States to impose stricter environmental requirements than those adopted by the Authority. Art. 21(3) of Annex III to UNCLOS provides that: “[n]o State Party may impose conditions on a contractor that are inconsistent with Part XI. However, the application by a State Party to contractors sponsored by it, or to ships flying its flag, of environmental or other laws and regulations more stringent than those in the rules, regulations and procedures of the Authority adopted pursuant to article 17, paragraph 2(f), of this Annex shall not be deemed inconsistent with Part XI”[194]. While this provision does not apply to the Union –

[194] As also recognised by the ITLOS in its 2011 advisory opinion (see Chapter I, footnote 6), at paragraph 240 [i]t is implicit in this provision that sponsoring States may apply to the contractors they sponsor more stringent standards as far as the protection of the marine environment is concerned”.

given that it is not, strictly speaking, a sponsoring State – it has already been noted that both Art. 209 UNCLOS and draft regulation 44(3) of the Revised Consolidated Text provide for an equivalent possibility at the level of international organisations. Nevertheless, these provisions do not diminish the central role that the sponsoring State continues to play in imposing additional environmental obligations on its sponsored contractors.

At the EU level, this possibility is further confirmed by Art. 193 TFEU, according to which "[t]he protective measures adopted pursuant to Article 192 shall not prevent any Member State from maintaining or introducing more stringent protective measures". These must, however, be compatible with the Treaties and must be notified to the Commission.

4.2. Exclusive competences: customs and the Common Commercial Policy

In the context of this Chapter, it has already been noted that the Union's exclusive competence over the Common Commercial Policy (CCP) mighr play a role in ensuring compliance with the obligations laid down in Art. 137(2) and (3) of the Convention. In that discussion, customs and duties were not considered, since the imposition of duties on minerals extracted in breach of Part XI would still presuppose their importation – an outcome inconsistent with the prohibition set forth in Art. 137(3).

In this paragraph, the two competences – CCP and customs – will be addressed jointly, as they are subject to the same constraints under UNCLOS and the 1994 Agreement. Their analysis will also consider the Union's position on activities in the Area, to assess whether these competences could be used to support a moratorium on deep seabed mining.

As a preliminary remark, the current version of the draft Regulations scarcely addresses these competences. The only relevant provision is the aforementioned draft regulation 29ter on certification of origin. On a strict reading, this would imply that the Union's sole obligation under the Mining Code is to recognise such certifications as issued by the Authority. However, this interpretation would be overly simplistic and fail to account for the origins, scope, and implications of the provision.

The drafting history of draft regulation 29ter provides important context. The proposal to include a certification mechanism originated from a submission by the Kingdom of

Belgium during the first part of the 27th Session[195]. The rationale was to give effect to the obligation in Section 6(1)(d) of the Annex to the 1994 Agreement, which more broadly prohibits discrimination between minerals recovered from the Area and those from other origins. Specifically, it mandates that "[t]here shall be no discrimination between minerals derived from the Area and from other sources. There shall be no preferential access to markets for such minerals or for imports of commodities produced from such minerals, in particular: (i) By the use of tariff or non-tariff barriers; and (ii) Given by States Parties to such minerals or commodities produced by their state enterprises or by natural or juridical persons which possess their nationality or are controlled by them or their nationals".

Although Section 6(1)(d) does not explicitly mention certification of origin, Belgium's submission explained that "[s]ometimes, a certificate of origin is required by the customs authorities of third countries when importing", and that certification would serve as a mechanism to ensure compliance with the non-discrimination obligation[196].

Consequently, in implementing draft regulation 29ter and the associated technical Standards that the Authority is expected to adopt, the Union is bound by Section 6(1)(d) of the 1994 Agreement. This significantly limits the Union's margin of discretion. In particular, Section 6(1)(d)(i) effectively precludes the Union from adopting tariff or non-tariff measures that would discriminate against minerals lawfully extracted in the Area in accordance with Part XI and the Authority's rules[197]. This includes both a general prohibition on the importation of such resources from non-EU States and the imposition of higher tariffs compared to land-based equivalents.

For the sake of completeness, it should be acknowledged that the Union could, in principle, impose very high duties on unprocessed materials extracted from the Area – such as polymetallic nodules. The Union's current tariff classification system, updated

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[195] Document ISBA/27/C/13.
[196] Another way identified by Belgium in the document referred to in the previous footnote was to "provide for some kind of extraterritorial competences for the sponsoring State, allowing it to claim that the minerals extracted by its sponsored contractor originate from the sponsoring State. In this case, the sponsoring State is responsible for providing the certificates of origin, and the minerals are considered coming from the internal market in that sponsoring State and in the countries that work under single market rules with that country".
[197] It can also be noted that – based on the analysis carried out in paragraph 2.1.2. – such prohibition would in any case be likely to be inconsistent with the provisions of the GATT.

annually by the Commission[198], does not currently assign customs duties to such materials, due to the absence of comparable land-based products. Therefore, imposing high duties on 'polymetallic nodules' would in theory not create a discrimination with a similar land-based product, simply because the latter does not exist. However, in practice, such a measure would arguably be unworkable, since the composition of polymetallic nodules is highly variable also depending on the specific part of the Area in which they are extracted[199]. As such, it would be nearly impossible to classify all the resource categories covered by the Regulations for tariff purposes.

In conclusion, although the Union possesses exclusive competence over customs and the Common Commercial Policy with regard to activities in the Area, this competence is severely circumscribed by the applicable legal framework. It arguably amounts to little more than the obligation to accept, without restriction, the certification of origin issued by the Authority in accordance with the Mining Code.

5. CONCLUSIONS

The analysis carried out in the previous paragraphs has shown that the European Union, as a Party to UNCLOS and a member of the International Seabed Authority, is directly involved in the implementation of Part XI. While its competences in this field are limited, they remain significant, particularly in relation to environmental protection, customs, and the Common Commercial Policy.

The Union's participation in the legal regime of Part XI does not, however, come without obligations. Pursuant to Art. 137(3) of the Convention, the Union is under a legal duty to take measures to ensure that activities in the Area are conducted in accordance with Part XI. One potential means of discharging this obligation has been identified – namely, a ban on resources extracted in contravention of the Convention. Nevertheless, this represents only one among several possible avenues to achieve the overarching objective

[198] Lastly through the Commission Implementing Regulation (EU) 2024/2522 of 23 September 2024 amending Annex I to Council Regulation (EEC) No 2658/87 on the tariff and statistical nomenclature and on the Common Customs Tariff (Document 32024R2522).

[199] See T. KUHN, A. WEGORZEWSKI, C. RÜHLEMANN, A. VINK, *Composition, Formation, and Occurrence of Polymetallic Nodules*, in R. SHARMA, *Deep-Sea Mining: Resource Potential, Technical and Environmental Considerations* (Springer International Publishing AG, 2017, corrected publication 2018), 23-63, at 29-39.

of ensuring compliance with Part XI and upholding the principle of the common heritage of humankind.

At the same time, the Union's role in implementing the rules, regulations, and procedures of the Authority is subject to clear limitations. The same commitment to multilateralism that prohibits the recognition of unilateral claims in the Area also requires the Union to act within the confines of the legal regime established by the Convention. Accordingly, unilateral measures – such as refusing to import minerals extracted in conformity with the Authority's rules – would likewise be inconsistent with UNCLOS. The discussion of these issues is also relevant for the analysis to be undertaken in the next Chapter, which will address judicial remedies and conflicting jurisdictions arising from the Union's participation in the regime of Part XI.

In addition to the international dimension, this Chapter has sought to bring to light the internal EU aspects of the Union's implementation of its obligations under the Convention and the rules of the Authority. This perspective is essential and cannot be underestimated: since the action of the Union is also bound by the determinations that member States may make, the latter's role especially within the EU Council might arguably be crucial in shaping the position of the Union.

CHAPTER IV
DISPUTE SETTLEMENT UNDER PART XI OF THE CONVENTION AND CONFLICTING JURISDICTIONS

1. INTRODUCTION

In the previous Chapter, the potential role of the Union in implementing both the provisions of the Convention and the rules of the Authority was analysed. This Chapter will focus instead on the relationship between the dispute settlement provisions under Section 5 of Part XI of the Convention (Art. 186 to 191) and the provisions of the Treaties governing the EU system of judicial remedies.

Several challenges must be acknowledged at the outset. First, the provisions of Section 5 of Part XI are exceptional compared to the general dispute settlement rules set out in Part XV, as they apply exclusively to disputes concerning Part XI[1]. To date, they have been invoked only once, when the Authority requested the 2011 advisory opinion from the Seabed Disputes Chamber (SDC) of ITLOS[2], pursuant to Article 191 of the Convention. In other words, only the provision governing the advisory jurisdiction of the Tribunal under Part XI has been applied in practice, while those concerning contentious jurisdiction remain untested. As a result, case-law and legal scholarship on Section 5 of Part XI are almost entirely lacking.

A second difficulty arises from the similarly limited practice concerning the relationship between the general dispute settlement provisions of Part XV and the EU Treaties governing the jurisdiction and functions of the European Court of Justice (ECJ). This issue will be addressed in the following paragraph, in order to provide a basis the analysis on the relationship with Part XI.

In light of these challenges, the methodology adopted in this Chapter differs slightly from that used previously. While, as mentioned, the next paragraph will examine the current relationship between Part XV and the EU system of judicial remedies, a similar analysis cannot be undertaken in relation to Section 5 of Part XI due to its largely theoretical

[1] At the same time, based on Art. 186 and 285 UNCLOS, for aspects that are not regulated by Section 5 of Part XI the general provisions on dispute settlement contained in Part XV apply.
[2] See Chapter I, footnote 6.

nature. Accordingly, the remainder of the Chapter will explore the most relevant provisions of the Convention on dispute settlement as they relate to activities in the Area. In doing so, it will analyse potential consequences and issues of interest for the European Union, with the understanding that such situations are likely to arise only once the rules of the Authority have been adopted and the Union has acquired a more comprehensive competence over matters governed by Part XI.

2. The European Union and Part XV of the Convention

As mentioned above, the general provisions of the Convention on dispute settlement are contained in Part XV, encompassing Art. 279 to 299. These provisions also apply *mutatis mutandis* to Part XI, as established by Art. 285, although with due regard to the fact that Section 5 of Part XI contains more specific rules that operate as *lex specialis* (and which will be further examined below).

As the Union is a Party to the Convention, these provisions apply to it by virtue of Article 7(2) of Annex IX, which states that "Part XV applies *mutatis mutandis* to any dispute between Parties to this Convention, one or more of which are international organizations." Notably, there are certain differences in how Part XV applies to States as compared to the Union. For example, Art. 287 allows States Parties to designate the International Court of Justice (ICJ) as a *forum* for settling disputes concerning the interpretation or application of the Convention. However, as only States have *ius standi* before the ICJ, Article 7(3) of Annex IX provides for an *ad hoc* procedure where an international organization is among the parties to the dispute[3].

Apart from such distinctions, Part XV applies in full to the Union, provided the subject matter of the dispute falls within its competence, as defined in the 1998 Declaration of Competence. The application of Part XV to the EU can be analysed from two perspectives. First, there is the international dimension, concerning how the Convention's provisions apply *vis-à-vis* third States. Second, from an internal perspective, the analysis will consider how the provisions of Part XV may affect the EU's system of judicial

[3] Art 7(3) of Annex IX provides that "[w]hen an international organization and one or more of its member States are joint parties to a dispute, or parties in the same interest, the organization shall be deemed to have accepted the same procedures for the settlement of disputes as the member States; when, however, a member State has chosen only the International Court of Justice under article 287, the organization and the member State concerned shall be deemed to have accepted arbitration in accordance with Annex VII, unless the parties to the dispute otherwise agree".

remedies under the Treaties, as well as the institutional division of competence regarding representation of the Union before the Tribunal.

2.1. The international dimension

Under the international perspective, it must be first underlined that no case brought against the Union[4] under the dispute settlement provisions of the Convention has ever reached the merits phase, partly due to the EU's consistent commitment to resolving disputes through diplomacy rather than litigation[5]. As a result, the observations that can be drawn from the two existing cases remain extremely limited.

The first relevant case was brought against the then European Community by the Republic of Chile in 2000, concerning the *Conservation and Sustainable Exploitation of Swordfish Stocks in the South-Eastern Pacific Ocean*[6]. The proceedings originated from a complaint by the Community against Chile before the WTO dispute settlement bodies[7], claiming that Chile's prohibition on the unloading of swordfish in its ports violated Art. V and XI of GATT. Chile, on the other hand, argued that the Convention – and, in that instance, the 1995 Fish Stocks Implementation Agreement[8] – constituted *lex specialis vis-à-vis* GATT[9]. Accordingly, it instituted proceedings against the EC by establishing an Arbitral Tribunal under Art. 287(3) of the Convention. The Parties later agreed, by means of a Special Agreement, to defer the issue to a Special Chamber of the ITLOS constituted under Art. 15(2) of its Statute[10].

As noted, the Tribunal never issued a judgment, as the proceedings were ultimately discontinued after remaining pending for nine years, at the Parties' joint request[11]. Beyond

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[4] To date, the Union has appeared as defendant in the only two cases in which it was involved (and which will be analysed in the following lines). Quite the contrary, it has never brought an action against another Party.
[5] See R. LONG, *Law of the Sea Dispute Settlement and the European Union*, in J. BARRETT, R. BARNES (eds.), cit., 417-455, at 436.
[6] International Tribunal for the Law of the Sea, *Case concerning the Conservation and Sustainable Exploitation of Swordfish Stocks in the South-Eastern Pacific Ocean* (Chile/European Union), Case no 7, documents of the case available at the following link: https://www.itlos.org/en/main/cases/list-of-cases/case-no-7/.
[7] *Chile – Measures affecting the Transit and Importing of Swordfish*, procedure DS193, available at the following link: https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds193_e.htm.
[8] See Chapter II, footnote 119.
[9] P-T. STOLL, S. VÖNEKY. *The Swordfish Case: Law of the Sea v. Trade* (2002) 62(1-2) *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht (ZaöRV)* 21-35, at 22.
[10] See the Notification of Special Agreement by the Republic of Chile, available at the following link: https://www.itlos.org/fileadmin/itlos/documents/cases/case_no_7/C7_Notification.pdf.
[11] ITLOS Case no 7, order of 16 December 2009, available on the webpage referred to in footnote 6.

scholarly commentary – which, among other things, commended the Tribunal's restraint in allowing the Parties to resolve the matter through negotiations[12] – the principal observation drawn from the case concerned the need to avoid parallel proceedings in different *fora*, which might lead to conflicting decisions[13]. As will be discussed further below (paragraph 3.3), the significance of this finding is more limited in the context of dispute settlement under Part XI, as overlapping proceedings under both the WTO and the Convention are expressly excluded by Section 6(1)(f) of the Annex to the 1994 Agreement. More generally, the case demonstrated the Union's ability to appear before the Tribunal under UNCLOS dispute settlement mechanisms in matters falling within its competence.

The second case – the so-called *Atlanto-Scandian Herring Arbitration*[14] – was brought against the EU by Denmark in representation of the Faroe Islands before an Arbitral Tribunal established under Annex VII to the Convention. The dispute concerned fisheries measures adopted by the Union, which the Faroe Islands alleged violated both the Convention and GATT[15]. As such, parallel proceedings were likewise instituted under the WTO dispute settlement provisions[16].

As with case between Chile and the European Community, the matter could have clarified the relationship between the Convention and GATT, and the means of avoiding conflicting decisions from parallel proceedings. However, the arbitration concluded following a settlement between the Parties, and no decision was rendered. As a consequence, any analysis must be limited to a few mainly procedural points. First, it is noteworthy that Denmark acted on behalf of the Faroe Islands, which are not subject to the Treaties under Art. 355(5)(a) TFEU[17] and therefore fall outside the scope of EU law.

[12] R. LONG, *Law of the Sea Dispute Settlement and the European Union*, cit., at 438.
[13] D. NELSON, *The International Tribunal for the Law of the Sea* (Sensitization Seminar on the Work of the International Seabed Authority, 28-30 March 2011), available at the following link: https://www.isa-.org.jm/wp-content/uploads/2022/12/ITLOS-DNelson.pdf; see in particular 11-12.
[14] Permanent Court of Arbitration (administering institution), *The Atlanto-Scandian Herring Arbitration (The Kingdom of Denmark in respect of the Faroe Islands v. The European Union)*, PCA Case Nº 2013-30, documents available at the following link: https://pca-cpa.org/en/cases/25/.
[15] For a full overview of the provisions of the allegedly violated GATT provisions, see Y. ISHIKAWA, *The EU-Faroe Islands Herring Stock Dispute at the WTO: the Environmental Justification* (2014) *ASIL Insights*, available at the following link: https://www.asil.org/insights/volume/18/issue/4/eu-faroe-islands-herring-stock-dispute-wto-environmental-justification.
[16] *European Union – Measures on Atlanto-Scandian Herring*, procedure no DS469, documents available at the following link: https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds469_e.htm.
[17] According to which "Notwithstanding Article 52 of the Treaty on European Union and paragraphs 1 to 4 of this Article: (a) the Treaties shall not apply to the Faeroe Islands". However, Denmark is still responsible for the external relations of the Islands. See E.J. PINEDA, *The European Union and the Pacific Settlement of Law of the Sea Disputes*, in G.A. OANTA (ed.), *The Presence of International Organizations in the*

Accordingly, the findings of the ECJ in the *Mox Plant* case (discussed *infra* in paragraph 2.2.) could not be extended to the present case.

Second, the case put into practice the mechanism under Art. 7(3) of Annex IX to the Convention, referenced at the beginning of paragraph 2, since – upon ratifying the Convention – Denmark selected the ICJ as the *forum* for dispute settlement[18]. As the EU does not have *ius standi* before the ICJ, Art. 7(3) of Annex IX required both Denmark and the EU to be deemed to have accepted the arbitration procedure under Annex VII, to which Denmark was consequently obliged to turn.

Turning to the internal dimension that will be analysed in the next paragraph, two aspects are particularly relevant. The first is the current relationship between the provisions of Part XV of the Convention and the EU Treaties on the jurisdiction of the ECJ, especially as elaborated in the Court's findings in the *Mox Plant* case. In this regard, the possibility for individuals to invoke a conflict between EU law and the Convention will also be addressed, based on the ECJ's judgment in the *Intertanko*[19] case. The second issue concerns the horizontal division of competence among the EU institutions, with a particularly prominent role played by the Commission.

2.2. The EU dimension

Starting from the first aspect, it is worth noting that no doubts have arisen regarding the exclusive jurisdiction of the ECJ over provisions of a mixed agreement (such as the Convention) falling within the Union's exclusive competence[20]. Similarly, it was well understood that the Court could not extend its jurisdiction to provisions falling under the exclusive competence of the member States[21]. What the Court's case-law had not clarified

Evolution of the International Law of the Sea – Thirty Years since the Entry into Force of UNCLOS (Brill | Nijhoff, 2025), 314-336, at 333.

[18] The declaration is available at the following link: https://treaties.un.org/pages/ViewDetailsIII.aspx-?src=TREATY&mtdsg_no=XXI-6&chapter=21&Temp=mtdsg3&clang=_en#EndDec.

[19] See below, footnote 36.

[20] See J. HELISKOSKI, *Mixed Agreements as a Technique for Organizing the International Relations of the European Community and its Member States* (*The Erik Castrén Institute Monographs on International Law and Human Rights*, Vol. 2, Brill | Nijhoff, 2002), at 46.

[21] See *ibidem*, at 55. See also A.D. CASTELEIRO, *The Exclusive Jurisdiction of the Court and International Courts: Commission v Ireland (Mox Plant)*, in G. BUTLER, R.A. WESSEL (eds.) *EU External Relations Law: The Cases in Context* (Oxford, Hart Publishing, 2022), 502-510, at 505, who interprets the judgement of the ECJ to the *Demirel* Case as implying that "the Court acknowledged that its jurisdiction did not cover provisions whereby Member States have entered into commitments in the exercise of their own powers". See European Court of Justice, Judgment of 30 September 1987, Case 12/86, *Meryem Demirel v Stadt Schwäbisch Gmünd* ('*Demirel*'), Document 61986CJ0012. Of the same opinion is E. NEFRAMI, *Mixed*

prior to the *Mox Plant* case, however, was whether its jurisdiction could extend to provisions of mixed agreements falling within shared competence, where neither the Union nor the member States had exercised such competence.

The factual background of the case is well-known and will therefore be recalled only briefly[22]. The dispute originated in 1992, when the Republic of Ireland raised concerns about the potential environmental impact of a mixed oxide fuel (MOX) reprocessing plant constructed at Sellafield, on the coast of the United Kingdom. Ireland alleged that discharges from the plant into the Irish Sea could pose risks to the marine environment and public health. On this basis, it argued that the United Kingdom had failed to comply with its international obligations concerning environmental protection and information-sharing.

Accordingly, in June 2001 Ireland initiated proceedings under the OSPAR Convention[23] before an Arbitral Tribunal[24]. At the same time, it requested provisional measures from the ITLOS under the Convention[25], and subsequently initiated arbitration under Annex VII of UNCLOS[26]. The encroachment with EU law arose in the latter two proceedings, in light of the EU's status as a Party to the Convention and its shared competence in environmental matters. The European Commission therefore started an infringement procedure against Ireland before the ECJ[27], alleging that Ireland had breached Art. 292 TEC by instituting dispute settlement proceedings under the Convention to resolve a dispute with another member State.

Agreements as a Source of European Union Law, in E. CANNIZZARO, P. PALCHETTI, R.A. WESSEL, *International Law as Law of the European Union* (*Studies in EU External Relations*, Vol. 5, Brill | Nijhoff, 2012) 325-349, at 326.

[22] For a full overview of the factual background to the case, reference is made to R. CHURCHILL, J. SCOTT, *The Mox Plant Litigation: The First Half-Life* (2004) 53(3) *International and Comparative Law Quarterly*, 643-676.

[23] Convention for the protection of the marine environment of the North-East Atlantic (22 September 1992, in force 25 March 1998) 2354 UNTS 67.

[24] Permanent Court of Arbitration (administering institution), *OSPAR Arbitration (Ireland v. United Kingdom)*, PCA Case no 2001-03, documents available at the following link: https://pca-cpa.org/en/-cases/34/.

[25] International Tribunal for the Law of the Sea, *The MOX Plant Case (Ireland v. United Kingdom)*, Provisional Measures, documents of the case available at the following link: https://www.itlos.org/en/-main/cases/list-of-cases/case-no-10/.

[26] Permanent Court of Arbitration (administering institution), *MOX Plant Case (Ireland v. United Kingdom)*, PCA Case 2002-01, documents of the case available at the following link: https://pca-cpa.org/en/cases/100/.

[27] See Chapter II, footnote 184.

A number of findings from the Court's judgment have already been examined in Chapters II and III. In the present context, further considerations can be made to inform the analysis in the following paragraphs.

First, a complete overlap between the jurisdiction of the Arbitral Tribunal and the ECJ was avoided due to the virtuous dialogue between the two courts. In particular, the Arbitral Tribunal prudently suspended the Annex VII proceedings "bearing in mind considerations of mutual respect and comity which should prevail between judicial institutions both of which may be called upon to determine rights and obligations as between two States"[28]. Arguably, similar considerations should apply in the context of Part XI, in the event of disputes between EU member States or between the Union and one or more of its members. As will be discussed in the next paragraphs, situations may arise where international tribunals must exercise a certain degree of self-restraint to avoid encroaching upon the jurisdiction of the ECJ.

Second, in terms of legal principles established in the *Mox Plant* judgment, the Court held that the provisions invoked by Ireland concerning the protection of the marine environment formed an integral part of the EU legal system, given the existence of several legal instruments adopted by the Union, as listed in the Appendix to the 1998 Declaration of competence[29]. On this basis, the Court found that it had exclusive jurisdiction over disputes relating to Convention provisions falling under shared competence when covered by EU legislation[30]. Accordingly, the Court concluded that Ireland, by submitting a

[28] Arbitral Tribunal, *MOX Plant Case (Ireland v. United Kingdom)*, PCA Case 2002-01 (see footnote 26), order no 3 of 24 June 2003, at paragraph 28.
[29] In line with the text of the Declaration, the Court considered that "a finding that there has been a transfer to the Community of areas of shared competence is contingent on the existence of Community rules within the areas covered by the Convention provisions in issue, irrespective of what may otherwise be the scope and nature of those rules". As such the Court examined whether Union acts existed in the specific field forming the subject matter of the dispute, the Appendix to the Declaration being considered "while not exhaustive, […] a useful reference base" for this purpose (paragraph 109 of the judgment).
[30] The reasoning of the Court also relied on the role of Art. 282 UNCLOS in order to avoid inconsistencies between the dispute settlement mechanisms provided for by the Convention and the provisions of the Treaty on the scope of the jurisdiction of the ECJ. Art. 282 UNCLOS provides that "[i]f the States Parties which are parties to a dispute concerning the interpretation or application of this Convention have agreed, through a general, regional or bilateral agreement or otherwise, that such dispute shall, at the request of any party to the dispute, be submitted to a procedure that entails a binding decision, that procedure shall apply in lieu of the procedures provided for in this Part, unless the parties to the dispute otherwise agree". The Court interpreted such provision as implying that "the system for the resolution of disputes set out in the EC Treaty must in principle take precedence over that contained in Part XV of the Convention" (ECJ, *Mox Plant* case, paragraph 125 of the judgement).

dispute involving such provisions to an Arbitral Tribunal constituted under Annex VII of the Convention, had failed to comply with Art. 292 TFEU[31].

The findings of the *Mox Plant* case are indeed relevant for the interpretation of Part XI. However, an important distinction must be drawn. Despite the link established by Art. 209 between Parts XI and XII of the Convention – and the resulting Union competence to regulate the environmental aspects of activities in the Area – no EU rules currently exist specifically addressing the environmental regulation of deep seabed mining activities in the Area. This reflects, among other things, the current absence of adopted ISA Regulations on Exploitation. Nor does any provision exist that could, by interpretation, extend existing Union rules to activities on the seabed under national jurisdiction or the sovereign rights of member States[32]. While general EU environmental law may still apply in principle[33], its territorial scope is typically limited to the Union's jurisdiction (including the EEZ and continental shelves of member States)[34], and may thus not extend to the Area[35].

Therefore, the considerations that will follow must take into account this element: in principle, the ECJ's exclusive jurisdiction over disputes in this field depends on the existence of EU rules applicable to activities in the Area and to the public or private entities engaged in them.

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[31] As noted by R. VIRZO, *Il Regolamento delle Controversie nel Diritto del Mare: Rapporti tra Procedimenti* (CEDAM, 2008), at 180-181, in cases where there is a doubt on whether the invoked provisions fall under the competence of the Union, it cannot be excluded that the prohibition provided for by Art. 292 TFEU does not operate. This would also seem to be confirmed by the previous case law of the ECJ, in particular in case *Commission v France* (European Court of Justice, Judgment of the Court of 7 October 2004, Case C-243/03, *Commission of the European Communities v French Republic* ('*Commission v France*').

[32] See P.A. SINGH, V. TASSIN CAMPANELLA, F. MAES, *The European Union and Seabed Mining*, in V. TASSIN CAMPANELLA (ed.), *Routledge Handbook of Seabed Mining and the Law of the Sea* (Routledge, 2024) 290-313, at 293, according to which "[g]iven the absence of specific EU legislation on the matter, seabed mining activities on the continental shelf (including the extended continental shelf) fall within the competence of the [member States]".

[33] For an overview of the general provisions of EU environmental law applying to the seabed under the national jurisdiction or subject to sovereign rights of member States, see F. ARNESEN, R. GREAVES, A. POZDNAKOVA, *European Union Law and the Seabed*, in C. BANET (ed.), *The law of the seabed: access, uses, and protection of seabed resources* (Brill | Nijhoff, 2020), 315-334, at 323-332.

[34] European Court of Justice, Judgment of the Court of 17 January 2012, Case C-347/10, *A. Salemink v Raad van bestuur van het Uitvoeringsinstituut werknemersverzekeringen* ('*Salemink*'), Document 62010CJ0347. See in particular paragraph 35, according to which "[s]ince a Member State has sovereignty over the continental shelf adjacent to it — albeit functional and limited sovereignty (see, to that effect, Case C-111/05 Aktiebolaget NN [2007] ECR I-2697, paragraph 59) — work carried out on fixed or floating installations positioned on the continental shelf, in the context of the prospecting and/or exploitation of natural resources, is to be regarded as work carried out in the territory of that State for the purposes of applying EU law".

[35] P.A. SINGH, V. TASSIN CAMPANELLA, F. MAES, *The European Union and Seabed Mining*, cit., at 297.

Before turning to the issue of the horizontal distribution of competence among the different EU institutions, some brief remarks must be made on the (in)ability of private individuals to invoke the noncompliance of EU law with provisions of the Convention, in line with the findings of the ECJ in the *Intertanko* case[36]. In that judgment, the Court held that the Convention "does not establish rules intended to apply directly and immediately to individuals and to confer upon them rights or freedoms capable of being relied upon against States", and that, as such, "the nature and the broad logic of UNCLOS prevent the Court from being able to assess the validity of a Community measure in the light of that Convention" [37]. This position was shortly thereafter reaffirmed in the *Commune de Mesquer* case[38].

Unlike in the case of Part XV, however, the relevance of the *Intertanko* findings is overall limited with respect to the dispute settlement mechanisms provided for in Part XI of the Convention. The reason – also expressly acknowledged by the Court in *Intertanko*[39] – lies in the distinctive nature of the dispute settlement provisions under that Part, which explicitly envisage, in Art. 187(c), (d), and (e), a role (albeit limited) for individuals, namely ISA private contractors or prospective contractors. These entities may therefore arguably be entitled to request an interpretation by the ECJ of provisions of EU law implementing those of Part XI of the Convention, or the relevant rules of the Authority.

Turning now to the competence of EU institutions regarding the dispute settlement provisions of UNCLOS, it must first be highlighted that Council Decision 98/392/EC (authorising the ratification of the Convention)[40] does not explicitly designate the competent institution to represent the Union before the ITLOS. In this respect, it differs significantly from Council Decision 98/414/EC (authorising the ratification of the Fish

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[36] European Court of Justice, Judgment of the Court of 3 June 2008, Case C-308/06, *The Queen, on the application of International Association of Independent Tanker Owners (Intertanko) and Others v Secretary of State for Transport* ('*Intertanko*'), Document 62006CJ0308. For a comprehensive commentary on the case, reference is made to M. MENDEZ, *The Legal Effects of the MARPOL Convention and the UN Convention on the Law of the Sea: Intertanko*, in G. BUTLER, R.A. WESSEL (eds.), *EU External Relations Law: The Cases in Context*, cit., 557-565.
[37] *Ibidem*, paragraphs 64-65 of the judgment.
[38] European Court of Justice, Judgment of the Court of 24 June 2008, Case C-188/07, *Commune de Mesquer v Total France SA and Total International Ltd* ('*Commune de Mesquer*'), Document 62007CJ0188. See in particular paragraph 85 of the Judgment.
[39] ECJ, *Intertanko* case (see footnote 36), at paragraph 63, where the Court stated that "[d]oubt is not cast on the foregoing analysis by the fact that Part XI of UNCLOS involves natural and legal persons in the exploration, use and exploitation of the sea-bed and ocean floor, and subsoil thereof, beyond the limits of national jurisdiction, since the present case does not in any way concern the provisions of Part XI", thereby implicitly recognising the non-applicability of its reasoning to Part XI.
[40] See Chapter II, footnote 118.

Stocks Agreement)[41], which in Art. 3 expressly appoints the Commission as the competent organ.

The matter was addressed with respect to Part XV in the ECJ's *Council v Commission* case[42] of 2015, where the Court – finding in Art. 335 TFEU "the expression of a general principle that the European Union has legal capacity and is to be represented, to that end, by the Commission" – concluded that the provision serves as a legal basis for the Commission to represent the Union before the ITLOS[43]. Moreover, the Court found Art. 218(9) TFEU inapplicable in that context[44], meaning that the Commission, when representing the Union before international courts, does not require prior authorisation from the Council to express its position[45].

In this case as well, certain considerations must be made concerning the applicability of those findings to the distinct dispute settlement system of Part XI. While the Court's general remarks on the Commission's role may be extended to Part XI, the scope of that role requires clarification. In *Council v Commission*, there was common ground among the parties to the proceedings that the Commission had expressed a position in the context of an ITLOS advisory opinion[46] request relating — at least in part — to the conservation of marine biological resources under the Common Fisheries Policy[47]. The subject matter therefore fell within the Union's exclusive competence.

Due to this exclusive nature, the Court did not address whether, and under what conditions, the Commission would be competent to represent the Union if the matter fell under shared competence. This issue may prove relevant in the context of Part XI of the Convention, as the Union currently lacks specific competence over seabed mining

[41] Council Decision 98/414/EC of 8 June 1998 on the ratification by the European Community of the Agreement for the implementing of the provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the conservation and management of straddling stocks and highly migratory fish stocks (Document JOL_1998_189_R_0014_009). For details on the Fish Stock Agreement, see footnote 119.
[42] Judgment of the Court of 6 October 2015, Case C-73/14, *Council of the European Union v European Commission* ('*Council v Commission*'), Document 62014CJ0073.
[43] On the broad interpretation of the Court of Art. 335, see A. KORNEZOV, *EU Representation in International Litigation: Council v Commission (International Tribunal for the Law of the Sea)*, in in G. BUTLER, R.A. WESSEL (eds.) *EU External Relations Law: The Cases in Context*, cit., 805-815.
[44] For the discussion on Art. 218(9), see Chapter III, paragraph 3.
[45] ECJ, *Council v Commission*, paragraphs 62-67.
[46] International Tribunal for the Law of the Sea, *Request for an Advisory Opinion submitted by the Sub-Regional Fisheries Commission (SRFC) (Request for Advisory Opinion submitted to the Tribunal)*, case no 21, advisory opinion rendered on 2 April 2015, documents of the case available at the following link: https://www.itlos.org/index.php?id=252.
[47] ECJ, *Council v Commission*, paragraph 55.

activities and holds primarily shared competence in the area of marine environmental protection.

Although the ECJ drew a distinction between policy-making in international bodies (subject to Art. 218(9)) and positions expressed in international proceedings[48], both arguably reflect the Union's external competence. Accordingly, its exercise by the Commission in the context of Part XI must arguably comply with Art. 216 TFEU, and the principles laid down by the Court in the *ERTA* case[49].

In closing this paragraph, it is clear that both international case-law and the ECJ's jurisprudence on the relationship between Part XV of the Convention and the EU legal order remain limited. While some findings may apply to the dispute settlement mechanism under Part XI, most would need to be reconsidered in light of the specific characteristics of that Part.

Given the lack of both theory and practice on Part XI and the complexities raised by the participation of an international organisation, the following paragraphs will therefore adopt a different approach. Specifically, they will examine the scope and operation of the most relevant provisions concerning the contentious and advisory jurisdictions established under Section 5 of Part XI. In doing so, particular attention will be paid to scenarios that could involve the European Union and give rise to overlapping jurisdiction between the relevant international tribunal[50] and the ECJ.

3. CONTENTIOUS JURISDICTION OF THE SEABED DISPUTE CHAMBER UNDER PART XI AND THE EUROPEAN UNION

Except for certain derogations provided elsewhere in the Convention and the 1994 Agreement (some of which will be examined below), Part XI establishes the compulsory and exclusive *ratione materiae* jurisdiction of the Seabed Disputes Chamber (SDC) of ITLOS[51]. Compulsory means that States Parties (including the Union) are, in principle,

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[48] *Ibidem*, paragraphs 62-67. On this point, reference is made to P. KOUTRAKOS, *Institutional balance and sincere cooperation in treaty-making under EU law* (2019) *68(1) International And Comparative Law Quarterly* 1-33, at 20-21.
[49] On the *ERTA* case and Art. 216, see Chapter II, paragraph 2.2.1.
[50] As it will be mentioned below, Section 5 of Part XI provides for the constitution of different judicial bodies, including arbitral tribunals and *ad hoc* chambers of ITLOS, whose jurisdiction might overlap with the one of the Seabed Dispute Chamber of the Tribunal.
[51] J-G. MAHINGA, *Le Tribunal International du Droit de la Mer – Organisation, compétence et procédure* (Éditions Larcier, 2013), at 119-120.

not permitted to refer disputes to another international court, as would normally be allowed under Art. 287, while exclusive indicates that, aside from the exceptions outlined in Art. 188(1)(a), 188(1)(b), and 188(2)(a) of the Convention[52], as well as Section 6(1)(f)(i) of the Annex to the 1994 Agreement[53], parties to a dispute may not opt to submit the matter to alternative *fora* (such as the ICJ).

Ratione personae, the peculiarity of the SDC compared to many international jurisdictions is that it is also open to private individuals, by this meaning the contractors (or prospective contractors) of the ISA[54].

The core provision delineating the SDC's contentious jurisdiction (or that of alternative chambers or courts established under Art. 188) is Art. 187 of the Convention, which – albeit in a somewhat convoluted manner[55] – sets out the categories of disputes falling under its scope in relation to Part XI. In line with the methodology outlined above, the analysis will focus on the most relevant subparagraphs of Art. 187, namely (a) and (b), in order to explore the different types of disputes and the potential involvement of the Union in each case. The remaining subparagraphs – (c), (d), (e), and (f) – will not be addressed, as they are unlikely to give rise to jurisdictional conflicts between the SDC and the ECJ. Furthermore, subparagraphs (c), (d), and (e) apply only where the Union holds a particular status under the Convention, namely that of a "contractor" – or, in the case of (d), a "prospective contractor" – of the Authority, meaning an entity engaged in activities in the Area. As highlighted in Chapter III, it is improbable that the Union will undertake such activities in the foreseeable future; hence, any analysis of these provisions would be of limited relevance.

[52] The relevant text of Art. 188 is here reported: 1. Disputes between States Parties referred to in article 187, subparagraph (a), may be submitted: (a) at the request of the parties to the dispute, to a special chamber of the International Tribunal for the Law of the Sea to be formed in accordance with Annex VI, articles 15 and 17; or (b) at the request of any party to the dispute, to an ad hoc chamber of the Seabed Disputes Chamber to be formed in accordance with Annex VI, article 36. 2. (a) Disputes concerning the interpretation or application of a contract referred to in article 187, subparagraph (c)(i), shall be submitted, at the request of any party to the dispute, to binding commercial arbitration, unless the parties otherwise agree.

[53] See below, paragraph 3.3.

[54] On the scope of the jurisdiction of the SDC (both *ratione personae* and *ratione materiae*), see T. TREVES, *Dispute Settlement and Seabed Mining in the Area*, in V. TASSIN CAMPANELLA (ed.), *Routledge Handbook of Seabed Mining and the Law of the Sea*, cit., 209-223.

[55] As noted in N-J. SEEBERG-ELVERFELDT, *The settlement of disputes in deep seabed mining – Access, jurisdiction and procedure before the Seabed Dispute Chamber of the International Tribunal for the Law of the Sea* (Nomos Verlagsgesellschaft Baden-Baden, 1998), at 78 "[t]he distinction based on individual categories of disputes is somewhat surprising. It would have appeared logical to simply establish a provision which simply referred to settlement of all disputes related to the deep seabed mining regime of UNCLOS to the jurisdiction of the SDC".

Finally, the discussion will briefly consider Section 6 of the Annex to the 1994 Agreement, which contains provisions relating to the Union's exclusive competences on the internal market and on customs and duties.

3.1. Article 187(a) UNCLOS

Article 187(a) of the Convention refers to "disputes between States Parties concerning the interpretation or application of [Part XI] and the Annexes relating thereto". The provision also arguably extends to the interpretation and application of the 1994 Agreement, since under its Art. 2(1) its provisions and those of Part XI "shall be interpreted and applied together as a single instrument"[56].

As noted above, the jurisdiction of the SDC over such disputes is compulsory – pursuant to Art. 287(2) UNCLOS[57] – but not exclusive, as this category of disputes may, by agreement of the parties, also be submitted to a special chamber of ITLOS formed under Art. 15 and 17 of Annex VI, as provided for in Art. 188(1)(a)[58].

This provision may be of direct relevance to the European Union, as the disputes concerned could fall within its competence. Since Art. 187(a) has never been invoked in practice, it is difficult to identify specific controversies involving the interpretation and application of Part XI, its Annexes, or the 1994 Agreement. Accordingly, the discussion will proceed in general terms, focusing on the categories of disputes – and the actors involved – that could potentially arise. In this regard, four scenarios in which the Union might be concerned by proceedings initiated under Art. 187(a) will be considered.

The first concerns disputes between EU member States over matters falling within the (exclusive or shared) competence of the Union. While disputes under the Union's exclusive competence – which is clearly defined in the Treaties – are unlikely to arise in

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[56] In this sense, E.D. BROWN, *The 1994 Agreement on the Implementation of Part XI of the UN Convention on the Law of the Sea: breakthrough to universality?*, (1995) 19 *Marine Policy* 5-20, at 16.

[57] According to which "[…] declaration made under paragraph 1 shall not affect or be affected by the obligation of a State Party to accept the jurisdiction of the Seabed Disputes Chamber of the International Tribunal for the Law of the Sea to the extent and in the manner provided for in Part XI, section 5."

[58] The need for the consent of all the parties to the dispute is the main difference between Art. 188(1)(a) and the following subparagraph (b), which allows the disputes to be deferred to an *ad hoc* chamber of the SDC to be formed in accordance with Art. 36 of Annex VI to the Convention, upon the request of even one of the Parties.

this context, more uncertainty may surround disputes involving shared competences, particularly in light of the findings in the *Mox Plant* case.

According to the ECJ, although the Convention forms an integral part of the Union's legal system, the existence of external competence in areas of shared competence depends on whether the relevant provisions have been implemented through EU legislation. In the *Mox Plant* case, the provisions on the protection of the marine environment had been implemented via instruments listed in the Appendix to the 1998 Declaration. On this basis, the Court held that it had exclusive jurisdiction over the dispute. While the Appendix was deemed a "useful reference base" for identifying the Union's external competences, it has not been updated since 1998 and may therefore be outdated with respect to Part XI. Nevertheless, it must be recalled that the Union's competences derive from the Treaties themselves, and not from their enumeration in the 1998 Declaration[59]. Accordingly, the omission of Part XI from the Declaration does not prevent the Union from exercising competence in that area.

Assuming the conditions outlined in Mox Plant are met, there is little doubt that the ECJ would hold exclusive jurisdiction over disputes concerning the interpretation and application of Part XI. However, in the absence of a revised Declaration, some legal uncertainty may persist as to whether those conditions have in fact been satisfied. Setting aside this ambiguity, the first hypothetical scenario remains relatively clear-cut: the duty of loyal cooperation would require member States to resolve such disputes through the mechanisms provided by the EU Treaties, rather than by resorting to the dispute settlement procedure under Art. 187(a).

Arguably, this solution is also consistent with the Convention. As noted above, Art. 285 UNCLOS states that the provisions of Part XV apply *mutatis mutandis* to disputes which, pursuant to Section 5 of Part XI, are to be settled in accordance with the procedures provided in Part XV. According to the majority of academic literature, this provision applies in particular to Art. 187(a), which coexists with the dispute settlement regime under Part XV[60]. On this basis, it may be argued that Art. 282 UNCLOS – clearly consistent with Art. 187(a), as it refers to "dispute concerning the interpretation or

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[59] See Chapter II, paragraph 5.1.
[60] See C. BURKE, *Article 187*, in A. PROELß, A.R. MAGGIO, E. BLITZA, O. DAUM, cit., 1254-1261, at 1259; M.H. NORDQUIST, N.R. GRANDY, S. ROSENNE, A. YANKOV, *United Nations Convention on the Law of the Sea 1982 – A Commentary* (Vol. VI, Martinus Nijhoff Publisher, 1990), at 618-619.

application of [the] Convention" – also applies in such cases, meaning that the procedures laid down in the Treaties prevail over those envisaged by the Convention.

This outcome may also be extended to the second scenario involving the Union: a dispute between the Union and one or more of its member States concerning the interpretation and application of Part XI. In this case, a subtle distinction arises. Given the Union's participation in the proceedings, the matter would *ipso facto* concern an area falling within its competence. Accordingly, there should be no doubt as to whether the ECJ's exclusive jurisdiction applies.

The third and fourth scenarios are more complex, as they concern, respectively, disputes between EU member States and non-member States over matters falling under the Union's competence, and disputes between the EU and non-member States on those same matters.

To understand why the first of these may occur, it is important to recall that while, as noted, the 1998 Declaration is not constitutive of the Union's competences, it nonetheless serves at the international level as the basis for allocating responsibility under the Convention between the Union and its member States[61]. Some of the legal ambiguities arising from this arrangement were examined in Chapter II, which noted that disputes may arise where, despite the formal allocation of competence to member States under the 1998 Declaration, the Union has in practice exercised that competence. In such instances, it was suggested that a non-member State might still prefer to initiate proceedings against the Union, given the uncertainty as to which member State should be held internationally responsible for the alleged breach.

Nevertheless, there may also be cases where responsibility can clearly be attributed to an individual member State. For example, the situation can be considered in which an EU member State acts pursuant to EU legislation adopted to implement a provision of Part XI of the Convention that, under the 1998 Declaration, formally falls within national competence, but which in practice has been exercised by the Union. If a non-member State alleges that the member State's conduct (arising from that EU legislation) violates Part XI, the resulting dispute would concern the interpretation and application of that part of the Convention.

[61] See Chapter II, paragraph 5.2.

Since the competence would formally remain with the member State, and in this hypothetical a responsible State can be identified, the non-member State might initiate proceedings against that member State. However, as the State's conduct derives from EU law, the proceedings would also in essence indirectly test the consistency of EU legislation with the State's obligations under Part XI. In such a case, there is no obligation upon non-member States to respect the ECJ's exclusive jurisdiction, and proceedings would likely be brought under one of the dispute settlement mechanisms provided in Section 5 of Part XI.

In this hypothetical scenario, it is difficult to imagine a resolution other than through diplomatic channels, especially considering the Union's established preference for avoiding international adjudication and the wide range of legal and institutional questions that the dispute would raise. A high degree of self-restraint may reasonably be expected from both the parties and the adjudicating body. Nevertheless, the cooperation of the member State remains essential. It can be argued that, under Art. 344 TFEU, the member State would be under an active obligation to pursue and facilitate an amicable resolution of the dispute – in other words, to make every reasonable effort to avoid a judgment being issued by the international tribunal. While a failure to uphold this obligation could result in infringement procedures under EU law (as in the *Mox Plant* case), it should be stressed that the obligation must be reasonably qualified as one of due diligence, meaning that in principle the State cannot arguably be held responsible for the procedural conduct of the opposing party.

Similar considerations apply to the fourth scenario, in which a non-member State brings proceedings directly against the Union in relation to a matter falling within its competence. This case differs from the previous one only in that no duty of loyal cooperation arises for member States. It would fall to the Union itself to manage the diplomatic efforts necessary to prevent an international tribunal from ruling on the compatibility of EU law with the Convention. Again, a diplomatic solution would be preferable. Nevertheless, strictly as a matter of law, nothing would prevent the non-member State from exercising its right to initiate proceedings under Art. 187(a).

3.2. Article 187(b) UNCLOS

Art. 187(b) of the Convention concerns disputes between a State Party and the Authority regarding: (i) acts or omissions of the Authority or of a State Party alleged to be in violation of Part XI[62] or the Annexes relating thereto or of rules, regulations and procedures of the Authority adopted in accordance therewith; or (ii) acts of the Authority alleged to be in excess of jurisdiction or a misuse of power. In both cases, the jurisdiction of the SDC is compulsory and exclusive, as the Authority is a party to the proceedings. Consequently, disputes under this provision must be brought before the SDC, with no possibility of resorting to an arbitral tribunal or an *ad hoc* Chamber of the ITLOS.

Unlike what will be said regarding the second subparagraph, in the case envisaged by Art. 187(b)(i), the Union may assume two different roles, as the provision encompasses both the scenario in which the Authority initiates proceedings against one of its members, and the converse situation in which a member initiates proceedings against the Authority.

The first scenario – where the Authority initiates proceedings against one of its members – has been described as analogous to the infringement procedure under Art. 258 to 260 TFEU, in that it enables the Authority to assess and address noncompliance by ISA member States with Part XI of the Convention and its rules[63]. As in the case of Art. 187(a), such noncompliance may arise from either the Union or its member States. In this regard, the earlier observations on the usefulness of updating the 1998 Declaration apply equally here.

A further situation of interest may however arise entailing the risk of parallel proceedings. As discussed in Chapter III, the Union may already exercise its competences to implement specific parts of the Regulations adopted by the Authority (notably the environmental ones). In such cases, EU member States would be required to comply not only with the Regulations but also with EU legislation implementing them. Situations may therefore arise where a violation of the Regulations also constitutes a violation of EU law, raising

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[62] As noted by M. LODGE, *The International Seabed Authority and Disputes over Deep Seabed Mining*, in H. RUIZ FABRI, E. FRANCKX, M. BENATAR, T. MESHEL (eds.), *A Bridge over Troubled Waters – Dispute Resolution in the Law of International Watercourses and the Law of the Sea* (Brill | Nijhoff, 2022), 277-290, at 284, the provision does not cover violations of the Authority other than those of Part XI and the Annexes thereto. In other words, the jurisdiction of the SDC under Art. 187(b) does not extend to violations of other Parts of the Convention.

[63] N-J. SEEBERG-ELVERFELDT, *The settlement of disputes in deep seabed mining*, cit., at 84. The considerations made in that context on Art. 169 of the EEC Treaty can be extended to current Art. 258 to 260 TFEU.

the question of the appropriate *forum* to address the breach – particularly where the requirements under both legal frameworks are identical. In other words, there could be instances in which parallel proceedings are initiated before the SDC (for a breach of the Authority's rules) and the ECJ (for an infringement of EU law). This scenario may even result in the SDC pronouncing on an issue of EU law, thereby encroaching upon the ECJ's exclusive jurisdiction.

Conversely, a situation may arise where EU legislation implementing the Regulations is itself inconsistent with the Authority's rules. In such a case, while the Authority could initiate proceedings before the SDC for breach of its rules, the same inconsistency could also be challenged before the ECJ by one or more member States[64]. Again, this could give rise to parallel proceedings and conflicting judgments. In both scenarios, diplomatic negotiations and the self-restraint of the parties involved would likely be the only effective tools to prevent such an outcome, as the Convention does not appear to offer a satisfactory legal solution.

A final point on this provision concerns the potential application of Art. 187(b)(i) to violations by Authority members of their responsibilities under Art. 139 of the Convention (discussed in Chapter III, paragraph 2.2.)[65]. However, this provision arguably applies only when the member is acting as a sponsoring State, since a State carrying out activities directly is considered a party to a contract (in which case, Art. 187(c) would apply. As the Union cannot act as a sponsoring entity but only conduct activities directly in the Area, Art. 187(b)(i) would not cover its potential violations by the Union of Art. 139.

The second scenario under Art. 187(b)(i) involves members of the Authority initiating proceedings against the Authority itself for the same types of violations. From the Union's perspective, the most relevant potential breach is noncompliance with Part XI or the 1994 Agreement. In contrast, the possibility of the Authority violating its own rules is largely theoretical and would depend on the content of those rules – especially in the area of

[64] In this case, there is no doubt that proceedings between the EU member States and the Union would have to be treated as a purely internal situations (thus being subject to the scrutiny of the ECJ), since the Convention does not provide for a legal basis for a State party to claim that the legislation adopted by another State party is not compliant with the rules of the Authority, such competence being exclusive to the ISA.
[65] In this sense, see *Ibidem*, at 87.

exploitation, where no final regulations have yet been adopted. This section will therefore focus solely on breaches of the Convention.

The Convention imposes no limitations on the right of ISA members to initiate such proceedings, meaning that the Union, as a concerned party, may in principle do so. However, certain constraints must be considered, both under international law and EU law. From the international law perspective, Art. 189 UNCLOS imposes significant limits on the SDC's powers. It stipulates that the SDC "shall have no jurisdiction with regard to the exercise by the Authority of its discretionary powers" and "in no case shall it substitute its discretion for that of the Authority". More explicitly, the same provision states that the SDC "shall not pronounce itself on the question of whether any rules, regulations and procedures of the Authority are in conformity with this Convention, nor declare invalid any such rules, regulations and procedures".

This substantial limitation is subject to a narrow exception: where "the application of any rules, regulations and procedures of the Authority in individual cases would be in conflict with the contractual obligations of the parties to the dispute or their obligations under this Convention", or in cases involving "claims concerning excess of jurisdiction or misuse of power, and to claims for damages to be paid or other remedy to be given to the party concerned for the failure of the other party to comply with its contractual obligations or its obligations under this Convention".

As a result, the Union would normally be prevented from requesting the SDC to determine whether the Authority's rules are consistent with the Convention – unless it can demonstrate an individual and concrete interest in avoiding conduct contrary to the Convention. While the wording of Art. 189 is ambiguous, a broad interpretation might support the Union's recourse to the SDC during the implementation phase of the Authority's rules – i.e., prior to adopting legislation based on those rules. In this way, the Union could avoid enacting legislation that would become part of its legal order yet potentially conflict with the Convention, thus also avoiding indirect judicial review of EU law by the SDC.

Turning to constraints under EU law, any complaint made by the Union concerning an act or omission of the Authority must necessarily fall within its area of competence. Where exclusive competences are at issue, there is no doubt that initiating proceedings before the SDC would fall within the Union's exclusive powers. In contrast, for shared competences, further analysis is required. In such cases, proceedings before the SDC constitute an exercise of the Union's external competence and must therefore comply with Art. 216 TFEU, which incorporates the criteria established in the *ERTA* judgment[66]. The Union would thus only be entitled to bring a case under this provision if the relevant criteria are met; otherwise, the competence would remain with the member States.

The second subparagraph of Art. 187(b) permits States to initiate proceedings against the Authority for acts "alleged to be in excess of jurisdiction or a misuse of power". As noted above, unlike under the first subparagraph, the Authority can only hold the position as defendant in this case, as the proceedings concern its own conduct.

The concept of 'excess of jurisdiction' is relatively straightforward. It covers acts that fall outside the Authority's mandate – for example, if the Authority were to regulate issues unrelated to "activities in the Area", such as the freedom of navigation or other uses of the seabed beyond national jurisdiction unrelated to mineral extraction. It also includes actions taken by an organ of the Authority outside its competence – for instance, if the Assembly were to approve a plan of work, a power conferred exclusively upon the Council.

The notion of 'misuse of power' is more nuanced but can be clarified by reference to similar concepts in the French and German legal traditions[67]. Potential instances in which the Union could raise such a claim might include the Authority failing to apply objective criteria in developing its rules, or exercising an unreasonable or disproportionate degree of control over activities in the Area, exceeding what is necessary to ensure compliance with Part XI and the 1994 Agreement[68]. The findings outlined in relation to Art. 187(b)(i) can be extended to the present situation, meaning that, in principle – and under the same constraints discussed above[69] (both from the perspective of international and EU law) – the Union might be entitled to initiate proceedings for violation of Art. 187(b)(ii).

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[66] See Chapter II, paragraph 2.2.1.
[67] N-J. SEEBERG-ELVERFELDT, *The settlement of disputes in deep seabed mining*, cit., at 105-106, according to which the term seems to derive from the traditional definitions of 'détournement de pouvoir' of the French tradition, and from the concept of 'Ermessensmißbrauch' of the German one.
[68] *Ibidem*, at 106.
[69] M.H. NORDQUIST, N.R. GRANDY, S. ROSENNE, A. YANKOV, *United Nations Convention on the Law of the Sea 1982 – A Commentary* (Vol. VI, cit.), at 619, according to which Art. 189 also applies to this provision.

3.3. Section 6 of the Annex to the 1994 Agreement

Following the adoption of the 1994 Agreement, three new categories of disputes have been brought under the jurisdiction of the SDC. Two of these – set out respectively in Section 3(12) and Section 8(1)(f) of the Annex to the Agreement – are of limited relevance for the Union, as they concern disputes regarding respectively the disapproval of a plan of work and the interpretation or application of the financial rules and regulations of the Authority. As noted, since the Union does not currently hold the status of an ISA contractor, such disputes are unlikely to arise in the near future. Moreover, they do not raise significant issues of coordination between the SDC's jurisdiction and that of other fora.

The third category of disputes introduced by the 1994 Agreement is more pertinent and is addressed in Section 6 of the Annex, which concerns the Authority's Production Policy. Specifically, paragraph (1)(b) provides that "[t]he provisions of the General Agreement on Tariffs and Trade, its relevant codes and successor or superseding agreements shall apply with respect to activities in the Area." On this basis, paragraph (1)(f) establishes two alternative mechanisms for settling disputes related to such agreements. Subparagraph (f)(i) provides that, where the States Parties concerned are parties to those agreements, they must resort to the dispute settlement procedures of those same agreements. Conversely, under subparagraph (f)(ii), if one or more of the States Parties are not parties to such agreements, they must resort to the dispute settlement procedures set out in the Convention – and therefore, given the subject matter, to those provided under Part XI.

This provision has important implications for the relationship between the Convention and the GATT (and related agreements). First, it affirms the primacy of the latter over the Convention in this context[70]. Second, it allows the SDC – in the circumstances described under subparagraph (f)(ii) – to interpret and apply provisions of the GATT and related agreements[71]. By setting criteria for determining whether a dispute should be brought before the SDC or the WTO dispute settlement bodies, Section 6(1)(f) aims to prevent parallel proceedings and the risk of conflicting decisions. At the same time, however, it

[70] E. IVANOVA, *The Competing Jurisdictions of the WTO and the UNCLOS Dispute Settlement Fora in the Context of Multifaceted Dispute* (Studies of the Max Planck Institute Luxembourg for International, European and Regulatory Procedural Law, Nomos Verlagsgesellschaft Baden-Baden, 2021), at 81.
[71] *Ibidem*, at 81.

weakens the SDC's exclusive jurisdiction over the interpretation and application of the Convention, particularly where a dispute between two States – both parties to the WTO Agreement – turns on the interpretation of UNCLOS provisions[72].

Two main considerations arise with regard to the Union's position under Section 6(1) of the Annex to the 1994 Agreement. First, the provision is clearly significant for the Union, as it is likely to affect areas that fall within its exclusive competences, notably customs, duties, and the internal market. Since this exclusive competence is also recognised in the 1998 Declaration[73], the risk of proceedings being brought by non-EU States against individual EU member States – or of parallel proceedings against both the Union and its member States – appears remote.

Second, it is equally clear that these provisions apply only to States Parties to the Convention. For example, if the United States were to unilaterally commence or sponsor exploitation activities in the Area in breach of Part XI, and if the Union responded by prohibiting the importation of minerals extracted in this manner (as described in Chapter III), the dispute settlement mechanisms under Section 6 of the Annex would not be available. However, the United States would still be entitled to initiate proceedings before the WTO dispute settlement bodies, given that both it and the Union are parties to the WTO Agreement and the DSU. In practical terms, therefore, the outcome would be substantially the same.

4. ADVISORY JURISDICTION OF THE SEABED DISPUTE CHAMBER AND THE EUROPEAN UNION

The advisory jurisdiction of the SDC is established under Art. 191 of the Convention, which empowers the Assembly or the Council of the Authority to request advisory opinions on legal questions arising within the scope of their activities. Additionally, Art. 159(10) of the Convention obliges the Assembly to request an advisory opinion on the conformity with the Convention of a proposal submitted to it on any matter, when such a

[72] *Ibidem*, at 82.
[73] It is reminded that – according to the 1998 Declaration – "by virtue of its commercial and customs policy, the Community has competence in respect of those provisions of Parts X and XI of the Convention and of the Agreement of 28 July 1994 which are related to international trade".

request is sponsored by at least one fourth of the members of the Authority[74]. Except in this case, the request for an advisory opinion follows the standard decision-making procedures of the Authority, meaning that it normally requires consensus within the Assembly or the Council (depending on which organ is competent on the matter), or – if all efforts to reach consensus have been exhausted – the majorities laid out in Section 3 of the Annex to the 1994 Agreement[75].

Upon receiving such a request, the SDC has no discretion to decline it, as the wording of Art. 191 (according to which "[t]he Seabed Disputes Chamber *shall* give advisory opinions […]") makes clear that it is under a legal obligation to deliver the opinion.

From the above discussion, it emerges that the Union may play only a limited role in the formulation of such requests, as the competence to submit them lies exclusively with the two aforementioned organs of the Authority, not with States Parties. Even the mechanism under Art. 159(10) appears difficult to access for the Union, as noted in Chapter III, paragraph 3, given the ambiguous rules governing its participation in the Assembly's voting procedures.

Conversely, a more meaningful role may be played by the Union once the request has been submitted to the SDC. Pursuant to Art. 133(3) of the Rules of the Tribunal[76], "States Parties and the organizations referred to in paragraph 2 shall be invited to present written statements on the question […]". Paragraph 2 refers to "intergovernmental organizations which are likely to be able to furnish information on the question" identified by the Chamber. However, for the purposes of this article, the Union must be considered a 'State Party', and therefore does not require identification by the Tribunal[77].

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[74] As noted by M.T. INFANTE CAFFI, *Seabed Disputes*, in R. WOLFRUM, H. RUIZ FABRI, *Max Planck Encyclopedia of International Procedural Law* (Oxford University Press, 2019), at paragraph 104, this power is conceptually aimed to assist the Assembly during its decision-making process.
[75] For which reference is made to Chapter I, paragraphs 1.3.1 and 1.3.2.
[76] International Tribunal for the Law of the Sea, Rules of the Tribunal, document ITLOS/8, available at the following link: https://www.itlos.org/fileadmin/itlos/documents/basic_texts/Itlos_8_E_17_03_09.pdf.
[77] As an evidence of that, it is sufficient to look at the written statements submitted by States parties and the intergovernmental organizations in ITLOS Case no 31 (*Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law (Request for Advisory Opinion submitted to the Tribunal*), documents of the case available at the following link: https://www.itlos.org/en/main/cases/list-of-cases/request-for-an-advisory-opinion-submitted-by-the-commission-of-sm--all-island-states-on-climate-change-and-international-law-request-for-advisory-opinion-submitted-to-the--tribunal/. The European Union is included among "States Parties" having submitted a written statement, and not among the intergovernmental organisations.

Accordingly, the Union may present written statements on matters referred to the SDC by the Authority. Two remarks must be however made on this power. First, the findings of the ECJ in the *Council v Commission* case[78] must be taken into account, meaning that in principle the competence to submit such written statement belongs to the Commission.

Second, the conditions under which the Union may be permitted – under EU law – to present a statement must be carefully assessed. As noted at the beginning of this Chapter, in order to exercise this prerogative, the subject matter of the request must fall at least partially within the Union's competence, whether exclusive or shared. In the advisory opinions delivered by the Tribunal in 2015[79] and 2024[80], this condition was met, as they concerned respectively the conservation of marine biological resources and the protection of the marine environment, respectively. However, as previously discussed, the Union has not yet adopted legislation specifically addressing the protection of seabed ecosystems in the Area. Consequently, it could be argued that the Union has not yet exercised its environmental competence in relation to Part XI of the Convention, for the purposes of the *ERTA* doctrine.

As a result, and pending a more complete exercise of such competence, it can be argued that the Union may submit written statements only on matters clearly falling within its existing competence. This would be the case, for instance, in relation to an advisory opinion concerning the market and customs aspects of deep seabed mining activities, as provided for by Part XI and the 1994 Agreement.

Conversely, it is open to question whether, in cases falling under the exclusive competence of the Union – such as the example above relating to customs or the internal market – EU member States are still entitled to submit written statements during the proceedings. The answer depends on whether one adopts the perspective of international or EU law. From the international law standpoint, neither the Convention nor the Rules of the Tribunal impose any limitations on States wishing to submit written statements during advisory proceedings of the SDC. Nor can the provisions of Annex IX, read in conjunction with the general duty of good faith laid down in Art. 301 of the Convention, be interpreted as limiting this power of States. Accordingly, the SDC arguably lacks the power to reject a statement submitted by a State on the ground that the subject matter falls

[78] See footnote 42.
[79] See footnote 46.
[80] See footnote 77.

within the Union's exclusive competence, also because this would in essence be an interpretation of the provisions of the EU Treaties, falling outside the jurisdiction of the Tribunal.

However, the picture changes if the EU law perspective is taken into account. As noted at the beginning of this Chapter, the submission of a written statement to an international Court amounts to the exercise of an external competence of the Union and is thus governed by the relevant rules laid down in the Treaties. Where the matter falls under an exclusive competence of the Union, it has already been established (Chapter II, paragraph 2.2.2.) that Art. 3(1) TFEU extends to external competences. As a result, in these areas only the Union is entitled to conduct external action. Therefore, the submission of a written statement by a member State on a matter falling under the Union's exclusive competence would arguably amount to a breach of Art. 2(1) TFEU[81] and could give rise to an infringement procedure before the ECJ.

Turning finally to the effects that an advisory opinion of the SDC may have on the Union's legal system, it must be emphasised that such opinions are in principle not of a legally binding nature. Nonetheless, they clearly express the Tribunal's view on a given issue and may well be followed if a contentious case on the same matter arose. Against this background, one may ask to what extent an interpretation of the Convention – or of the rules of the Authority – provided by the SDC in an advisory opinion might constrain the institutions of the Union and, in particular, the ECJ.

In this respect, it should be recalled that there may be instances in which the interpretation of the Convention or of ISA rules offered in an advisory opinion could affect the interpretation or application of an EU legislative act. A legitimate question then arises as to whether the ECJ, if called upon to interpret such legislation, would be bound by the interpretation of the Convention and the ISA rules given by the SDC.

From the standpoint of EU law, advisory opinions issued by the SDC are not legally binding on the Union or the ECJ. Although the Convention prevails over EU secondary legislation[82], the ECJ is not directly bound by the SDC's interpretation, particularly since

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[81] Which, it is reminded, provides that "[w]hen the Treaties confer on the Union exclusive competence in a specific area, only the Union may legislate and adopt legally binding acts, the Member States being able to do so themselves only if so empowered by the Union or for the implementation of Union acts".

[82] See Art. 216(2) TFEU ("Agreements concluded by the Union are binding upon the institutions of the Union and on its Member States"). As noted by T. MOLNÁR, R.A. WESSEL, *Interactions Between EU Law and International Law – Juxtaposed Perspectives* (Principles of International Law series, Elgar Publishing,

Art. 191 UNCLOS does not impose an obligation of compliance with advisory opinions upon members of the Authority. Consequently, the ECJ would retain, at least in theory, full autonomy in interpreting provisions of EU law.

Nevertheless, advisory opinions rendered by the body entrusted by the Convention with its interpretation would undoubtedly carry considerable authority – particularly given that, on the one hand, the provisions of UNCLOS form an integral part of the Union's legal system and, on the other, the Union may even be involved in the process leading to the formulation of the request. Accordingly, an interpretation of the Convention or of ISA rules by the SDC would arguably be highly persuasive for the ECJ, which could scarcely disregard it without risking a violation of the Convention by the Union in a potential contentious case. Thus, while the ECJ is not formally subordinate to the SDC, it may *de facto* find itself aligning its position with that of the Chamber.

This approach appears consistent with the past practice of the ECJ, in particular in the judgment in the *Front Polisario* case[83]. In that context, although the Court did not rule on the legal nature of advisory opinions rendered by international courts and tribunals, it made several references to the findings of the advisory opinion issued by the International Court of Justice on *Western Sahara*[84] for the purposes of its reasoning, as such confirming the highly authoritative value of such opinions for the purpose of interpreting international legal instruments.

2024) at 107, given the vagueness of this provision, a crucial role in governing the relation between international law and EU law has been played by the ECJ, which "has become the natural 'gatekeeper' of these matters".

[83] European Court of Justice, Judgment of the Court of 21 December 2016, Case C-104/16 P., *Council of the European Union v Front populaire pour la libération de la saguia-el-hamra et du rio de oro* ('*Front Polisario*'), Document 62016CJ0104. The judgment has been mentioned by the Republic of Mauritius in its *Written Observations on the Preliminary Objections raised by the Republic of Maldives* of 17 February 2020 in the context of the *Maldives / Mauritius* case (International Tribunal for the Law of the Sea, *Dispute concerning delimitation of the maritime boundary between Mauritius and Maldives in the Indian Ocean* ('*Mauritius/Maldives*'). The Republic of Mauritius considered in that context that "legal determinations made by the ICJ in its advisory opinions are accepted as binding and dispositive statements of the law by other international courts and tribunals", siting to this end the ECJ *Front Polisario* case. See F.S. EICHBERGER, *The Legal Effect of ICJ Advisory Opinions Redefined? The Mauritius/Maldives Delimitation Case – Judgment on Preliminary Objections* (2021) 22(2) *Melbourne Journal of International Law*, in particular at 8.

[84] International Court of Justice, Advisory Opinion of 16 October 1975 on the Western Sahara, I.C.J. Reports 1975, p. 12.

5. Concluding remarks

The analysis conducted in this Chapter confirms that the interaction between the European Union and the dispute settlement system established under the Convention – particularly under Part XI – raises a number of unresolved legal and institutional questions. The limited practice concerning both the general and the specific dispute settlement mechanisms of the Convention, combined with the complexity of the EU's internal legal architecture, has so far prevented the emergence of a clear and consolidated framework governing their mutual relationship.

With regard to Part XV, existing case law – most notably the *Mox Plant* and *Intertanko* cases – has clarified certain fundamental principles that can guide the Union's participation in the Convention's dispute settlement mechanisms. However, these findings cannot be fully transposed to Part XI, whose provisions – especially those governing the SDC – present distinct procedural and substantive features.

As regards the contentious jurisdiction of the SDC, it has been noted that the risk of overlapping or conflicting jurisdictions between the SDC and the ECJ cannot be entirely ruled out. The absence of express coordination mechanisms between their respective jurisdictions highlights the importance of the duty of loyal cooperation and of mutual self-restraint between the judicial bodies concerned, in line with the precedent set by the *Mox Plant* proceedings.

Moreover, the analysis has shown that the exercise of the Union's external competence under Part XI remains largely theoretical. The limited extent to which the Union has thus far regulated activities in the Area implies that its role before the SDC is, at present, more potential than actual. Nonetheless, the progressive development of the ISA's regulatory framework and the possible future adoption of EU measures implementing those rules may have the effect of rendering these questions increasingly concrete, thereby making the need for a coherent and structured relationship between the EU and the Convention's dispute settlement system all the more pressing.

With respect to the advisory jurisdiction of the SDC, while the Union has no power to request advisory opinions, it may nonetheless contribute to the proceedings through written statements on matters falling within its competence. Furthermore, although advisory opinions of the SDC do not have binding force, they may, in practice, carry considerable interpretative authority within the EU legal order. While the ECJ is not legally bound by such opinions, it would be difficult for it to disregard the authoritative interpretation offered by the body entrusted by the Convention with ensuring the uniform interpretation of its provisions.

CONCLUSIONS

The analysis carried out throughout this dissertation has sought to explore the complex relationship between the regime established under Part XI of the Convention and the legal order of the European Union, with the objective of assessing the participation of the Union in the International Seabed Authority from an institutional standpoint and demonstrating the multiple and evolving intersections between these two normative systems.

From the international perspective, the ISA regime constitutes one of the most ambitious collective governance models ever established under international law. Its founding principle – the common heritage of humankind – departs from traditional notions of sovereignty and open access, and instead promotes the management of the seabed beyond national jurisdiction through multilateral institutions and shared benefit mechanisms. Yet, the mandate of the Authority – struggling to move from the exploration to the exploitation phase of activities in the Area – is exposed to significant institutional and legal challenges, particularly concerning the adoption of the Mining Code, the balance between commercial and environmental considerations, and the increasing risk of unilateral appropriation of the Area and its resources.

As the dissertation has shown, these developments are of relevance also for the European Union: first, because its Member States represent a significant portion of the Authority's membership and its companies are among the main holders of exploration contracts. Second, in light of the importance of the minerals that might be recovered from the Area for the 'green transition' of the Union. In this respect, also the position of the Union on the 'moratorium' on exploitation activities will need to take into due regard the need for those critical raw materials.

From the EU perspective, the analysis of competences has revealed a multi-layered framework. The Union does not possess a general competence relating to Part XI of the Convention, yet it exercises a number of powers directly or indirectly relevant to activities in the Area – ranging from customs and the Common Commercial Policy to environmental protection, energy, and research. The nature of these competences, their shared character, and their external projection determine the scope of the Union's participation in the Authority and the extent to which it can act autonomously or jointly with its Member States. The mixed character of the Convention and the dynamic evolution of EU competences create a delicate balance between unity of external representation and respect for Member States' prerogatives, which might easily be subject to evolution in parallel with the development and potential adoption of the ISA's Regulations.

At present, the Union's involvement in the implementation of the Authority's rules, regulations and procedures remains limited, but may still impact both EU member and non-member States. As discussed in the dissertation, the Union is bound by the fundamental obligations of Part XI, including the prohibition of appropriation and the duty to ensure that activities in the Area are conducted in conformity with the Convention. The possible adoption of internal measures ensuring compliance with provisions of the Convention – such as the proposed ban on U.S. minerals extracted in noncompliance with Part XI and the related certification of origin – illustrates how EU law can serve as a vehicle for the effective implementation of international obligations.

At the same time, its capacity to influence the development and implementation of the Mining Code, while constrained by its competences and the need for coordination with Member States, might especially in the future allow it to influence how EU member States might carry out activities in the Area in the future through the promotion especially of environmental standards and principles.

It was also highlighted that a strengthened participation of the Union in the Convention and the institutional framework of the Authority does not come without responsibilities, which may give rise to potential conflicts. In this respect, the study of dispute settlement mechanisms has highlighted the complexity of judicial interaction between the EU and the Part XI regime. While the Seabed Dispute Chamber exercises exclusive jurisdiction over disputes concerning activities in the Area, the European Court of Justice retains final authority within the EU legal order. The absence of explicit coordination mechanisms between the two bodies may lead to interpretative overlaps or tensions, although both might easily be expected to exercise mutual restraint and respect for their respective competences. Also advisory opinions of the SDC, though not legally binding, carry considerable persuasive authority and are likely to influence the Union's interpretation of provisions of the Convention, forming an integral part of the Union's legal system.

Overall, the dissertation aimed at demonstrating that the interaction between the ISA regime and the EU legal system is a process of reciprocal influence. The Union contributes (albeit for the time being in a limited manner) to the development of the institutional framework and the rules of the Authority, especially through the participation of its member States in the ISA organs. Conversely, the evolution of the Authority's regulations – and the decisions of its organs or judicial bodies – might shape especially in the future the legal obligations and policy choices of the Union and its Member States. This interdependence underscores the need for a higher degree of coherence in the Union's external representation, as well as – and especially – for a clearer articulation of competences in relation to Part XI and closer coordination between EU and Member State positions within the Authority.

A final – though by no means less important – objective of this dissertation was to demonstrate that the Authority is not immune from the broader tension that characterizes the contemporary law of the sea, namely between efforts towards multilateral cooperation and the unilateral action of certain States. The reference is, in the first place, to the unilateral claims advanced by the United States over the Area and its resources; however, similar tendencies can also be observed within the Union itself. In this regard, the discussion in Chapter III concerning the moratorium on exploitation activities is particularly illustrative: were the Union to impose on its Member States a direct or indirect prohibition on conducting activities in the Area, such a decision could have adverse implications for the Union's capacity to exercise 'effective control' over those activities.

Looking ahead, the potentially forthcoming exploitation phase of activities in the Area presents both opportunities and risks for the Union. On the one hand, it offers the possibility of contributing to a regime that might reveal crucial for the Union's objectives from the environmental viewpoint (and especially the above-mentioned green transition). On the other, it tests the Union's capacity to reconcile its environmental objectives, internal market rules, and external obligations under international law.

In conclusion, the relationship between the European Union and the International Seabed Authority exemplifies the increasing interconnection between international and regional legal orders. Far from being an isolated issue, the governance of the Area under Part XI UNCLOS might clearly become in the future a leading example of how the EU participates in, and is constrained by, the broader architecture of international law.

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