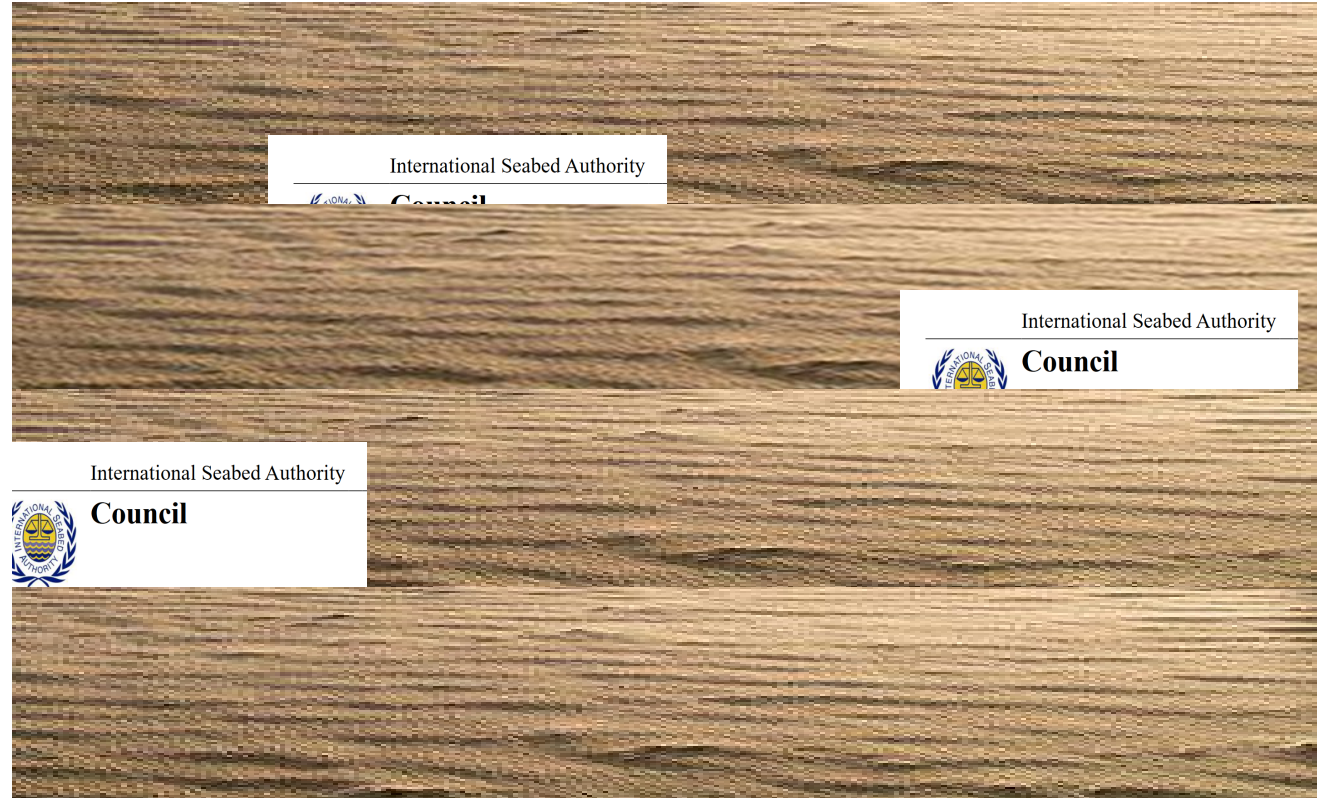


The Riddle of the Standards



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Disclaimer:

The following presentation sets out the personal findings and opinions of the author. It is not intended to provide (a) a comprehensive treatise on the subject, or (b) legal advice in any manner.

2023 – the year of the ISA Exploitation Rules?

- Target: for the Draft Rules to be approved at least by the ISA Council in **Summer 2023**
- Status: batches of the main body of the Draft Rules (in all: 107 regulations, 10 annexes, 1 schedule → 117 pp) **under review at the Council**, entailing substantial „redline“
- Extra challenge: some 40-50 **Standards and Guidelines** implementing or accompanying the Rules are supposed to be in place at about the same time as the Rules.

Let`s talk about this „extra challenge“ today.

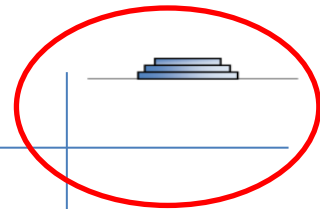
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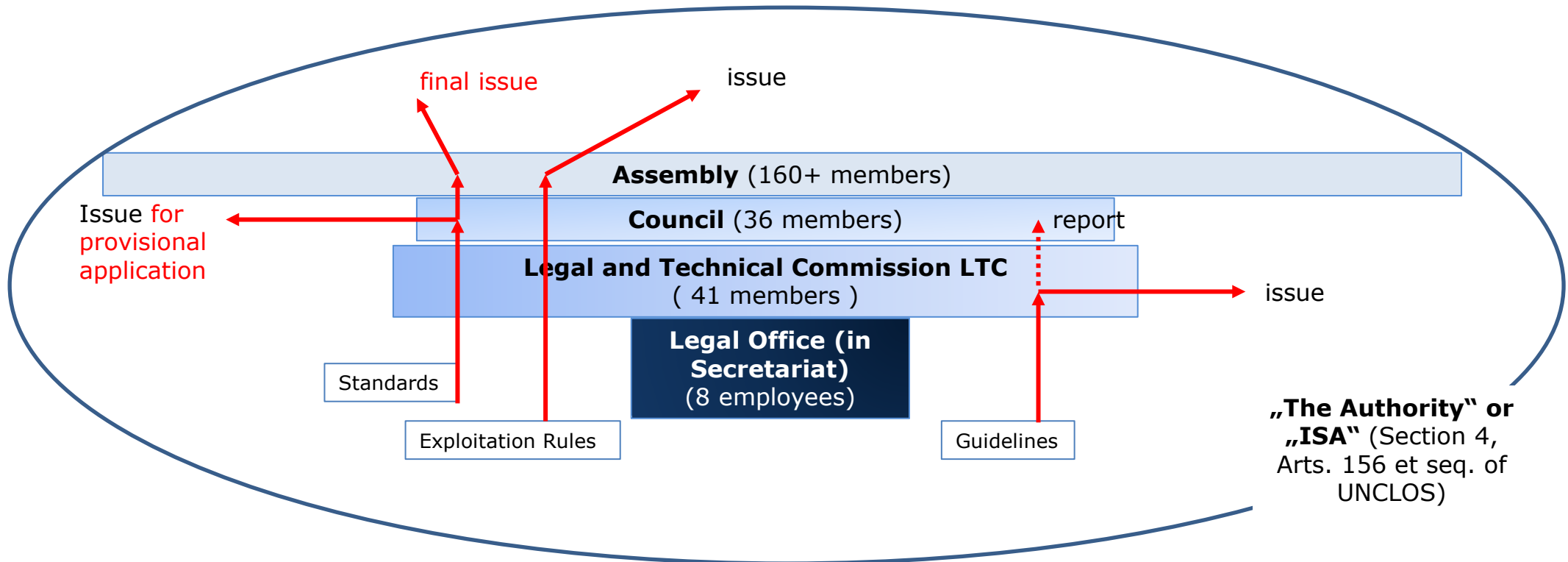
Overview:

1. 2023 – the year of the ISA Exploitation Rules?
2. Standards & Guidelines: Planned – drafted – pending
3. Plan and reality
4. Status of, and challenges for, S&G drafting
5. Future Scenarios
6. Outlook

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Standards & Guidelines („S&G“) planned – drafted - pending



2. Standards & Guidelines („S&G“) planned – drafted - pending

In general:

- **Standard:** usually a feature or property to be consistently found in a variety of things, processes or situations. Standards may be factual or normative.
- **Guideline:** a statement by which to determine a course of action. Guidelines may be mandatory or non-mandatory.

In the ISA Draft Rules:

- Draft Regulation 94 provides for the adoption of **Standards (normative)** mainly in the fields of operational safety, resource conservation and environmental matters.
- Draft Regulation 95 provides for the issuance of **Guidelines (non-mandatory)**, without saying so) to support the implementation of the regulations of the Rules from an administrative and technical perspective.
- Details of which organ of ISA is to approve either type of instrument, and the related process, belong to the more contentious matters in the present Council debates on the Draft Rules.

2. Standards & Guidelines... (2)

Relevance of the S&G for the mining industry:

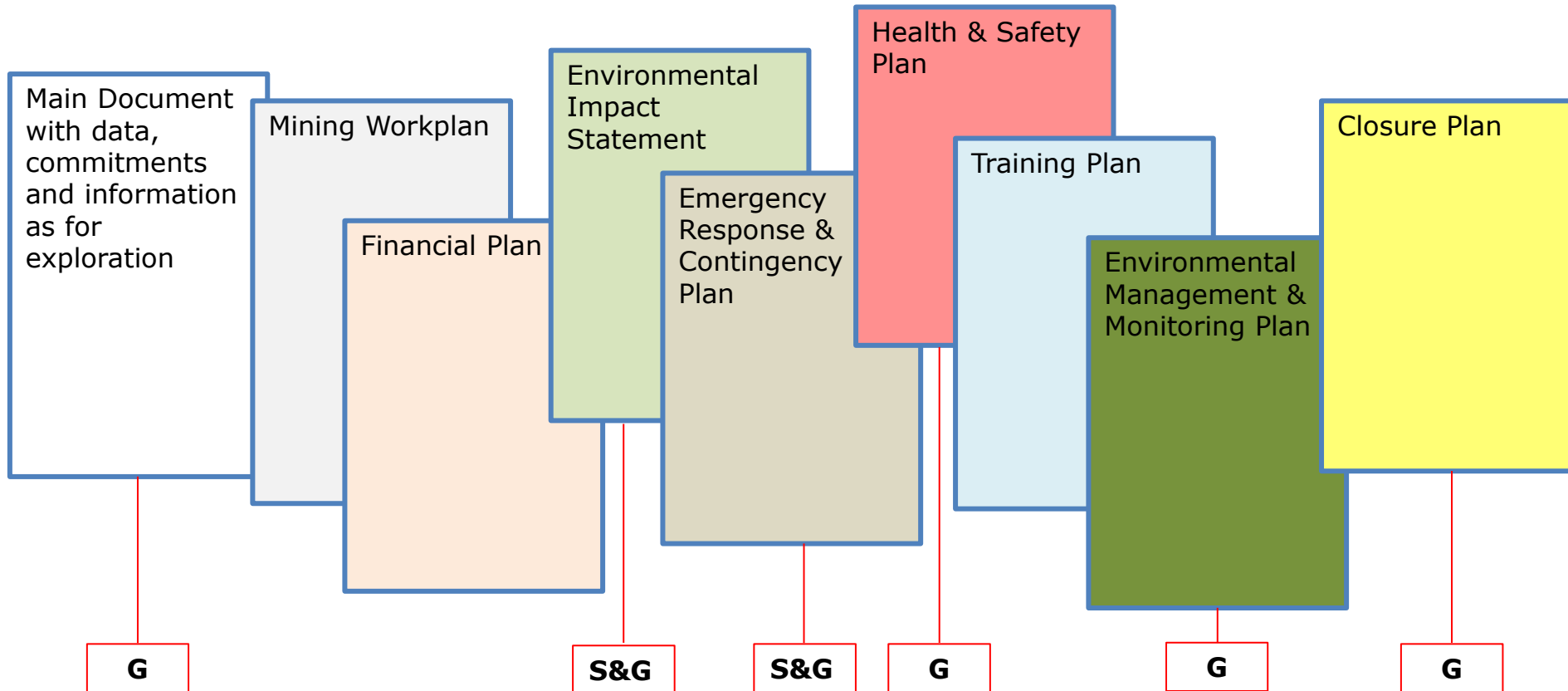
- The applicant for an exploitation license, or – once this is granted – the contractor, should expect the following from the Rules in combination with S&G:
 - **The Rules** to tell him on a more abstract level, what is required, e.g. „undertake an Environmental Impact Assessment (EIA) and, based thereon, generate and submit an Environmental Impact Statement (EIS)“
 - The **Standard** to tell him what quality, properties, or values the required deliverable (e.g. an EIS) or action (e.g. EIA) must fulfill
 - The **Guidelines** to show him a recommended procedure for attaining those qualities, properties, or values

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2. Standards & Guidelines... (2)

Example: Application for Approval of a Plan of Work: Formal requirements as per Draft Regulation 7 of the actual Draft Rules



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2. Standards & Guidelines... (4)

Which S&G were planned, which are drafted by now, and which are pending? Concept: Issue in 3 batches („Phases“) according to relevance: **Phase 1** along with issue of the Rules, **Phase 2** before receipt of 1st. Application for Exploitation license, **Phase 3** at start of commercial mining. Reference for what is planned: Outcome of Pretoria Workshop 2019. Phase 3 S&G (9 entries) not shown on these slides.

Phase: 1

Status:

Green = issued
Yellow = before
Council
Red = unknown,
not yet seen

Topic	Standard	Guide-line	Phase	status	Remarks
Application Plan of Work		x	1	Yellow	
EIA process	x	x	1	Yellow	
EIS preparation		x	1	Yellow	
Env Mgmt & Monitoring Plan prep		x	2?	Yellow	transferred to 1 by LTC
<i>Idem</i> , corr 1		x	2?	Yellow	
Env. Mgmt System development & prep	x	x	1	Yellow	
Hazard Identif. & Risk Assessment tools		x	1	Yellow	
Safe Operation Mining Vessels & Installations	x	x	2?	Yellow	transferred to 1 by LTC
Environmental Performance Guarantee	x	x	1	Yellow	
Baseline Environmental Data		x	1	Yellow	
Emergency Response Plans	x	x	1	Yellow	

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2. Standards & Guidelines... (5)

Phase: 1 cont'd

Status:

Green = issued

Yellow = before

Commission

Red = unknown,

not yet seen

Topic	Standard	Guide-line	Phase	status	Remarks
Risk based approach generic thresholds & indicators		x	1		Necessity to to reconsider
Access to environmental data		x	1		
Stakeholder participation		x	1		Separate policy?
Exploitation contract as security		x	1		
Application of good industry practice		x	1		Depending on definition in Rules
Determination of date of commercial production		x	1		<i>idem</i>
Insurance requirements and risk allocation		x	1		
Modification of plan of work & meaning of material change		x	1		
Transfer of rights & obligations under an exploitation contract		x	1		

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2. Standards & Guidelines... (6)

Phase: 2

Status:

Green = issued

Yellow = before
Commission

Red = unknown,
not yet seen

Topic	Standard	Guide-line	Phase	status	Remarks
Health + safety management system		x	2/1	Yellow	Pretoria: commission to determine need.
Safe operation		x	2/1	Yellow	
Maritime security		x	2	Red	Comm trans- ferred 2 to Phase 1
Mapping of seabed habitats + resources		x	2	Red	
Management + monitoring plans		x	2/1	Yellow	comm. Transferred to phase 1
Monitoring + result evaluation of environmental effects		x	2	Red	
Preparation of closure plans		x	2	Red	
Application of "reasonable regard"		x	2	Red	Pretoria: Commission to determine need
Health + safety management system		x	2	Red	

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2. Standards & Guidelines... (7)

Phase: 2
Status:
 Green = issued
 Yellow = before
 Commission
 Red = unknown,
 not yet seen

Topic	Standard	Guide-line	Phase	status	Remarks
Application of "best available techniques"		x	2		Pretoria: may be covered by improved definitions
Best environmental practice		x	2		
Best available scientific evidence		x	2		
Change of control		x	2		
Application of "as much as reasonably practicable"		x	2		
Annual and other reporting under expl. Contract		x	2		
Review of activities under a plan of work		x	2		
Adoption of labour rules		x	2		Pretoria: check coverage by IMO instruments
Formal safety assessment		x	2		
Performance assessment		x	2		
Adaptive management measures		x	2		
Notifiable events		x	2		
Royalty returns		x	2		
Enforcement and penalties		x	2		

3. Plan and reality

Wherever there was a plan with respect to the preparation and adoption of S&G, this appears to have changed over time. Several „roadmaps“ emerged over time, yet they mainly planned meetings and subject matters, however no real targets.

- **Draft of 8 Aug 2017, DR 80:** First mentioning of „recommendations for the guidance of contractors to assist in the implementation of the Rules“, to be issued „from time to time“ (ISBA/23/LTC/CRP.3) i.e. **after entry into force of the Rules**
- **Draft of 30 April 2018, DRs 92, 93:** corresponding, but „Standards“ added (ISBA/24/LTC/WP.1) → remained in **Draft before Council as DRs 94, 95** (ISBA/25/C/WP.1)
- **Stakeholder Consultation 2019:** → need to prepare S&G early, partly along with Rules
- **Council 2019:** prepare S&G in 3 phases (1) to issue with Rules, (2) to issue before receipt of 1st. Application for exploitation license, (3) to issue at start of commercial mining
- **Pretoria Workshop May 2019** with outcome: revised 3-phase-list, 50 + S&G

3. Plan and reality (2)

➤ 2020-2021:

- LTC **concentrating on phase 1 S&G**, incl. 2 Shareholder Consultation rounds.
Corona prevents/impedes regular live meetings for major parts of the time

➤ 2021:

- **June: Nauru notifies** of intention to submit application for approval of a plan of work for exploitation (= appl. for exploitation license) → Rules to be complete 9 July 2023 pursuant to Annex, Section 1 Art. 15 of the 1994 UNCLOS Amendment
- **August:** Council requests setup of 3 **informal working groups** to i.a. deal w/S&G
- **November: ISA solicits external counsel** support for preparation & finalization of all Phase 2 S&G, plus harmonization thereof and of Phase 1 S&G with Rules, w/target to have them ready (incl. iterations) at the planned issue date of the Rules mid 2023

➤ 2022:

- Submission of **first 10 Phase 1 S&G by LTC to Council** in January; status unknown.

➤ 2023:

- Inquiry on whether/how a **review** of a possible exploitation license application by Nauru could be **deferred**
- **LTC** foresees another up to **5 years** for the finalization of Phase 2, 3 S&G

4. Status of, and challenges for, S&G drafting (2)

Status:

- Of the **39** S&G originally contemplated for phases 1 and 2, **10** are drafted and before the Council. 5 of them come in a pair (Standard plus Guideline)
- Of the 10 drafted S&G documents,
 - **All**, as we learned, will need alignment with the Rules text once that is „stable“
 - **Most** might need intra-document review, by lawyers or comparable resource, in one or more of the following aspects
 - Putting „teeth“ to Standards by formulating unambiguous requirements
 - Checking and possibly adjusting relationship between „Guideline-part“ and „Standard-part in a S/G pair
 - Concentrating Guidelines more on „how to do it“
 - Removing overlapping language between Standard and Guideline in a S/G pair
- As said: Some of the listed, yet undrafted S&G await decision of LTC/Council as to whether they will at all be required



4. Status of, and challenges for, S&G drafting

Challenges:

- Corona (formerly) and multitude of statements in **Council** in the way of more systematic & accelerated discussion of the Rules
 - → S&G (even phase 1) cannot be properly addressed in **Council** before Rules are more stable
- Rush prompted by the Nauru initiative leads to unplanned „last minute action“ also affecting **LTC**
 - Demand by Council to **all ISA organs** to find ways & means to defer review of possible application for „plan of work“ approval
 - Task from Council **to LTC** to develop new Standards on „environmental threshold values“
 - → hardly time & resource at **LTC/Secretariat** for creating new S&G (from the list)



5. Future Scenarios

With about two months to go until the „Nauru date“ (9 July 2023), and looking at the S&G drafting status to-date, it may be allowed to ask: „what if?“ ---

1. The (phase 1) Standards issue too late?
2. The phase 1 Guidelines issue too late?
3. One or more phase 2 or 3 Guidelines issue too late or not at all?
4. One or more Standards or Guidelines are revoked?

6. Outlook

The debate on Deepsea Mining is supposed to become more heated in the future:

- On the one hand, the recent finalization (pending lawyer's review, signatures, & ratifications) of the BBNJ Convention, along with the intent expressed in the Montreal conference 2022 to make 30% of the planet environmental protected areas by 2030, is likely to increase criticism of planned DSM activities.
- On the other hand, many raw materials also extractable from the seafloor face increasingly severe shortage risks from their land based sources: wars, sanctions and export restrictions already now lead to major supply chain problems. This – once again – directs the interest of many States and mining companies to the seafloor.
- **If** the deadline triggered by Nauru expires with Rules / S&G pending effectiveness for some time to come, **and if** no way is found to interpret the UNCLOS provision in a way allowing to defer review of applications for exploitation licenses, **then** the rules governing first deepsea mining will be quite basic at best. Setbacks this may cause for the preservation of the marine environment may not only entail ecological damage, but also a potentially irreparable harm to the efforts to establish a DSM system implementing in a balanced way all aspects of the concept of Common Heritage of Mankind.

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Thank you for your attention and
patience.

And have a safe voyage home!