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Legal Perspectives and European Challenges for Mineral Resource Exploration and Exploitation in the Pacific : New Caledonia, French Polynesia, Wallis and Futuna and Clipperton

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Introduction

The issue of the exploration and exploitation of seabeds has been in the news for close to 80 years. As the international community began to become aware of the significance of the mineral resources of seabeds, a study of international law shows that questions about access to such non-living resources and control have fashioned the creation of an international legal framework capable of addressing the supply needs of States since the end of World War II. That means that the interest for the resources of seabeds is not new. However, it has been revitalised by the discovery of new mineral resources and the development of technology for operating in deep sea environments, which were out of the reach of human activity until now.

In reality, the novelty lies in the changes in the international community and its mode of governance. While international governance was formerly guided by an approach that was solely centred on sovereign States, the creators and beneficiaries of international law, it is now diversifying and opening to civil society.

Those profound upheavals in international governance can be seen in different areas, particularly in the influence exerted since the 1970s by a number of non-governmental organisations, think tanks, foundations, academics and experts in a variety of disciplines within international and regional institutions. The involvement of civil society in subjects that were heretofore exclusively left to States has resulted in heightened consideration for environmental, social and cultural issues. When applied to the area of seabed exploration and exploitation, that has resulted in more regular challenges to the priorities defined by States in terms of the use and management of marine resources, particularly mineral resources. The difficulties encountered by the International Seabed Authority in negotiations for formulating the exploitation code for seabeds outside national jurisdictions are a good example of that development.

Under the influence of the governance model proposed by Agenda 2030 on sustainable development, the law of the sea has taken note of the change by inserting, for the first time, a mechanism for consulting stakeholders (particularly civil society, local communities and indigenous peoples) during environmental impact studies and the setting up of protected marine areas in areas beyond national jurisdictions (under the agreement known as the BBNJ Agreement[1]). By extending the sharing of scientific data and information about marine biodiversity to new players, that agreement - in line with the UN Decade of Ocean Sciences - establishes not just a new mode of environmental governance, based firmly on science and knowledge, but also a new way of planning human marine activities, particularly on seabeds.

[1] Agreement implementing the UN Convention on the Law of the Sea relating to the conservation and sustainable use of biodiversity in areas beyond national jurisdiction, adopted in June 2022.

Seabeds under national jurisdiction, which are closer to coasts and generally not as deep, are thus easier to access, but still draw less attention than those located within what is the shared heritage of humanity (beyond national jurisdictions). However, there are a few exceptions, particularly in some regions of the world which are of particular interest to industry because of their potential mineral resource wealth. That is true of the Pacific region, which has been viewed for almost 20 years as the area that will lead the way in marine mining.

The European Union, which is a long-standing special partner of the Pacific States, has itself been involved in these concerns since 2010, and has funded a series of projects aimed at supporting the development of these activities in line with international law. Besides, the European Union is particularly active in the region. Indeed, it is not just an influential third party, it also has association agreements with three French overseas territories (the "OCTs") located in the region, namely New Caledonia, French Polynesia and Wallis and Futuna. These three OCTs have the particularity of being especially affected by issues of seabed regulation and management. They have been explicitly mentioned in several seabed development strategies of the French State, and are also the subject of particular interest in view of their seabeds and resources, particularly because of continental shelf extension submissions, most of which are still being processed. With varying legal statuses that reflect the principle of self-determination, permanent sovereignty over natural resources and the decolonisation process that is under way, these territories are now facing particularly complex issues relating to the articulation of legal standards on several levels, which have an impact on the regulation and management of these seabed areas, and the way in which exploration and exploitation could be carried out (or not), in the short, medium or long term.

That overlap of legal rules - or stratification - becomes even greater when European law is taken into account. Thus, even though European law does not 'automatically' apply to these OCTs in principle, the overlapping competence between the French State and the OCTs has generated a complex situation, with European law and values exerting their influence to varying extents. The value of such a study, even though its subject is the OCTs, is thus to allow the European Union and the European Parliament to firstly better grasp the influence and application of its law over the whole territory of its member States, and secondly identify the opportunities offered by that influence in terms of legal and political development, in view of the leadership ambitions of the Union in the area of international ocean governance.

This study, which is limited to France and four overseas territories located in the Pacific (New Caledonia, French Polynesia, Wallis and Futuna and Clipperton), does not purport to be comprehensive. It does not intend to provide a detailed analysis of the various transpositions of EU law into French law, or of all the provisions of French law applicable in the various overseas territories. However, it does aim to bring out, through the example of the aforementioned OCTs and Clipperton, the main dynamics relating to the regulation of seabeds and mineral resources under national jurisdiction in order to better support the understanding of these issues, and thus

inform the action of the European Parliament. The structure of this report is intended to allow learning, giving readers additional information as they go on, in order to allow them to better grasp the complexity of the regulation of areas and resources because of the stratification and distribution of competency.

For clarity, the study will start with a general overview to understand the reasons behind the creation of the two marine areas of interest in this study: the continental shelf and exclusive economic zones (part I). Then, it will turn to throwing light on the current legal framework of the law of the sea that applies to these activities, and contemporary implementation issues (part II). After the study of these fundamentals, a more specific angle will be adopted in order to review the distribution of competence between the Union and its member States - in the area of the issue of the regulation of seabeds under national jurisdiction - and the identification of the main European instruments that apply in the field (part III). On that basis, the study will then address the particular case of the OCTs (New Caledonia, French Polynesia and Wallis and Futuna) and Clipperton, showing the principle of distribution of competence for regulating these seabeds under national jurisdiction, with a stress on the measures currently in place to manage these areas and resources (and particularly the issue of moratoriums), and the principles of application of EU law to these territories (part IV). The last part of the study aims to finalise the review of the frameworks applicable to these activities of exploration and exploitation in order to assess the perspectives for the development of such activities in the Pacific region. To that end, it will address the different regional frameworks and initiatives for the exploration and exploitation of resources, and the strategy of the European Union in the region (part V).

Part I – General aspects

Understanding the context and reasons for which the legal framework applicable to seabed activities has been designed is key for grasping the complexity of the distribution of competence between the European Union, the French State and the different territories covered by this study. As a result, the developments below aim to lay out the history of the creation of the regimes for the continental shelf and for exclusive economic zones, by addressing contemporary aspects of state practices at each occasion. As these aspects are general, the developments will only address issues of international law, and generally the creation and implementation of the law of the sea.

I. The continental shelf: an area created to address the supply needs of States

A. Historical information

Even though oil drilling began as early as in the late 19th century, States only seriously turned their attention to marine resources off their coasts after the end of World War II[2]. The challenge was huge: supporting the efforts to build back war-torn societies, and also securing these areas and resources[3] in order to avoid any new appropriation that might destabilise the recently found international balance.

The United States was the first State to claim the seabed off its shores. The proclamation of 28 September 1945 by the then president Harry Truman, known as the "Truman proclamation", left a deep impression on the history of the law of areas for several reasons. From the legal point of view, this proclamation of jurisdiction and control over resources was particularly supported by the argument that the landmass of the coastal State extended over these seabeds, thus justifying the attachment of the continental shelf (soil and subsoil) to the power of the coastal State. Besides, it also used the concept of "natural resources", making it possible to bring together not just oil, but also all the other mineral resources within one and the same category. These two concepts (extension of the landmass to seabeds and natural resources) combined

[2] The first offshore oil rig was built in 1938 by Superior Oil off the coast of Louisiana (USA).
[3] "*since self-protection compels the coastal national to keep close watch over activities off its shores which are the nature necessary for utilization of these resources"*. 1945 US Presidential Proclamation no 2667, Policy of the United States with respect to the natural resources of the subsoil and sea-bed of the continental shelf (hereinafter the "Truman proclamation").

with the vertical division of marine areas[4], were to form the basis of the legal regime of the continental shelf a few years later.

From the geopolitical standpoint, the proclamation revealed the significant forces that drove it: the fact that progress and science now permitted access to and the use of resources that were out of reach till then, the potential threat of such progress in terms of the security of the territory and resources, and the need for the supply and diversification of resources to address worldwide demand. It is of interest to note in this respect that even though these forces for change underwent modifications over the years as a result of the geopolitical context, they remain substantially the same today, even though they are presented differently[5].

Lastly, from a general viewpoint, even though the proclamation has often been seen as one that opened the way to the exploitation of these resources, it must be stressed that it makes more than one reference to the importance of control by the coastal State over the conservation and prudent utilisation of the resources. Conservation issues, and thus particularly those relating to the strategy of use of resources and environmental policies, were thus also a central concern of the proclamation[6].

After the proclamation, a number of South American States followed in its footsteps and in turn laid a claim on their continental shelves[7]. Even though the content of these various proclamations varies greatly in terms of their geographical scope (some States claimed complete sovereignty including over the superjacent waters), they all had in common the affirmation of a new form of power of the coastal State on the soil and subsoil off its shores.[8]

The multiplication of these unilateral claims had the effect of an electroshock on the international community, and drove States to take a closer look at the issue of the legal regime applicable to these claims. Does the continental shelf (and its resources) belong to the law of the high seas or is it an area where new activities, those that are not governed by the rules of the high seas developed a few centuries ago by Hugo Grotius, could develop without restrictions?

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[4] Separating the legal regime for waters from that for the marine soil and subsoil. That new vision moved away from the horizontal vision that had prevailed until then to regulate navigation and communication. See in particular C. Vallée, *Le plateau continental dans le droit positif actuel*, Bruylant, Paris: Bruxelles, 1985, pp. XIII-XXI.

[5] See in this respect V. Tassin Campanella, "Introduction", in V. Tassin Campanella (ed), *Routledge Handbook on Seabed Mining and the Law of the Sea*, Routledge, London, 2023, pp. 1-7.

[6] "*Whereas recognized jurisdiction over these resources is required in the interest of their conservation and prudent utilization when and as development is undertaken […] the effectiveness of measures to utilize or conserve these resources would be contingent upon cooperation and protection from the shore […] Having concern for the urgency of conserving and prudently utilizing its natural resources.*" Truman Proclamation, op. cit.

[7] See in particular the Panama decree no 449 of 17 December 1946, and the Santiago declaration of 18 August 1952 signed by Chile, Peru and Ecuador. More generally, see B.B.L. Auguste, *The continental shelf: the practice and policy of Latin American States with special reference to Chile, Ecuador and Peru: a study in international relations*, Librairie E. Doz, Geneva, 1960, 408 p.

[8] It must be noted that the Truman proclamation fully protects the regime for superjacent waters from any control by the coastal State.

Faced with the significance of these questions, the International Law Commission[9] decided to include the study of the continental shelf into its work in 1950[10]. However, the study was soon differentiated from that of the high seas, insofar as it was clear that States were looking to create rights that could guarantee exclusive access and use, and give coastal States a monopoly over the natural resources of such seabeds. The continental shelf does not therefore fall under the *res nullius* or *res communis* categories known to international law, and a new, *sui generis* and *à la carte* regime had to be set up. The regime, formulated by the ILC as part of the codification of international law, then formed the basis for early international negotiations on the law of the sea, which resulted in 1959 in the adoption in Geneva of a specific convention on the continental shelf[11].

That Geneva Convention, which continues to be in force, gives the coastal State sovereign exclusive rights over the exploration and exploitation of natural resources on its continental shelf. Also, it sets out the principles for organising the relationship between the different uses of seabeds (relationship between exploration and exploitation activities and the activities carried out as part of high seas freedoms). Even while it addressed the economic and geostrategic needs of States, it was soon challenged with the accession to independence of many States, all keen to protect their natural resources[12]. Indeed, the geographical definition of the continental shelf included a boundary criterion based on the "exploitability" of the shelf[13], which does not give an equal footing, firstly to States with the scientific and engineering resources for exploiting resources (developed States), and secondly States without such capabilities (developing States). Other international negotiations became necessary to allow recently independent States to take part in the formulation of a 'new' law of the sea.

Following the failure of negotiations in the 1960s aimed at solving these problems and other pending questions (exclusive fishing rights and limits of the territorial sea), new negotiations were attempted in the 1970s. Thus, the third UN conference on the law of the sea began in 1973 and ended successfully with the adoption of the United Nations Convention on the Law of the Sea[14] on 30 April 1982.

[9] Hereinafter "ILC".
[10] For more details about the examination of the continental shelf issue by the International Law Commission and a critical view of the competence of the Commission in that respect, see V.J.M. Tassin, *Les défis de l'extension du plateau continental : consécration d'un nouveau rapport de l'État à son territoire,* Pedone, Paris, 2013, pp. 56-57 and 213-219.
[11] Hereinafter the "Geneva Convention".
[12] See in particular the UN general assembly, *Permanent sovereignty over natural resources*, resolution 1803 (XVII), 14 December 1962, particularly paragraph 7 which refers to sovereign rights.
[13] « *[…] the term "continental shelf" is used as referring (a) to the seabed and subsoil of the submarine areas adjacent to the coast but outside the area of the territorial sea, to a depth of 200 metres or, beyond that limit, to where the depth of the superjacent waters admits of the exploitation of the natural resources of the said areas; (b) to the seabed and subsoil of similar submarine areas adjacent to the coasts of islands*". My emphasis.
[14] Hereinafter "UNCLOS".

Those negotiations, the longest to date in the history of international law, did not just overcome the particularly complex context of the 1970s (Vietnam war, cold war, oil crises, decolonisation, acceleration of industrialisation and inequality etc.), they also succeeded, in a single document, in regulating all of the marine area and related activities, thus aiming to establish a "*a legal order for the seas and oceans*", to enable the "*maintenance of peace, justice and progress for all peoples of the world*"[15].

For its part, the continental shelf regime was included overall in the Geneva Convention with a few changes, particularly relating to the geographic extent of the shelf. Now, the shelf was extended up to a limit of 200 nautical miles; the distance criterion provided the benefit of sovereign rights to exploration and exploitation to all States, regardless of whether or not there was a geological continental shelf. A mechanism for extending it up to 350 nautical miles[16], subject to a specific procedure under the leadership of the Commission on the Limits of the Continental Shelf (CLCS) was also established. This procedure makes it possible to verify the scientific implementation of the extension criteria set out in article 76 of the UNCLOS, by placing firstly the coastal State making the submission for extension and secondly the CLCS, which ultimately makes the recommendation relating to the external boundary line of the continental shelf, at the centre of the proceedings.

B. Contemporary perspectives

From the entry into force of the UNCLOS in 1994 to the year 2009, few believed that the procedure for extending the continental shelf would interest many States. The exorbitant costs of scientific campaigns for gathering the information and data required by article 76 of the UNCLOS, combined with the technical nature of extension submissions, were some of the reasons why the Commission on the Limits of the Continental Shelf ("CLCS") was designed as an entity that would work on a small number of days every year, with limited resources[17].

The year 2009, a turning point in the history of the continental shelf, revealed on the contrary a very keen interest for this extension mechanism[18]. With 35 submissions and 44 files of

[15] Reference to the preamble of the UNCLOS, paragraphs 4 and 1 respectively.
[16] Or to a distance no more than 100 nautical miles from the 2500 metre isobath, which is the line that joins points located at a depth of 2500 metres. Technically, that last criterion can allow going beyond the limit of 350 nautical miles from the baselines from which the breadth of the territorial sea is measured. See article 76, UNCLOS.
[17] In 2006, the CLCS had prepared several scenarios based on the possible number of extension submissions filed in 2009. The scenario that best matches the current situation is scenario "C", recognised by the chairman of the CLCS at the 15th session as the worst case scenario, requiring the use of waiting lists (effective to date). CLCS, *Statement by the Chairman of the Commission on the Limits of the Continental Shelf on the progress of work in the Commission*, CLCS/50, 10 May 2006, p. 14.
[18] A ten-year period for filing extension submissions has been set up under article 4, annex II of the UNCLOS. However it was interpreted by the States party to the UNCLOS as starting on the exact date of 13 May 1999, for States that had ratified the UNCLOS before 13 May 1999. That easing of the time limit for filing submissions did not however address the technical difficulties encountered by less privileged States. A last adjustment was thus made to enable them to file indicative preliminary information

preliminary information[19] filed in 2009, it has become very clear that the exercise of sovereign rights to exploration and exploitation over a larger extent of the seabeds was at the centre of the new geopolitical considerations of the 21st century[20].

However, its implementation is particularly long, technical and complex[21], which explains in part why to date, there is a waiting time of about 25 years for all the extension submissions to be examined[22]. Besides, out of the 93 extension submissions listed until now, only 34 recommendations have been made, and 10 limits have been published by the relevant States in accordance with the obligations of article 76, paragraph 9 and article 84, paragraph 2 of the UNCLOS. That lack of publication of limits[23] significantly hampers the publicity process set up within the United Nations, which underlies the mechanism for (potential) challenges to the limits claimed by States.

To date, 18 EU member States have filed extension submissions. Six of them received recommendations from the CLCS, two are being processed, five are disputed and five are on the waiting list. Currently disputed submissions are considered to have priority over those filed later when the dispute is settled and the block lifted[24].

In general, it must be noted that the extension of these shelves has significant implications for the European Union, firstly because it provides a way of projecting its presence, through its member States, into the different oceans of the world, and secondly because depending on the relationship between the various legal standards of these territories, it can help affirm the European environmental policy, particularly its ambitions as a leader of international ocean governance. These questions will be discussed in greater detail in the report below.

(and not complete submissions) which would be considered to fulfil the 10-year requirement. To date, a large quantity of preliminary information has been filed as submissions in their own right.

[19] See explanation in note 17 op. cit.

[20] For a complete analysis of the political dimension of such extension, see V.J.M. Tassin, "Les raisons politiques de l'extension : un contrôle élargi", *Les défis de l'extension du plateau continental : consécration d'un nouveau rapport de l'État à son territoire,* op. cit., pp. 141-203.

[21] For more details, particularly see V.J.M. Tassin, "La Commission des limites du plateau continental : clef de voûte fragile de la procédure d'extension", *Les défis de l'extension du plateau continental : consécration d'un nouveau rapport de l'État à son territoire*, op. cit, pp. 313-381. Also see the chronicles of R. Meese on the continental shelf beyond 200 miles (2004-2019) available in the *Annuaire du droit de la mer*, Pedone: Paris, and more recently on the following blog for the years from 2020 to the present: https://www.chroniquesdroitoceansetmer.com/archives/category/chroniques (viewed in April 2024).

[22] As estimated by Walter Roest (ABLOS conference 2023). Indicative time calculated on the basis of the submissions pending in April 2024. The time may be extended in the case of changes, particularly if there is any dispute in accordance with annex I, paragraph 5, Rules of procedure of the Commission on the Limits of the Continental Shelf, CLCS/40/Rev.1, 17 April 2008.

[23] Consisting in the submission of maps and relevant information to the UN secretary general and, for the extended continental shelf, the submission of those maps and information to both the UN secretary general and the International Seabed Authority. Such a submission may not be assimilated with the publication of a law or a decree in domestic law. In that respect, it appears that the interpretation provided in article 84, paragraph 2 by the International Seabed Authority, does not comply with the spirit of the Convention, since the delivery diplomatic notes that demonstrate the implementation of the aforementioned article are not referenced (probably because these diplomatic notes do not exist).

[24] These two criteria are important, because amicable or legal settlements do not - unfortunately - necessarily lift the block. See the Bangladesh/Myanmar case.

Table 1: Continental shelf extension submissions filed by member States of the European Union[25]

State	CLCS registry number	Extension submission filing date	CLCS recommendation date	Publicity of limits (art. 76 § 9)	Status of submission
Joint submission by France, Ireland, Spain and Great Britain (Celtic Sea and Bay of Biscay)	6	19.05.2006	24.03.2009	No	Completed
France (French Guiana + New Caledonia)	8	22.05.2007	02.09.2009	No	Completed
France (Antilles and Kerguelen Islands)	17	05.02.2009	19.04.2012	No	Completed
Great Britain (Hatton Rockall area)	19	31.03.2009			Standing by for dispute resolution. Submission blocked by Denmark in 2010 because of a dispute. Maritime delimitation is under way between Iceland, Denmark, Ireland and Great Britain.
Ireland (Hatton Rockall area)	20	31.03.2009			Standing by for dispute resolution. Submission blocked by Denmark in 2010 because of a dispute. Maritime delimitation is under way between Iceland, Denmark, Ireland and Great Britain.
Denmark (Faroe Islands)	28	29.04.2009	11.03.2014	No	Completed
Joint submission by France and South Africa (Crozet and Prince Edward Island)	34	06.05.2009	07.03.2023	No	Completed

[25] The capacity of member State is that at the time of filing the submission. Table prepared in April 2024.

France (Reunion Island, Saint-Paul and Amsterdam Islands)	40	08.05.2009	04.03.2020	No	Completed
Portugal	44	08.05.2009			Under processing
Great Britain (Falkland Islands, South Georgia and West Sandwich Islands)	45	11.05.2009			Standing by for dispute resolution. Submission blocked by Argentina in 2009 due to a sovereignty conflict over the islands.
Spain (Galicia)	47	11.05.2009			Under processing
Denmark (Faroe-Rockall Shelf)	54	02.12.2010			Standing by for dispute resolution. Submission blocked by Iceland in 2011 due to the overlap in shelves in the area covered by the submission. Maritime delimitation is under way in the Rockall area.
Denmark (South Greenland)	61	14.06.2012			On waiting list
Denmark (North East Greenland)	68	26.11.2013			On waiting list
France (Saint Pierre and Miquelon)	72	16.04.2014			Standing by for dispute resolution. Submission blocked by Canada due to a dispute over the submitted area, which goes beyond that awarded by the arbitration tribunal in the case for the delimitation of maritime areas between Canada and France (10 June 1992).
Denmark (North Greenland)	76	15.12.2014			On waiting list
Spain (West Canary Islands)	77	17.12.2014			On waiting list
France (French Polynesia)	79	06.04.2018			On waiting list

Conclusions	18 European submissions out of 93 submissions filed	Submissions filed between 2006 and 2018	Six CLCS recommendations out of the 18 submissions filed	No publication of the outer limits of the continental shelf[26]	Out of 18 submissions, 6 are completed, 2 are being processed, 5 are currently blocked and 5 are on the waiting list.

In respect of preliminary information, the only EU member States which have used this mechanism are France (for Saint Pierre and Miquelon, Polynesia and Wallis and Futuna), and Spain (for the Canary Islands). To date, only the complete submission of France for Wallis and Futuna has not yet been filed.

II. Exclusive economic zones: a more recent regime that overlaps the continental shelf regime

A. Historical information

Unlike the continental shelf, for which a legal regime is in existence since the Geneva Convention of 1958, exclusive economic zones (hereinafter "EEZs"), which are better known to the public, only came into being in 1982. This regime essentially addresses the sovereign access of the coastal State to the living resources located off its shores.

It was created as the result of long negotiations that are rooted in the Hague Conference of 1930 on the codification of international law. That was when the first disagreements of States were expressed in respect of the idea of creating a territorial sea, and an area related to that sea, giving the coastal State sovereign rights of access to fishery resources.

The many unilateral claims on continental shelves made following the Truman proclamation only sharpened the concerns of some States on the potential reduction of high seas areas. Indeed, some claims on continental shelves, such as that of Chile, encompassed the water column located above the shelf and consisted in a claim of full sovereignty[27].

Those disagreements continued at the first UN conference on the law of the sea, and are the reason why no convention devoted to territorial seas was adopted in 1958. The subsequent failure of the negotiations of the second UN conference on the law of the sea of 1960 did not

[26] In April 2024, only 10 States out of a total of 34 States with CLCS recommendations had notified the limits of their continental shelf in accordance with their obligation under the UNCLOS. None of the States is a member of the European Union.
[27] The Truman proclamation did not refer to "sovereignty" but "jurisdiction and control" over the natural resources of the continental shelf.

however prevent some progress in the talks. Several important points were indeed raised by African States: the concerns of developing States vis-à-vis advancing technology and the need to conserve resources for the benefit of all[28], the fact that developing States were lagging behind in these technologies and their inequality in terms of the exploitation of marine resources, and lastly the importance of the economic element and geography in the reading of the law of the sea, in order to protect peace between nations.

Following these various contributions, the idea of technical assistance to developing States was accepted unanimously,[29] and work was done to think of the law of the sea in terms of equality, not only law - by inviting developing States to this formulation of the new law of the sea - and also in fact, by preparing mechanisms to take account of the situation of developing States and assist them accordingly (particularly through what would later become the technology transfer mechanism). After the creation in 1967, of an *ad hoc* UN committee on the peaceful use of seabeds and oceans, Kenya took the opportunity of the forum in January 1972 to present a proposition relating to the creation of an area of 200 nautical miles giving sovereign rights to the coastal State over fishing and pollution control. It was followed by the Santo Domingo Declaration, adopted in June 1972 by the Caribbean region. A new proposition was then formulated in July 1973 by African States, also as part of that *ad hoc* committee, suggesting that coastal States have "*exclusive competence to control, regulate, exploit and conserve both living and non-living resources in the area and to prevent and combat pollution*"[30]. That proposition, part of the debates on the idea of patrimonial sea (as proposed by Latin American States), would result in the adoption of the concept of exclusive economic zones at the third UN conference on the law of the sea.

B. Contemporary perspectives

Today, in accordance with the UNCLOS, EEZs cover the area of the water column and the soil and subsoil located below that water column, and extend over a distance of 200 nautical miles from the baselines from which the territorial sea is measured[31]. This area therefore covers the continental shelf, and thus partly overlaps the existing continental shelf regime.

Even though the areas occupy the same geographical space, the history of their creation is very distinct. The regime for the continental shelf was set up in response to the wish of coastal States to gain sovereign and exclusive access to natural resources (mainly oil and mining resources), whereas EEZs were set up on the basis of the idea of sovereign access by the

[28] In order to prevent capture by industrialised States, and also prevent technology from harming the health of the oceans (fear of new sources of pollution).
[29] See second UN conference, A/CONF.19/L.8, 22 April 1960. Resolution adopted unanimously with twenty abstentions.
[30] The proposal to extend the competence of the coastal State over non-living resources should be noted here.
[31] Articles 55 and 57, UNCLOS.

coastal State to fishing resources and its duty to conserve those resources, particularly in respect of various forms of pollution.

In practice, however, these two legal zones are often confused, so much so that one may wonder if the EEZ has not just replaced, or even absorbed the continental shelf within 200 nautical miles. That question was raised as part of the *Barbados vs. Trinidad and Tobago* arbitration, where the tribunal gave a clear answer in the following statement: "*the continental shelf and the EEZ coexist as separate institutions, as the latter has not absorbed the former (...) and as the former does not displace the latter*"[32].

In spite of everything, a significant element is common to these two areas: in both the EEZ and on/in the continental shelf, the sovereign rights of the coastal State are limited[33]. As a result, other activities can be conducted in the EEZ and the continental shelf, which come under a different legal regime, that of the high seas[34]. These activities may, for instance include the laying of cables and pipelines, navigation, marine scientific research etc. The result is a complex overlap of rules within the UNCLOS, which becomes ever more complicated as they are implemented, while other legal frameworks, particularly regional or international ones, overlap the rules of the law of the sea.

From a practical viewpoint, a very large number of States have declared EEZs since their ratification of the UNCLOS (130 States in April 2024), to the extent that the institution of the EEZ is now recognised as forming part of international customary law[35]. Some regions in the world are however known for having only a few declared EEZs. That is so of the Mediterranean Sea, because of the known overlaps in respect of some resources (living and non-living) and the perspective of very lengthy settlement of delimitation disputes[36]. Like EEZs, States can therefore declare different types of zone such as fishing zones or environment protection zones etc. France is a good example in that respect, and set up an environmental protection zone 2003[37] which was then replaced in 2012 by an EEZ[38], modified more recently in 2018[39]. Italy

[32] *Arbitration between Barbados and Trinidad and Tobago*, *Decision of 11 April 2006*, § 234. Also see in this respect *Continental shelf (Libyan Arab Jamahiriya/Malta), ruling, ICJ collection 1985*, p. 33, § 33.
[33] These legal frameworks are described in detail in the following part.
[34] Particularly agreements for the implementation of the UNCLOS applicable to these resources and activities that are not covered by the legal regime for EEZs and continental shelves.
[35] See in that respect *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia), ruling, ICJ collection 2022*, § 56. Also see *Continental shelf (Libyan Arab Jamahiriya/Malta)*, op. cit., p. 33, § 34.
[36] See in particular T. Scovazzi, "The Mediterranean sea maritime boundaries", in D.A. Colson and R.W. Smith (eds), *International maritime boundaries*, vol. 5, Leiden and Boston, Brill/Martinus Nijhoff, 2005, 3483.
[37] Act no 2022-346 of 15 April 2003 relating to the creation of an environmental protection zone off the shores of the Republic.
[38] Decree no 2012-1147 of 12 October 2012 relating to the creation of an exclusive economic zone off the shores of the Republic in the Mediterranean Sea.
[39] Decree no 2018-681 of 30 July 2018 establishing the outer limit of the territorial sea off the shores of metropolitan France.

followed suit when in 2006 it put in place an environmental protection zone[40] that was replaced by an EEZ in 2021[41].

In the Pacific Ocean, only French Polynesia and Clipperton have an EEZ as named by the UNCLOS, while New Caledonia and Wallis and Futuna have economic zones, a legacy name used before the adoption of the UNCLOS. For convenience, the report will only refer to EEZs, but readers are asked to keep that difference in terminology in mind. The table below provides greater details about all the elements relating to the limits of the different marine areas concerned.

Table 2: Limits of EEZs and continental shelves in New Caledonia, French Polynesia, Wallis and Futuna and Clipperton

Territory	EEZ or equivalent	Continental shelf		Delimitation agreements
		Within 200 m	Beyond 200 m	
New Caledonia	• Decree no 78-142 of 3 February 1978 instituting an economic zone off the shores of New Caledonia[42] ⇨ Limits notified in accordance with article 75 (2): M.Z.N 81 2011.LOS of 3 May 2011	N/A (see notification of limits of the economic zone)	• Extension submission no 8 filed on 22 May 2007[43] • CLCS recommendation adopted on 2 September 2009 (see CLCS/64) • Decree no 2015-1182 of 25 September 2015 ⇨ No limits notified in accordance with the procedure of article 76 (9)[44]	With Australia: • Decree no 83-99 of 9 February 1983 (Melbourne Agreement of 4 January 1982) With the Solomon Islands: • Decree no 90-1261 of 31 December 1990 (Honiara Agreement of 12 November 1990) With Fiji: • Decree no 91-74 of 17 January 1991 (Suva Agreement of 19 January 1983) • Decree no 91-156 of 8 February 1991 (Suva Agreement of 8 November 1990) amending decree no 91-74 of 17 January 1991

[40] Act 61 on the establishment of an environmental protection zone beyond the limits of the territorial sea, 8 February 2006.
[41] Act 91 establishing an exclusive economic zone beyond the limits of the territorial sea, 14 June 2021.
[42] Note that this economic zone has a name that is not the same as that of the EEZ instituted a few years after the UNCLOS. Following the ratification of the UNCLOS by France, the name was not revised.
[43] This extension submission led to reactions from three States: Vanuatu (letter of 11 July 2007), New Zealand (letter of 15 August 2007) and Surinam (letter of 17 August 2007). None of these States opposed the examination of the submission by the CLCS in spite of the existence of overlapping zones. The French extension submission also overlaps the extended continental shelf of Australia, and the maritime border between Australia and New Zealand of 25 July 2004; in spite of that, the overlap is not mentioned by Australia or New Zealand.
[44] Source: UN Division for Ocean Affairs and the Law of the Sea (hereinafter "DOALOS"). It must however be noted that the International Seabed Authority ("ISA") lists decree no 2015-1182 as fulfilling the publicity requirements in accordance with article 84 (2) of the UNCLOS, even though France has not sent the decree to the UN secretary general or the ISA in accordance with the requirements of article 84 (2). That practice of the ISA does not therefore appear to conform to the spirit of article 84 (2) of the UNCLOS.

				• Decree no 2022-1742 of 30 December 2022 (Suva Agreement of 8 November 2015) amending decree no 91-156 of 8 February 1991 Note: negotiations pending or under way with New Zealand and Vanuatu relating to the extended continental shelf.
Polynesia	• Decree no 2020-591 of 18 May 2020 establishing the outer limit of the exclusive economic zone off the shores of French Polynesia ⇨ No publication in accordance with article 75 (2)[45]	N/A (see limits of the EEZ)	• Preliminary extension submission filed on 8 May 2009 • Extension submission no 79 filed on 6 April 2018	With the Cook Islands: • Decree no 90-965 of 23 October 1990 (Rarotonga Agreement of 3 August 1990) With Kiribati: • Decree no 2003-128 of 12 February 2003 (Tarawa Agreement of 18 December 2002) With the United Kingdom: • Decree no 84-424 of 25 May 1984 (Paris Agreement of 25 October 1983) amended by decree 93-462 of 22 March 1993 (Paris Agreement of 17 December 1992 and 19 January 1993)
Wallis and Futuna	• Decree no 78-145 instituting an economic zone under the act of 16 July 1966 off the shores of Wallis and Futuna Islands[46] ⇨ No publication in accordance with article 75 (2)[47]	N/A (see limits of the economic zone)	• Preliminary extension submission filed on 8 May 2009 • Joint extension submission no 62 between France, Tuvalu and New Zealand, filed on 7 December 2012	With Fiji: • Decree no 91-74 of 17 January 1991 (Suva Agreement of 19 January 1983) • Decree no 91-156 of 8 February 1991 (Suva Agreement of 8 November 1990) amending decree no 91-74 of 17 January 1991 • Decree no 2022 of 30 December 2022 (Suva Agreement of 8 November 2015) amending decree 91-156 of 8 February 1991 With New Zealand: • Decree no 2004-42 of 6 January 2004 (Atafu Agreement of 30 June 2003)

[45] Source: DOALOS.
[46] Note that this economic zone is not called an EEZ, which name was instituted a few years later by the UNCLOS. Following the ratification of the UNCLOS by France, the name was not revised and the limits of the economic zone were not published. Several bilateral agreements refer to it however, particularly the agreement on the delimitation of economic zones with Tonga.
[47] Source: DOALOS.

				With Tuvalu: • Decree no 86-1056 of 22 September 1986 (exchange of notes of 6 August 1985 and 5 November 1985 between the government of the French Republic and the government of Tuvalu) • Decree no 2022-1352 of 24 October 2022 (Agreement in the form of exchange of letters between the government of the French Republic and the government of Tuvalu) With Tonga: • Convention between the Government of the French Republic and the Government of the Kingdom of Tonga on the Delimitation of Economic Zones, 11 January 1980 Note: negotiations pending with New Zealand in respect of the extended continental shelf.
Clipperton	• Decree no 78-147 of 3 February 1978 relating to the creation of an economic zone off the shores of Clipperton Island • Marine map 7751 titled Clipperton Island (not dated)[48]	N/A	Preliminary information submitted to the CLCS on 8 May 2009, but withdrawn two days later	The preliminary information was withdrawn without explanation[49]. There may be several explanations, the most plausible of which is the sovereignty conflict pending with Mexico, which could have been spurred in the event of the examination by the CLCS of an extension submission. Indeed, Mexico could have objected to the submission and blocked the examination process, making it impossible for France to

[48] The SHOM catalogue shows that the map was published in 2017, but was used by France in 2012 to notify the limits of the EEZ to the UN in accordance with article 75. The date is thus uncertain. SHOM, Catalogue of marine maps and nautical structures: catalogue generated on 26 March 2014, p. 7.

[49] In that regard, see the comments of the French Economic, Social and Environment Council (CESE) on the issue: "*However, questions must be asked about why France withdrew the preliminary information in such a way. Regarding the document submission procedure, had there been any dysfunction between those responsible for filing it and those who decided whether or not it was to be filed? After all, it is unusual to send a document to New York and not ultimately file it. It is even more surprising to see the document filed and then withdrawn. No plausible explanation was given to the overseas delegation of the CESE in spite of repeated requests. As for the fundamental reason behind the decision to withdraw the preliminary information, the overseas delegation heard conflicting versions of it. The [Ministry for External Affairs] believes the reason was the non-existence of a legal continental shelf extension. One could also wonder why IFREMER allowed the transport from Brest to New York of a document prepared by it if it lacked scientific substance or grounds. The [secretary general] for the Sea believes the aim was to not upset Mexico, which goes against the statements made by the [Ministry]. What is most surprising is that the [Ministry] is asking the Prime Minister to make a decision about a matter that is strictly scientific.*" According to the CESE report, the Clipperton extension submission could still be filed. See comments below. CESE, *L'extension du plateau continental au-delà de 200 milles marins : un atout pour la France*, Opinion, 9 October 2013.

	⇨ Limits notified in accordance with article 75 (2)by M.Z.N. 87.2012.LOS of 3 July 2012 and M.Z.N. 80.2010.LOS of 6 December 2010 • Decree no 2018-23 of 16 January 2018 establishing the outer limits of the territorial sea and the exclusive economic zone off the shores of Clipperton Island ⇨ Limits notified in accordance with article 75 (2) by M.Z.N. 142.2019.LOS of 26 February 2019			obtain an extension till the conflict had been settled[50].

[50] The sovereignty dispute over Clipperton Island between France and Mexico was the subject of arbitration by the King of Italy, Victor-Emmanuel III, on 28 January 1931. The French EEZ declared in 1978 was however challenged by Mexico following the seizure by France of an illegal fishing vessel in the EEZ. In order to keep the dispute in check and avoid the use of the international dispute settlement mechanism, France came to an amicable settlement by entering into a fishery agreement in its EEZ with Mexico. That fishery agreement is however the subject of dispute because of its failure to address sustainable fishing (no quotas, consideration or mesh size limits). Setting aside these divergences, it must however be noted that the real debate about Clipperton consists in determining whether or not the island can be the origin of an EEZ and a continental shelf in the meaning of the law of the sea. If the island is recognised as unfit for human habitation and its own economic life, it will be considered to be a rock, with a territorial sea of up to only 12 nautical miles. The consequences for Mexico and France are clear: in the absence of an EEZ and a continental shelf, the sovereign rights mechanism does not apply. The EEZ would come under the regime of the high seas, and would thus be open to exploitation by all. The same would apply to the continental shelf, which would then be under the regime of the area, where the exploration and/or exploitation of mineral resources would then be subject to the governance mechanism set up under the International Seabed Authority (with greater sharing of exploitation revenue than if the resources were under national jurisdiction). In reality, it is very much in the interest of both States to come to an agreement about both living and non-living resources.

Part II – International vision: the regulation of activities on continental shelves and in EEZs

The regulation of seabeds in areas under jurisdiction has the particularity of overlapping several legal regimes over the same marine area, namely the soil and subsoil of seabeds. There are two overlapping levels: one located *within* 200 nautical miles and one *beyond* 200 nautical miles.

To better understand the challenges of the interaction between these regimes, particularly in overseas territories, it is crucial to have a proper grasp of the differences between the law applicable to these seabeds. This section will be devoted to that goal, with a focus on the differences and similarities between the rights of the coastal State under the legal regimes for continental shelves and for exclusive economic zones.

I. Sovereign rights of exploration and exploitation over natural resources

A. Sovereign rights over the continental shelf

These rights exist since they were formulated in the Geneva Convention on the continental shelf of 1958. Since then, they have not been discussed or called into question at the various conferences on the law of the sea, in spite of the arrival of newly independent States at the negotiating table. As a result, these sovereign rights to exploration and exploitation over the continental shelf are now recognised as customary rights that can thus be extended to States that are not party to the UNCLOS.

From the viewpoint of their content and field of application, these rights have several particularities.

First, in respect of terminology, they are called “sovereign” rights, in order to reflect the exclusivity and monopoly of the State to exercise these rights[51]. As stated by the UNCLOS, these rights are independent of the effective or non-effective occupation of the shelf, and do not have to be claimed expressly. They are, as stated by the International Court of Justice, *ipso facto* and *ab initio*[52] rights.

[51] See V. Tassin Campanella, Y. Cissé et D. Tladi, “Rights and obligations of States on the continental shelf and the Area”, in V. Tassin Campanella (ed), *Routledge Handbook on Seabed Mining and the Law of the Sea*, Routledge, London, 2023, pp. 81-106.
[52] *North sea continental shelf, ruling, ICJ, Collection 1969,* paragraph 19, p. 23.

These sovereign rights further have the particularity of being identical over the whole geographical extent of the continental shelf, that is to say within and beyond 200 nautical miles. The jurisprudence follows that interpretation, since the concept of "*single continental shelf*" has been confirmed in several cases[53]. As a result, the mechanism for the extension of the continental shelf, subject to the scientific procedure of article 76 of the UNCLOS, merely aims to determine the outer limits of the shelf, and not the exercise of sovereign rights. The implementation of the extension procedure does not therefore affect the exercise of these sovereign rights, or any delimitation of the border on the continental shelf.

That distinction between the outer limit and the benefit of sovereign rights has significant consequences, particularly in the case of a State not party to the UNCLOS and not subject to the extension procedure of the UNCLOS, which nevertheless wants to exercise such sovereign rights over its continental shelf beyond 200 nautical miles. Such a case, which is far from hypothetical, recently came to light with the publication by the USA of the outer limits of its extended continental shelf in December 2023.

Going back to sovereign rights over the continental shelf, it must be noted that in spite of the concept of a single continental shelf, intended to restate that the same legal regime applies to the shelf within and beyond 200 nautical miles, there are several particularities when sovereign rights to exploration and exploitation are exercised on the extended continental shelf.

First of all, revenue from the exploitation of natural resources on the extended continental shelf is subject to the particular rule that the coastal State must pay contributions in cash or in kind, every year, for all the production from a given exploitation site, only after the first five years of exploitation of the site. Such contributions do however have an upper limit and remain very small, since they cannot exceed 7% of the value or volume of production of the site, which rate is applied from the twelfth year of exploitation[54]. The contributions are to be made through the International Seabed Authority, which is an international organisation set up by the UNCLOS, located in Jamaica, in charge of managing the marine area covering the seabeds beyond national jurisdiction. That payment mechanism is the expression of what remains of the principle of the common heritage of mankind, which applies to these seabeds under jurisdiction as a result of a compromise between States[55].

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[53] *Dispute concerning delimitation of the maritime boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar), ruling, ITLOS, Collection 2012*, paragraph 361. Also see *Arbitration between Barbados and Trinidad and Tobago,* op. cit. § 213, p. 147, and *Bay of Bengal Maritime Boundary Arbitration between Bangladesh and India, Award, 7 July 2014*, § 77, p. 21.

[54] Article 82, UNCLOS. Also see C. Schofield and J. Mossop, "The Article 82 Conundrum: Implementing payment for the exploitation of the continental shelf beyond 200 nautical miles", *Routledge Handbook on Seabed Mining and the Law of the Sea*, V. Tassin Campanella (ed), Routledge, 2023, pp. 141-154.

[55] International Seabed Authority, *Non-Living Resources of the Continental Shelf Beyond 200 Nautical Miles: Speculations on the Implementation of Article 82 of the United Nations Convention on the Law of the Sea*, Technical study 5, 22 June 2015.

Besides, in the exercise of its sovereign rights to exploration and exploitation over the extended continental shelf, the coastal State can establish "*specific areas for detailed exploration or exploitation operations*" thanks to which it can withhold consent for marine scientific research projects[56]. These "*specific areas*" may not however be established on the continental shelf within 200 nautical miles, where the coastal State must, in normal circumstances, give consent to marine scientific research projects[57]. Even though this mechanism has not been used to date by coastal States, in view of the number of extension submissions, it will foreseeably be activated in coming years, particularly in the case of usage conflicts relating to living and non-living resources.

To date, no mining of resources on the extended continental shelf is effective, and no national legislation is ready for making the payment mechanism operational. However, developments are expected in view of the exploration activities that have been recently announced on the extended continental shelves of Norway and Japan.

However, there is an overlap of rights between that the large majority of States do not yet have legislation to regulate the activities known as deep sea mining activities.[58] Most States have legislation to cover oil exploration and exploitation, which are indeed extractive activities, but where the risks and particularities are very different from those of the exploration and exploitation of mineral resources such as nodules, hydrothermal sulphides and ferromanganese crusts[59].

Significant legislative work thus remains to be done before the implementation of these rights over the exploration and exploitation of such mineral resources, which includes, in accordance with the UNCLOS, the implementation of an environmental policy that supports and regulates these activities.

[56] The phrase "*detailed exploration or exploitation operations*" has not been defined and has not been interpreted for now.
[57] Article 246, UNCLOS. Normal circumstances means marine scientific research projects with no direct effect on the exploration and exploitation of natural resources, living or non-living, which do not require the use of explosives or the introduction of harmful substances into the marine environment, the construction, exploitation or use of artificial islands, installations or structures under articles 60 and 80 of the UNCLOS or projects where the information provided is inaccurate or if the State or competent international organisation behind the project has outstanding obligations to the coastal State from a prior research project.
[58] Deep sea mining is defined here as the exploration and exploitation of mineral resources at depths below 200 metres.
[59] Conclusions drawn from regional and national studies carried out for the book *Routledge Handbook on Seabed Mining and the Law of the Sea*, which analyses the practice of 7 regions and 14 States in the world, including the European Union. For more details about these various activities of exploration and exploitation of mineral resources and their differences, see SystExt, *Controverses minières : exploration et exploitation minières en eaux profondes*, tome 1, volet 2, November 2022 (report prepared in partnership with the IUCN). Available via the following link: https://www.systext.org/controverses-minieres (viewed in April 2024).

B. Sovereign rights over the exclusive economic zone

In accordance with the UNCLOS, the coastal State has sovereign rights over the entire geographical area of the EEZ in addition to sovereign rights over the continental shelf.

These sovereign rights have a wider range than those over the continental shelf. Indeed, they are not limited to the exploration and exploitation of natural resources of the continental shelf, but further cover the exploration and exploitation of living and non-living resources of the water column and the soil and subsoil, and the conservation and management of the natural living and non-living resources of the water column and those of the soil and subsoil. Lastly, these rights cover other activities relating to the exploration and exploitation of the EEZ for economic purposes, particularly the production of energy from water, currents or winds. This list is not defined comprehensively, and these rights can therefore be easily applied to new scientific and technical discoveries that allow the exploitation of the EEZ and its resources for economic purposes (e.g. the exploitation of algae).

The first point to note about the relationship between the sovereign rights over the EEZ and those over the continental shelf is the complementarity of the two institutions and therefore of the rights. As stated by the International Court of Justice in 1985: "*Although the institutions of the continental shelf and the exclusive economic zone are different and distinct, the rights which the exclusive economic zone entails over the sea-bed of the zone are defined by reference to the regime laid down for the continental shelf. Although there can be a continental shelf where there is no exclusive economic zone, there cannot be an exclusive economic zone without a corresponding continental shelf.*"[60].

For its part, the international tribunal for the law of the sea observed in 2014 that the sovereign rights of the coastal State in the EEZ encompass "*all rights necessary for and connected with the exploration, exploitation, conservation and management of the natural resources, including the right to take the necessary enforcement measures*". It has further specified that the use of the words "*conserving*" and "*managing*" indicates that "*the rights of coastal States go beyond conservation in its strict sense*" and cover different aspects relating to the conservation of living resources, and also the exploitation of those resources (requiring conservation and management measures) insofar as these activities are directly related to fishing[61].

The second point to note is that of the difference between the sovereign rights over the EEZ and those over the continental shelf. In principle, the use of the same terminology, that of "*sovereign rights*", ought to have an identical legal value. However, the UNCLOS establishes a difference in the benefit of these rights. While sovereign rights over the continental shelf are *ipso facto* and

[60] *Continental shelf (Libyan Arab Jamahiriya/Malta),* op. cit., paragraph 34.
[61] *M/V "Virginia G" (Panama/Guinea-Bissau), judgement, ITLOS Collection 2014*, paragraphs 211-212.

ab initio, not dependent on any occupation or claim, sovereign rights over the EEZ are often described as "*declarative*"[62], meaning subject to a declaration of an EEZ by the coastal State. That means that if the coastal State does not declare an EEZ, the legal regime for the waters is then subject to the high seas legal regime. Changes to the institution of the EEZ as a customary institution do not modify the characteristics of these rights, which remain declarative. They can simply be exercised by States that are not party to the UNCLOS.

However, there is an overlap of rights between the EEZ regime and that of the continental shelf, as regards the activities of exploration and exploitation of the natural resources of the soil and subsoil. That overlap ought not to raise any problems in the case of 'simple' management, i.e. by only one and the same State authority. However, the situation becomes complicated if the competence is shared, as is the case for some overseas territories, where the overseas territory can be given an EEZ and the (mainland) State the continental shelf. What happens if there is a conflict of competence, particularly a conflict of interest between the two managing authorities? That is the case studied by this report.

Table 3: Comparative view of seabed rights as part of an EEZ and a continental shelf

Subject	EEZ	Continental shelf
Marine activities covered specifically by the relevant legal regime and associated rights	• Exploration and exploitation, conservation and management of natural resources, living or non-living (sovereign rights of the coastal State) • Other activities relating to the exploration and exploitation of the EEZ for economic purposes, such as the production of energy from water, currents or waves (sovereign rights of the coastal State) • Installation and use of artificial islands, installations and structures (exclusive jurisdiction of the coastal State). That includes the exclusive right to carry out construction and authorise and regulate the construction, exploitation and use of artificial islands, installations and structures for economic purposes such as energy from water, currents or wind, or other economic purposes, or installations and structures that might hinder the exercise of the rights of the coastal State in the area. The exclusive right further covers laws and customs, tax, health, safety and	• Exploration and exploitation of natural resources (exclusive sovereign rights of the coastal State) • Authorisation and regulation of drilling, regardless of its purposes (non-sovereign exclusive right of the coastal State) • Digging of galleries for subsoil mining (is neither a sovereign right nor an exclusive right of the coastal State) • Planning, laying or maintaining submarine cables and pipelines (power of approval of the coastal State) • Construction, exploitation and utilisation of artificial islands, installations and structures (exclusive jurisdiction of the coastal State) in the same conditions as those stated opposite in respect of the EEZ

[62] See *Delimitation of the Maritime Boundary in the Gulf of Maine Area, judgement, ICJ Collection 1984,* p. 246.

	security and immigration regulations. • Marine scientific research (jurisdiction of the coastal State and high seas regime) • Protection and conservation of the marine environment (jurisdiction of the coastal State)	
Other activities and principles of articulation with the other activities of the EEZ/continental shelf	• Freedom of navigation and overflight (high seas regime) • Freedom to lay submarine cables and pipelines (high seas regime) • Freedom to use the sea for other lawful international purposes relating to the exercise of these freedoms, particularly for ships, aircraft, cables and pipelines (high seas regime) • The coastal State must duly take account of the rights and obligations of other States and act in accordance with the UNCLOS. • The other States must duly take account of the rights and obligations of the coastal State and fulfil its obligations under the UNCLOS and international law.	• The rights of the coastal State do not affect the legal regime for the superjacent waters or the airspace located above these waters (EEZ legal regime and/or that of the high seas). • The coastal State must not harm navigation or the recognised rights and freedoms of other States or hinder their exercise (high seas regime).
Sedentary resources	No[63]	Yes[64]
Mineral resources	Yes	Yes
Genetic resources	Yes (not mentioned explicitly, but included in living resources)	Yes (not mentioned explicitly, but included in sedentary resources)
Other resources	Yes " *living and non-living resources*"	Yes "*Other non-living resources of seabeds and their subsoil*"[65]
Environmental policy	Prepared by the coastal State [66]	Prepared by the coastal State [67]
Specific environmental obligations[68]	Yes[69]	No[70]

[63] Article 68, UNCLOS.
[64] "*Organisms which, at the harvestable stage, either are immobile on or under the seabed or are unable to move except in constant physical contact with the seabed or the subsoil*", article 77, UNCLOS. Such sedentary resources can include the genetic resources that then come under the application of the Convention on Biological Diversity, applicable in the areas under national jurisdiction. Besides, these resources are subject to the sovereign rights of exploration and exploitation of the coastal State.
[65] This category is not defined by the UNCLOS and makes it possible to include, as scientific discoveries are made, new resources subject to the sovereign rights to exploration and exploitation of the coastal State. See article 77, UNCLOS.
[66] Explicitly mentioned in article 193 of the UNCLOS: "*States have the sovereign right to exploit their natural resources pursuant to their environmental policies and in accordance with their duty to protect and preserve the marine environment.*"
[67] Ibid.

Conclusions	The coastal State has sovereign rights over a wider range of activities and resources, with specific environmental obligations (conservation and management), in addition to the general obligations imposed by part XII of the UNCLOS. The sovereign rights of the EEZ cover the mineral resources of the soil and subsoil and living and non-living resources.	The coastal State has sovereign rights over a limited number of activities and resources, with no specific environmental obligations, other than the general obligations imposed by part XII of the UNCLOS. The sovereign rights over the continental shelf cover the mineral resources of the soil and subsoil and living and non-living resources and sedentary species.

[68] Understood as being inserted in the legal regime of said area. The environmental obligations under part XII of the UNCLOS apply *de facto* to all marine areas.
[69] Obligations to conserve and rationally manage living resources, particularly highly migratory species and overlapping stocks, marine mammals, stocks of fish, stocks of anadromous fish, catadromous species. In this regard, see articles 61, 63, 64, 65, 66, 67. These provisions apply in addition the general provisions relating to the protection and conservation of the environment of part XII of the UNCLOS.
[70] For an explanation about this absence of specific environmental provisions relating to exploration and exploitation activities, see V.J.M. Tassin, "Les raisons économiques de l'extension : un accès privilégié aux ressources naturelles", *Les défis de l'extension du plateau continental : consécration d'un nouveau rapport de l'État à son territoire,* op. cit., pp. 71-139.

II. Perspectives for the implementation of exploration and exploitation rights: towards a holistic and consistent reading of international law

International law is complex, made up of different specialities**,** with differentiated implementation, depending on the various ratifications of instruments by States.

The law of the sea is no exception. As a result, even though the regime for the continental shelf appears a bit 'empty' at first sight and certainly thereby addresses the initial wishes of States to have easier sovereign access to the natural resources of seabeds, this regime does not however escape implementation in accordance with all of international law and thus under binding rules that may not be part of the law of the sea.

Today, the implementation of the law of the sea particularly faces these issues of complementarity. Indeed, in addition to the rights and obligations of States as part of the UNCLOS, those same States are also required to fulfil their obligations in other areas, particularly climate law, environment law, human rights, intellectual property law and also other fields such as international trade law or investment law, all of which apply to marine activities and areas, depending on the location and type of the activity**.** That complementarity of international law and the resulting synergies or inconsistencies have not for now been addressed in any detail by the doctrine, which generally focuses on horizontal or themed questions**.** However, those areas of complementarity are regularly addressed by practitioners, who have to grapple with the practical implementation of obligations.

This study does not aim to describe all the dimensions of international law that need to be taken into account while developing activities in seabeds, but merely to illustrate the challenges that stand in the way of the implementation of sovereign rights to exploration and exploitation, in view of the complementarity of international law.

A. Climate law and pollution from ships

The United Nations Convention on Law of the Sea contains specific provisions relating to measures against pollution[71], particularly those resulting from exploration and exploitation[72]. In that regard, it provides for obligations relating to the installations and equipment used, for instance, or measures to prevent and handle accidents, or to keep marine operations safe. Pollution from ships is also covered by the Convention, even though it is not directly related to exploration and exploitation activities. These obligations in respect of pollution from ships particularly include measures for preventing discharge, intentional or otherwise.

[71] Part XII, UNCLOS.
[72] Articles 194 paragraph 3 (c), UNCLOS.

Even though there is legal uncertainty about the precise status of offshore rigs in international law[73], we need to consider the category of pollution 'from ships' more broadly, that is to say not only offshore rigs engaging in exploitation, but also all the other vessels involved in lifting ore, handling and pre-processing ore, processing ore or activities for transport[74] from the exploration or exploitation site to the land.

In addition to the pollution of the marine environment in the area, could the air pollution produced by these vessels be considered to be included in the obligations of States in respect of measures against pollution as part of the United Nations Convention on the Law of the Sea? The International Tribunal on the Law of the Sea recently found, in May 2024, that pollution of the marine environment includes man-made greenhouse gas emissions[75]. As a result, States are required to fulfil a series of obligations aimed at preventing, reducing and controlling such pollution, "*encompassing any type of harm or threat to the marine environment. Under this provision, States Parties have the specific obligation to protect and preserve the marine environment from climate change impacts and ocean acidification*"[76].

That means that international law of the sea must apply in a complementary, consistent and effective way along with other obligations under international law, particularly the United Nations Convention on Climate Change and the Paris Agreement. The result is that pollution caused by exploration and exploitation cannot therefore be considered to be limited to direct harm to/in the marine environment, but must also include air pollution.

B. Human rights and the marine environment

The human right to a clean, healthy and sustainable environment is considered to be an essential condition for the full and entire exercise of human rights, as recognised at the United Nations General Assembly on 8 October 2021[77].

Its effective implementation under the law of the sea is only in its early days, since the contours and modalities of its implementation need to be made clear[78]. However, and particularly in view

[73] See in this regard P. Gautier and V.J.M. Tassin, "Les plates-formes en mer et le droit international", *Annuaire français du droit international*, LIX, 2013, CNRS Edition, Paris.
[74] These transport activities are not considered by the International Tribunal for the Law of the Sea as included in the category of activities in the international seabed area. Similar reasoning may be extended to the case of the exploration and exploitation of the continental shelf. For more details, see V.J.M. Tassin, "L'exploration et l'exploitation des ressources naturelles du plateau continental à l'heure de l'extension au-delà de 200 milles marins", *Annuaire du droit de la mer 2010*, Tome XV, Pedone: Paris, 2011, pp. 87-120.
[75] International Tribunal for the Law of the Sea, *Request for an advisory opinion submitted by the commission of small island states on climate change and international law*, Advisory opinion, Case 31, 21 May 2024, (b), p. 164.
[76] (f), p. 165. Ibid.
[77] Human rights council, Right to a clean, healthy and sustainable environment, Resolution, UN Doc A/HRC/RES/48/13, 18 October 2021.

of the exploration and exploitation of the natural resources of seabeds, this right does apply and its implementation requires a certain number of considerations to be taken into account while planning and carrying out such activities.

Generally, this human right includes the right to pure air, healthy biodiversity and access to information and participation by the public in decision-making and access to justice, which rights are already recognised under other applicable international instruments (particularly the Aarhus Convention[79] or the Espoo Convention[80]) and implemented by a large number of national systems[81]. The impact of human activities on the marine environment, particularly cases of significant pollution and/or considerable harmful modifications of the marine environment, could also be recognised as harming the right to health and life, on a case-by-case basis. Such a scenario could for instance be envisaged when some seabed activities have a major impact on fish stocks on which local communities are dependent, or when these activities create direct or indirect pollution that damages the marine ecosystem on which such people and communities depend socially, economically and culturally. Some seabed damage (particularly to undersea mountains that are protected or recognised by customary law as sacred places) could further be considered to be an infringement of the rights of indigenous peoples and local communities, and of their cultural rights. Lastly, the preamble of the resolution of this human right to a clean, healthy and sustainable environment also mentions the case of "*non-viable use of natural resources*", considered to alter the essentials of what may be expected from a healthy and sustainable environment. The result is that the policy and measures for managing such resources could also be potentially called into question via the exercise of that human right.

[78] See in particular Human rights council, *Right to a healthy environment: good practices Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment*, A/HRC/43/53, 30 December 2019.
[79] Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, 25 June 1998. Implemented in France by decree no 2002-1187 of 12 September 2002, which does not apply the Convention in New Caledonia, French Polynesia and Wallis and Futuna (see the reservation and statement of the government of the Republic of France).
[80] Convention on Environmental Impact Assessment in a Transboundary Context, 25 February 1991. Implemented in France by decree no 2001-1176 of 5 December 2001 relating to the publication of the Convention on Environmental Impact Assessment in a Transboundary Context, which does not apply to French Polynesia (see statements and objection, paragraph 2).
[81] See General Assembly of the United Nations, *Annex V: Recognition of the right to a healthy environment in Constitutions, Legislation and Treaties: Asia-Pacific region*, A/HRC/43/53/Annex C, 14 February 2020.

Part III – Distribution of competence between the European Union and member States

European Union law is based on the distribution of competence between the European Union and its member States. While some areas are exclusive, others are covered jointly or support each other. The resulting kaleidoscope of competence, complementarity and synergy reflects the particularly advanced state of progress of that law.

Understanding its application to seabed mining would first of all make it necessary to be able to differentiate the relevance to the issue of each competence and each piece of legislation. For clarity, the distribution of competence between the European Union and the member States will be explained before going into a map of the main EU instruments applicable to the activities carried out on the seabeds of an EEZ or continental shelf.

I. Articulation of competence in respect of the management of seabed activity under national jurisdiction and the use of resources

Table 4: Distribution of competences between the European Union and member States in respect of issues relating to seabeds under national jurisdiction

Subject	European Union competence	Competence of the member State	Comments
Mining	No (no indication in the area)	Yes	Exclusive competence of the member State, subject to the distribution of other competences (particularly energy and environment)
Environment (land and sea)	Yes[82]	Yes	Shared competence
Energy	Yes[83]	Yes	Shared competence
Fisheries	Yes, for the conservation of living resources[84]	Yes, for all other aspects other than the conservation of living resources[85] However, there is an overlap of rights between	Exclusive complementary competence

[82] Article 4 (e) Treaty on the functioning of the European Union.
[83] Article 4, (i), ibid. Measures taken by the European Union "*shall not affect a Member State's right to determine the conditions for exploiting its energy resources, its choice between different energy sources and the general structure of its energy supply, without prejudice to Article 192(2)(c).*". Article 194, Treaty on the functioning of the European Union.
[84] Article 3, (d), ibid.
[85] Ibid. *A contrario*. Read with the shared environmental competence in article 4 (e), ibid.

Research and innovation	Yes, but only to take action to define and implement programmes and action to support the competence of member States	Yes	Exclusive competence of the member State, with support from the European Union
Conservation of living sea resources	Yes, but only as part of the common fisheries policy	Yes (excluding fisheries)	Exclusive complementary competence
Security and defence	Yes, but limited[86]	Yes[87]	Exclusive competence of the member State
Overseas countries and territories	Yes, but only an association subject to a numbered list with a limited scope[88]	Yes	Exclusive competency subject to an association with the European Union
Conclusion of international agreements	Yes if it is provided by a legislative instrument of the Union or required to enable it to exercise its competency internally or insofar as it is likely to affect common rules or modify their scope	Yes (outside the exclusive competence described opposite)	Limited exclusive competence of the Union, complementary competence of the member State

The thirteen overseas countries and territories (OCTs) associated with the European Union include:

- New Caledonia;
- French Polynesia;
- Wallis and Futuna.

These OCTs are eligible for programmes managed by the European Union, which supplies funding in the form of subsidies. Direct support is also provided by European development funds. This category of OCTs must be differentiated from the outermost regions of the European Union, which form integral part of the Union[89].

[86] Through the common foreign and security policy set up by the treaty on the European Union and updated by the treaty of Lisbon. It includes a defence section that allows the Union to deploy civilian and military missions and operations abroad.

[87] "*Member States may decide, on a case-by-case basis if so provided under national law, not to apply this Directive to projects serving national defence purposes, if they deem that such application would have an adverse effect on those purposes.* " Article 1, paragraph 3, Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment.

[88] The purpose of the association of overseas countries and territories is to "*promote the economic and social development of the countries and territories and to establish close economic relations between them and the Union as a whole*". It is meant "*primarily to further the interests and prosperity of the inhabitants of these countries and territories in order to lead them to the economic, social and cultural development to which they aspire*". Article 198, Treaty on the functioning of the European Union.

[89] "*The TFEU and the secondary legislation adopted on the basis of it do not automatically apply to the OCTs, with the exception of a number of provisions which explicitly provide for their application. Although not third countries, the OCTs do not form part of the single market and must nevertheless comply with the obligations imposed on third countries in respect of trade, particularly rules of origin, health and plant health standards and safeguard measures.* " Paragraph 10, my emphasis. "*The special relationship between the Union and the OCTs is moving from a development cooperation approach to a reciprocal partnership to support the OCTs'*

The current framework of cooperation between the Union and the OCTs has been defined by the Decision on association adopted on 5 October 2021[90]. That framework is supported by three main pillars: (1) improvement of competitiveness (2) reinforcement of resilience and reduction of vulnerability and (3) promotion of cooperation and integration between OCTs and other partners and neighbouring regions. Besides, the action programme provides that the new association must pay particular attention to interconnections between sustainable development goals, particularly goals 6, 3, 11, 13, 14 and 15[91].

Besides, funding by the Union for a certain number of projects in these OCTs is intended to support the strategic position of the Union in the region[92]. Indeed, such funding implies a number of legal and contractual obligations between the Union and recipients, including the right of the Union to use product communication material, while the recipient of the funding retains ownership of the material.

The programmes being developed in the three aforementioned OCTs are as follows[93].

Table 5: Main European programmes applicable to the studied OCTs

Programmes under way	New Caledonia	French Polynesia	Wallis and Futuna	Does the programme have a marine component?
2018-2024 Regional Oceania project of territories for sustainable management of ecosystems (PROTEGE)	Yes	Yes	Yes	Yes[94]
2021-2027 Regional programme for Pacific Ocean OCTs[95]	Yes	Yes	Yes	Scheduled, but no more information is available

sustainable development […]". Paragraph 11. Council Decision (EU) 2021/1764 of 5 October 2021 on the association of the Overseas Countries and Territories with the European Union including relations between the European Union on the one hand, and Greenland and the Kingdom of Denmark on the other.

[90] Ibid.

[91] Goal 6: Clean water and sanitation, Goal 3: Good health and well-being, Goal 11: Sustainable cities and communities, Goal 13: Climate action, Goal 14: Life below water and Goal 15: Life on land.

[92] In this regard, see document "Communicating and raising EU visibility: guidance for external action", 2022. Available via the following link: https://international-partnerships.ec.europa.eu/knowledge-hub/communicating-and-raising-eu-visibility-guidance-external-actions_en (viewed in May 2024).

[93] List not comprehensive.

[94] In particular, the project covers fisheries and aquaculture, and provides for the setting up of participative and integrated management of fishing resources and the reinforcement and development of the management of marine resources by regulated fishing zones. For more information, particularly the latest progress made, see the following link: https://protege.spc.int/fr/themes/coastal-fisheries-and-aquaculture/les-initiatives-de-gestion-participative-et-de-0 (viewed in April 2024).

2021-2027 Inter-regional envelope of the DOAG[96]	Yes	Yes	Yes	No information for having a view of the overall envelope allocated
KIWA Initiative[97]	Yes	Yes	Yes	Yes
Horizon Europe	Yes	Yes	Yes	Yes
2021-2027 LIFE programme	Yes	Yes	Yes	Yes

II. Main European instruments applicable to seabeds of member States[98]

The table groups the main binding and non-binding instruments in order to indicate the current state of the law and the political commitments that support changes to the law on the management of seabeds and marine resources.

Table 6: Main European instruments applicable to the seabeds of member States

Legislation	Comments[99]	Applicability in the EEZ	Applicability on the continental shelf
Treaty on the functioning of the European Union	• Confirms solidarity between Europe and overseas countries, and the wish to enable the development of their prosperity, in accordance with the principles of the UN charter. • The policy of the European Union in the area of the environment contributes to the pursuit of the following goals: preserving, protecting and improving the quality of the environment; protecting human health; prudent and rational use of natural resources; promoting measures at international level to deal with regional or worldwide environmental problems, and in particular combating climate change[100]. • "*Union policy on the environment shall aim at a high level of protection taking into account the diversity of situations in the various regions of the Union. It shall be based on the*	Yes	Yes

[95] Supports the greening and bluing of the food systems of the three territories. The start is scheduled for 2025.
[96] Aims to promote links and closer collaboration with neighbouring countries, outermost regions and regional organisations through pilot projects. Valued to be €36 million for the region.
[97] Funded by the EU, France, Canada, Australia and New Zealand, to support nature-based solutions to promote biodiversity and adaptation to climate change in the Pacific.
[98] Subject to the distribution of competence in relations between the member State and its overseas territories.
[99] Comments aimed at stressing the relevance of the legislation vis-à-vis the question of seabed mining and the specific case of these activities in the OCTs, outermost regions and other territories of member States. However, they are not comprehensive.
[100] Article 191, paragraph 1, Treaty on the functioning of the European Union.

	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[101]." • In preparing its policy on the environment, the Union takes account of: available scientific and technical data; environmental conditions in the various regions of the Union; the potential benefits and costs of action or lack of action; the economic and social development of the Union as a whole and the balanced development of its regions[102].		
Habitats Directive[103]	• In case of an adverse impact of the exploitation of seabeds[104] on the special areas of conservation set up by the directive, the activity may only be conducted for imperative reasons of overriding public interest, including those of a social or economic nature, if all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected are taken[105].	Yes[106]	Yes[107]
Marine strategy framework directive[108]	• Seabeds are included in the qualitative descriptors used for defining a good environmental status[109]. • The topography and bathymetry of the seabed, and also the types of dominant habitat types of these water columns, the description of biological communities associated with the predominant seabed and water column habitats are included in the guidance list of characteristics[110]. • Physical damage to seabeds (abrasion and selective extraction due to the exploration and exploitation of living and non-living resources on seabed and subsoil) is included in the guidance list of pressures and impacts[111].	Yes[112]	Yes[113]
Effects on the environment directive[114]	• The direct and indirect effects on the environment and their interaction must be identified on the basis of the following	Yes	Yes

[101] Ibid, paragraph 2, ibid.
[102] Ibid, paragraph 3, ibid.
[103] Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora.
[104] More specifically, see article 6, ibid. "*Member States shall take appropriate steps to avoid, in the special areas of conservation, the deterioration of natural habitats and the habitats of species as well as disturbance of the species for which the areas have been designated, in so far as such disturbance could be significant in relation to the objectives of this Directive.*"
[105] Ibid.
[106] The directive indicates the geographical scope of application: "*the European territory of the Member States to which the Treaty applies*". This expression has been interpreted to apply beyond territorial seas. See in particular Case C-06/04, Commission v. United Kingdom (2005), § 114 and 117, ECLI:EU:C:2005:626.
[107] Ibid.
[108] Directive 2008/56/EC of the European Parliament and of the Council of 17 June 2008 establishing a framework for community action in the field of marine environmental policy (Marine Strategy Framework Directive).
[109] "*Sea-floor integrity is at a level that ensures that the structure and functions of the ecosystems are safeguarded and benthic ecosystems, in particular, are not adversely affected.*" Annex I, paragraph 6, ibid.
[110] Annex III, table 1, ibid.
[111] Annex III, table 2, ibid.
[112] Article 3, 1 (a), ibid.
[113] Ibid.

	factors: (a) human beings, fauna and flora; (b) soil, water, air, climate and the landscape; (c) material assets and the cultural heritage. • Only annex II and the categories "*extraction of minerals by marine or fluvial dredging*" and "*deep drilling*"[115] would be applicable in the event of seabed exploration/exploitation.		
Strategic environmental assessment directive[116]	• If seabed mining is part of a plan or programme or is considered by the member State as forming part of a plan or programme that could have notable effects on the environment, the directive applies and therefore requires procedures for consultation with other member States. • The notable effects on the environment cover environmental, social and cultural considerations[117].	Yes	Yes
European biodiversity strategy[118]	• Reinforces the protection of biodiversity, especially on seabeds[119], particularly so as to offer direct economic benefits to a large number of industries. • Expressly mentions some seabed ecosystems to protect, particularly seagrass meadows. • Also states that "*Particular focus will be placed on protecting and restoring the tropical and sub-tropical marine and terrestrial ecosystems in the EU's outermost regions given their exceptionally high biodiversity value*"[120].	Yes	Yes
Action plan for protecting and restoring marine ecosystems in favour of sustainable and resilient fisheries[121]	• Importance of the seabed habitat as an "*essential element of healthy ecosystems. Their rich biodiversity provides nursery and spawning grounds for many species and contributes to maintaining the structure and functioning of marine food webs, as well as to regulating the climate*". • Stresses the damage done by mobile bottom fishing to seabeds and the associated habitats, and calls for the	Yes	Yes[124]

[114] Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment.
[115] Note that this category includes a non-exhaustive list that would make it possible to include the case of deep drilling on the continental shelf.
[116] Directive 2001/42/EC of the European Parliament and of the Council of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment.
[117] See annex I, (f), ibid.
[118] 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*, COM(2020) 380 final, 20 May 2020.
[119] By restoring the good environmental status of marine ecosystems, the biodiversity strategy aims to apply, as part of Union legislation, an ecosystem-based management approach in order to reduce "*the adverse impacts of fishing, extraction and other human activities, especially on sensitive species and seabed habitats*". See ibid, commitment 13 of the nature restoration plan of the Union, p. 18 and explanations p. 13.
[120] Ibid, p. 6.
[121] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *EU Action Plan: Protecting and restoring marine ecosystems for sustainable and resilient fisheries*, COM(2023) 102 final, 21 February 2023.

	discontinuation of that technique and its ban in all protected marine areas[122], while making sure it is not replaced by equivalent or worse solutions. • Stresses the urgency for protecting and restoring seabed habitats in protected marine areas outside these zones[123].		
European green deal[125]	• References to the marine environment relate to its management and protection (protected marine areas and improvement of aquatic and marine resources) and not to the manner in which some energy resources could support the required transition. • There is no limitation on the geographical application of this vision (it is formulated in a general way).	Yes	Yes
Nature restoration regulation[126]	• Specific provision aimed at restoring marine ecosystems (particularly hydrothermal springs and soft sediments) but none of the ecosystems of the Pacific region are included in the list in annex II[127].	Yes	Yes
Critical raw materials regulation[128]	• There are only two references to activities in the marine environment, one relating to the assessment of the effects of existing and future activities, and one to the Marine Strategy Framework Directive[129].	Yes	Yes

[124] The natural resources of the continental shelf include sedentary resources that may be fished or exploited for DNA extraction (marine genetic resources); this latter case is only possible within the framework of the sovereign rights to exploration and exploitation over the continental shelf.
[122] In the meaning of the protection goals set by the European Environmental Agency, covering the region of European seas. For more details, see https://www.eea.europa.eu/publications/marine-protected-areas/marine-protected-areas. This action plan asks member States to focus "*in particular on marine protected areas (MPAs) and on ways in which fisheries management can contribute to more effective protection and restoration of their marine biodiversity, thereby contributing to achieving the objectives of the proposed Nature Restoration law*". In view of that statement, divergent interpretations may be offered in respect of the field of application of the plan outside the area of regional European seas. The reference to the goals of the proposed legislation, particularly the main goal, to "*contribute to the continuous, long term and sustained recovery of biodiverse and resilient nature across the Union's land and sea areas through the restoration of ecosystems, habitats and species and to contribute to achieving Union climate mitigation and climate adaptation objectives and to meeting EU international commitments [...] additional targets based on these common methods may be set by amending the regulation*" and the reference "in particular" to the protected marine areas of regional European seas do however indicate that this action plan and its ambition go beyond the geographic extent of regional European seas. See *Proposal for a Regulation of the European Parliament and of the Council on nature restoration*, COM(2022) 304 final, 22 June 2022, p. 4.
[123] Ibid, p. 12.
[125] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *The European green deal*, COM(2019) 640 final, 11 December 2019.
[126] *Proposal for a Regulation of the European Parliament and of the Council on nature restoration*, COM(2022), 304 final, 22 June 2022.
[127] The Regulation has a euro-centric approach, and focuses on the regional marine ecosystems of Europe.
[128] Regulation (EU) 2024/1252 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 168/203, (EU) 2018/858, (EU) 2018/1724 and (EU) 2019/1020. COM(2023). Entry into force on 23 May 2024.
[129] See note 8, p. 5, ibid.

	• A mechanism for recognising strategic projects (with definite criteria) is established[130] and a list of critical raw materials is drawn up.		
Revised maritime security action plan[131]	• Includes considerations for maritime infrastructure, particularly submarine cables and pipelines[132]. • Mentions the case of unauthorised exploration in EEZs and on the continental shelf[133]. • Stresses the strategic importance of Pacific overseas territories and outermost regions in the Indian Ocean that are the object of "intense geopolitical competition".	Yes	Yes
Net Zero Industry Act[134]	• Relates to the products of net zero technologies, and sets out resilience criteria that influence the choice of sources of supply • Explicitly mentions projects for CO2 storage in seabeds (CO2 emissions reduction) but no reference to the natural resources of these seabeds as part of the regulation, other than the pluri-annual financial framework "Heading 3 Natural resources and environment".	Yes	Yes

Note in that respect that to date, European Union law does not regulate the safety of the exploration and exploitation of mineral resources, neither that of (and the responsibility for) unmanned vehicles used for these activities. Besides, to date, there is no framework for the governance of environmental data that would make it possible to reconcile the divergent

[130] See in particular article 1, paragraph 1 (c), ibid: "*the project would be implemented sustainably, in particular as regards the monitoring, prevention and minimisation of environmental impacts, the prevention and minimisation of socially adverse impacts through the use of socially responsible practices including respect for human rights, indigenous peoples and labour rights, in particular in the case of involuntary resettlement, potential for quality job creation and meaningful engagement with local communities and relevant social partners, and the use of transparent business practices with adequate compliance policies to prevent and minimise risks of adverse impacts on the proper functioning of public administration, including corruption and bribery*". And (e): "*for projects in third countries that are emerging markets or developing economies, the project would be mutually beneficial for the Union and the third country concerned by adding value in that third country*".

[131] Particularly see Council of the European Union, Joint Communication to the European Parliament and the Council on the update of the EU Maritime Security Strategy and its Action Plan "An enhanced EU Maritime Security Strategy for evolving maritime threats", JOIN (2023) 8 final, 10 March 2023; Council of the European Union, A strategic compass for security and defence, 21 March 2022; Council of the European Union, Maritime security strategy of the European Union, 24 June 2014.

[132] It may be noted in this respect that Directive 2013/30/EU of the European Parliament and of the Council of 12 June 2013 on safety of offshore oil and gas operations and amending Directive 2004/35/EC does not apply to infrastructure involved in the exploration and exploitation of marine mineral resources. Major accidents in the performance of these operations can however occur, particularly in view of the risks generated by these 'new' activities. With an eye to preventive action, and in view of the different positions of member States in the area, there would be a need to start thinking at the European level about the regulation of these new activities on the seas, including response mechanisms in the event of an incident. It must be remembered in this context that the European Union and its member States are required to apply the UNCLOS, particularly its obligation to control the pollution resulting from seabed-related activities under national jurisdiction (article 208, UNCLOS).

[133] This case is particularly mentioned in the planned moratorium that is currently being examined by the Congress of New Caledonia.

[134] Proposal for a Regulation of the European Parliament and of the Council on establishing a framework of measures for strengthening Europe's net-zero technology products manufacturing ecosystem, COM (2023) 161 Final, 16 March 2023, adopted on 27 April 2024.

interests of private and public players, and particularly take account of the sensitivity of some data from the point of view of defence activities.

III. Position of the European Union in respect of the exploration and exploitation of mineral resources under national jurisdiction

A. Changes in the European position between 2000 and 2020

From the 2000s, the European Union stated its interest for access to mineral raw materials, which are considered to be crucial for the proper working of the European Union and its industry. A series of funding packages were provided to strengthen not just scientific knowledge of these ecosystems, but also the regulation and governance of the mineral resources of seabeds for the purpose of their future exploration and exploitation.

A first such project, "*Deep Sea Minerals Project*" was formalised in 2011 with the Secretariat of the Pacific Community[135], enabling some communities in the Pacific to improve the governance and management of their mineral resources, particularly in view of the wealth of the resources and the appetite of industry for them. The project included fifteen Pacific States[136] and did not bring in New Caledonia, French Polynesia or Wallis and Futuna[137].

It enabled the region to develop a non-binding regional legislative and regulatory framework in 2012, as yet the only one of its kind in the world (project 1)[138], and then put in place an assistance programme for those same States to adapt their national law (project 2). Other projects followed, particularly aimed at strengthening national capabilities in the area (project 3) and developing systems for the management and monitoring of exploration and exploitation activities (project 4)[139].

[135] SCP-EU EDF10 Deep Sea Minerals Project.
[136] Those fifteen States are: Cook Islands, Federated States of Micronesia, Fiji, Kiribati, Marshall Islands, Nauru, Niue, Palau, Papua New Guinea, Samoa, Solomon Islands, East Timor, Tuvalu and Vanuatu.
[137] Note in this respect that the Secretariat of the Pacific Community comprises 27 members, including France, New Caledonia, French Polynesia and Wallis and Futuna.
[138] European Union and Secretariat of the Pacific Community, *Pacific-ACP States Regional Legislative and Regulatory Framework for Deep Sea Minerals Exploration and Exploitation*, 2012. Available via the following link: https://dsm.gsd.spc.int/index.php/publications-and-reports (viewed in April 2024).
[139] See "*2016 Pacific-ACP States Regional Financial Framework for Deep Sea Minerals Exploration and Exploitation*", "*2016 Pacific -ACP States Regional Environmental Management Framework for Deep Sea Minerals Exploration and Exploitation*", "*Pacific-ACP States Regional Scientific Research Guidelines for Deep Sea Minerals*" and "*An Assessment of the Costs and Benefits of Mining Deep-sea Minerals in the Pacific Islands Region"*, available via the following link: https://dsm.gsd.spc.int/index.php/publications-and-reports (viewed in April 2014).

At the core of this interest of the European Union is the potential of the blue economy[140], which could enable "*European industry to become competitive in seabed extraction*" and access raw materials considered to be "*crucial for the proper functioning of the EU economy*"[141].

However, the mid-2010s seem to have witnessed a change in position by the EU, which is now clearly showing more circumspection and hesitation towards these exploration and exploitation activities. That cautious attitude, in support of the implementation of the precautionary principle which is part of the treaty on the functioning of the European Union, can be noticed in the joint parliamentary resolution ACP-EU of 2014 on the extraction of oil and minerals from the seabed[142], and in the resolution of the European Parliament of 2018 on international ocean governance[143], which calls on the Commission and member States, for the first time, 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"*. That ambitious formulation (emphasised) does not however exactly state its scope of application (would 'deep sea' also include continental shelves, particularly extended ones, or just the international seabed zone?).

In 2020, the strategy of the Union in the area of biodiversity for 2030 prepared by the Commission[144] and the strategy of the Union in the area of biodiversity of the European Parliament[145] followed in those footsteps with a few variations on the geographical scope of application of the moratorium on exploitation.

[140] See in particular European Parliament, *Untapping the potential of research and innovation in the blue economy to create jobs and growth*, resolution, 2014/2240(INI), 8 September 2015, following the Communication of the European Commission, *Innovation in the Blue Economy: realising the potential of our seas and oceans for jobs and growth*, COM (2014) 0254, 8 May 2014.
[141] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *Blue Growth Opportunities*, COM(2012) 494 final, 13 September 2012.
[142] The resolution notes the concerns in respect of the environmental, social and economic impact of such mining and urges "*the ACP and EU governments to put an end to the resource curse and to put the rich mineral resources of the ACP countries at the heart of their development strategy for the benefit of the whole population instead of these resources only enriching investors and small elites without benefiting ordinary citizens*". Thus, the resolution calls for setting the obligations and duties for foreign investors operating in developing countries in order to comply with human rights, environmental standards and fundamental standards of the International Labour Organisation. ACP-EU Joint Parliamentary resolution, *Mining for oil and minerals on the seabed in the context of sustainable development*, ACP-EU/101.546/14/fin., 19 March 2014, paragraphs 3 and 9. Also see ACP-EU Joint Parliamentary Assembly, *Resolution on the Blue Economy: Opportunities and Challenges for ACP States*, ACP-EU/102.368/17/fin., 2014.
[143] 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 (2017/2055[INI]), paragraph 42.
[144] The communication specifies that the suggested measures only relate to exploitation in the international seabed area and further adds limitations to the development of exploitation to those formulated earlier by stating: "*and the technologies and operational practices are able to demonstrate no serious harm to the environment, in line with the precautionary principle and taking into account the call of the European Parliament*". The Commission foresees that the European Union will continue to finance research work on the impact of deep sea mining and on environmentally friendly practices. 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*, COM (2020) 380 final, 20 May 2020, p. 25.
[145] For its part, it takes up the moratorium on exploitation and the term "*deep sea*" specifying, however, that it is to be promoted "*including at the International Seabed Authority*", which suggests that it relates to seabeds under national jurisdiction and beyond.

The update of the strategy of the Union on international ocean governance published in 2022 by the Commission continues on the same track and appears, because of the generality of its phrasing, to include both mining under national jurisdiction and beyond, and potentially a wider field of activities, as they are not reduced to exploitation as specified earlier[146].

For its part, the resulting Parliament resolution[147] "*Reiterates its call on the Commission and the Member States to support an international moratorium on deep seabed mining*" reinforcing doubts about interpretation both of the geographical scope of application of the moratorium, and also the activities covered (exploration as such is not mentioned in the different resolutions calling for a moratorium, and the use of the word "reiterates" is surprising).

B. Latest developments: the resolution on Norway

The latest resolution of the European Parliament of 2024 relating to the recent decision by Norway to initiate seabed mining[148] also appears to take up a position that now encompasses deep sea exploration and exploitation.

In actual fact, this resolution adds two items of interest in the interpretation of the European position:

1) By using the expression "*deep-sea mining*" by reference to Norway, the Parliament appears to indicate that the expression covers both areas under national jurisdiction and those located beyond national jurisdiction.

2) The Parliament has addressed the issue at a time when Norway has only opened its continental shelf to exploration activities[149]. That move by the Parliament strategically makes it possible to particularly highlight one of the largest usage disputes, namely fisheries[150], the transboundary effect of these activities, and also its views about the development of the premature exploration **and** exploitation of the deep seas,

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European Parliament resolution of 9 June 2021 on the EU Biodiversity Strategy for 2030: Bringing nature back into our lives (2020/2273 [INI]), paragraph 184.

[146] "*The EU will continue to advocate for prohibiting deep-sea mining until these scientific gaps are properly filled, that it can be demonstrated that no harmful effects are arising from mining and, as required under the UNCLOS, the necessary provisions in the exploitation regulations for effective protection of the marine environment are in place.* " That interpretation may be strengthened by the fact that the precise case of negotiating the mining code is specified, thus differentiating the general from the particular relating to the international seabed area. Note in that respect that the term "exploitation" is not specified and that the strategy now generally refers to "mining on seabeds" without differentiating exploration from exploitation.

[147] European Parliament resolution of 6 October 2022 on momentum for the ocean: strengthening ocean governance and biodiversity (2022/2836(RSP).

[148] European Parliament resolution on Norway's recent decision to advance seabed mining in the Arctic 2024/2520(RSP), 31 January 2024.

[149] Not exhaustive.

[150] Resolution of the European Parliament, 2024.2520 (RSP), op.cit., paragraph K.

underlining the need for an "*international research effort […] to reach a scientific consensus on this subject*" and the fact that "*more scientific research is needed to fully understand the potential effects of deep-sea mining on the marine environment and biodiversity*"[151].

It therefore appears that the position of the Union is being fine-tuned over the years, and is turning towards the unfailing promotion of marine scientific research to allow a precise assessment of the environmental impact of these exploration and exploitation activities, particularly in areas under national jurisdiction.

That position may be due to the tensions that exist with its own member States[152]. It must therefore be noted that in the current absence of a European Union policy in respect of these activities or any specific law applicable to the area[153], all the member States of the Union are free to follow the Commission and Parliament in their position or not[154]. Regardless of their choice, member States remain bound by compliance with international law and European Union law applicable to these activities.

Along with these positions in respect of seabed activities, the European Union has made progress in the implementation of the green deal, and the Council recently approved the Regulation on critical raw materials in March 2024.

Even though the regulation can apply to the case of seabed raw materials, it would appear that the current goal of the Union is actually to reinforce procurement partnerships with some African countries, in addition to the two partnerships that are currently in place with Canada, Kazakhstan, Namibia, Ukraine, Argentina and Chile[155].

In the case of the future application of this regulation to seabed raw materials, particularly in the overseas territories of member States, OCTs or the outermost European regions, member

[151] Paragraph J, ibid.
[152] See in this respect the different scenarios of tensions in P.A. Singh, V. Tassin Campanella et F. Maes, "The European Union and Seabed Mining", in V. Tassin Campanella, *Routledge Handbook on Seabed Mining and the Law of the Sea*, Routledge, London, 2023, p. 309.
[153] The Commission has, on several occasions, organised consultations with civil society on issues that relate to mining in these seabeds.
[154] In that respect, some States, particularly France, Germany and Portugal, have recently expressed their support for the international moratorium. Others, like Belgium, appear to be giving the subject thought, while still others such as Italy have no official position. However, it must be noted that all declarations of moratoriums generally relate to the resources of seabeds beyond national jurisdiction and many doubts remain regarding their applicability to mineral resources under national jurisdiction. Regarding the position of Germany, see N. Matz-Lück "Germany and Seabed Mining", in V. Tassin Campanella, *Routledge Handbook on Seabed Mining,* op. cit., pp. 372-378. For Belgium, see K. Willaert et F. Maes, "Belgium and Seabed Mining", idem, pp. 345-350. Regarding Portugal (before the announcement of a moratorium), see M. Neves et P. Madureira, "Portugal and Seabed Mining", idem, pp. 427-432.
[155] International Institute for Sustainable Development, *EU Plans Talks With African Nations to Boost Supplies of Critical Raw Materals*, online issue, 28 June 2023. Available via the following link: https://www.iisd.org/fr/node/17524 (viewed in April 2024).

States are bound by the same rules of international and European law applicable in the area, subject to the distribution of competence with the different OCTs.

IV. BBNJ Agreement and issues relating to the management of activities in areas under national jurisdiction within a European perspective

The agreement implementing the UN Convention on the Law of the Sea relating to the conservation and sustainable use of biodiversity in areas beyond national jurisdiction was signed by the European Union in September 2023[156].

The agreement, known as the *BBNJ Agreement*, includes new mechanisms for the implementation of an ecosystem-based approach, making it possible to reduce the artificial division of marine areas located within and beyond national jurisdiction.

In spite of the fact that the geographical scope of application of the Agreement is that of *areas not under national jurisdiction*, an obligation on States as part of the activities carried out *in areas under national jurisdiction* was inserted.

In accordance with that mechanism, when any State (coastal or flag) which exercises its jurisdiction or control *over a planned activity that is to be conducted in marine areas within national jurisdiction determines that the activity may cause substantial pollution of or significant and harmful changes to the marine environment in areas beyond national jurisdiction*,[157], that State must ensure that an environmental impact assessment of such activity is conducted[158]. As this mechanism relates to the transboundary impact of activities (which may be direct, indirect or even cumulative), it applies to activities carried out in the EEZ and on the continental shelf.

From the viewpoint of European law[159], these areas under jurisdiction are already covered by the directive on the assessment of effects on the environment. That directive, applicable to "*public and private projects likely to have a major effect on the environment*", requires preliminary assessments before any activity is authorised, and therefore performed. Taking account of not only ecological and biological effects, but also social and cultural effects and the interaction between various factors[160], this European directive takes a stricter and more holistic approach to impact assessments than the BBNJ Agreement. Its field of application is however

[156] Council Decision (EU) 2023/1974 of 18 September 2023 on the signing, on behalf of the European Union, of the Agreement under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction.
[157] My emphasis.
[158] Article 28, BBNJ Agreement.
[159] As part of this study, the issue of the application of the directive to the OCTs covered here is not addressed.
[160] Other indicators such as the cultural heritage and landscape are absolutely singular, and do not appear in the BBNJ Agreement (see article 30 of the BBNJ Agreement).

more restrictive[161] and must therefore be revised in view of the new requirements of the BBNJ applicable to any "*planned activity*"[162]. Further, the mechanism set up between mandatory assessments (annex I of the directive) and those determined by the member State in view of certain criteria (annex II of the directive) introduces differentiation between the level and scope of the obligation which does not appear to be in line with the general obligation of the BBNJ Agreement.

It is therefore foreseeable that this directive is one of the many instruments that will potentially be reviewed in the light of the BBNJ Agreement, when an agreement on the sharing of competence between the Union and member States is reached[163]. A large amount of work remains to be done. In view of the involvement of the European Union throughout the negotiation process and its very strong support for the implementation of the ecosystem-based approach[164], there is no doubt that the application of this Agreement within European law will be ambitious and carried out for the purpose of stating the leadership position of the European Union in terms of international ocean governance.

[161] In particular, see the definition of public and private projects and the many exemptions, such as those relating to national defence (article 1, paragraph 3), and exceptional cases (article 1, paragraph 4).
[162] Questions about interpretation may besides be raised regarding the articulation between article 4 of the BBNJ Agreement (exceptions) and article 1, paragraph 3 (exemption for national defence).
[163] Triggering the mechanism for the ratification of the BBNJ Agreement by the European Union, and by the member States. The terms of this distribution of competence were not finalised at the time of the writing of this report.
[164] For more details, see P. Singh, V. Tassin Campanella and F. Maes, "The European Union and Seabed Mining" in V. Tassin Campanella (ed), op.cit, p. 307-310.

Part IV – Legal instruments of interest for the exploration and exploitation of the mineral resources of seabeds in the studied territories

I. New Caledonia

New Caledonia is an overseas authority with a particular, *sui generis* status. Since the Nouméa agreement of 1998[165], the territory has initiated a process for the gradual transfer of competence from the State to its local institutions, moving resolutely towards independence[166].

A. Distribution of competence (New Caledonia/French State)

In general, New Caledonia is subject to the principle of legislative speciality[167], according to which the laws and regulations of the French State only apply if expressly mentioned.

Table 7: Distribution of competence between New Caledonia and the French State in respect of marine areas

Territory	Distribution of competence	
	New Caledonia	French State
New Caledonia	**Exclusive economic zone** Regulation and exercise of rights over the exploration, exploitation, management and conservation of natural[168], living and non-living resources of the exclusive economic zone[169] Regulation on artificial islands, installations, structures and their related installations[170]	**Continental shelf** *A contrario* reading of the organic law no 99-209 of 19 March 1999 + order of 8 December 2016, articles 15[171] and 55[172]

[165] Nouméa agreement, 5 May 1998. This study does not intend to analyse the implementation of the agreement or to understand, in view of current events, the way in which the transfer can be made in line with international law.
[166] In that regard, see title XIII of the French Constitution of 4 October 1958 and the constitutional revision of 20 July 1998.
[167] Article 74, French Constitution.
[168] On that legal basis, New Caledonia has made scientific, research and exploration activities in the Coral Sea Natural Park subject to permission from the government of New Caledonia, without restricting the ordinary law competence of the French State over marine scientific research. See article 5-I of the country law no 2022-1 of 12 January 2022 on the protection for marine areas of New Caledonia.
[169] Article 22, paragraph 10, Organic act no 99-209 of 19 March 1999 on New Caledonia. It must be noted that the Environmental Code developed in different provinces of New Caledonia only applies in its territorial waters. Only New Caledonia has competence for managing the EEZ. That competence must take account of the Environment Charter of 2004 (constitutional law no 2005-205 of 1 March 2005) which enters the precautionary principle and the implementation of risk assessment procedures into the constitution (article 5).

		National defence[173] and policing of the seas[174]
		Marine scientific research Higher education and research (particularly marine scientific research)[175]
	Mining Regulation relating to hydrocarbons, nickel, chromium, cobalt and rare earth elements[176] The Mining Code is applicable since 2009. It includes interesting considerations, particularly the introduction of the concept of sustainable development with the possibility of reserving mining resources for local metallurgical exploitation through the creation of metallurgical geographic reserves and provincial technical reserves, and efforts to promote better knowledge of the resources[177]. In 2022, a reform was brought in, chiefly to improve the tax revenue derived from land-based exploitation of nickel. No marine dimension has been added and the current Mining Code does not allow for regulating exploration and exploitation activities of mineral resources in the EEZ.	**Atomic energy and resources** Regulation relating to the materials identified in (1) of article 19 of Decree no 54-1110 of 13 November 1954 reforming the regime of mineral substances in overseas territories, and the installations making use of them[178] Residual mining competence relating to the natural resources of the continental shelf.

[170] Article 19, section 1, title II, order no 2016-1687 of 8 December 2016 on marine areas under the sovereignty or jurisdiction of the Republic of France. "*Where the competence of the State for regulating the exploration and exploitation of the resources of the exclusive economic zone and continental shelf are transferred, under national law to an authority identified in article 74 of the Constitution or New Caledonia, all the laws and regulations applicable in the territory of that authority apply to the artificial islands, installations, structures and their related installations located in the exclusive economic zone or on the continental shelf as if they were on the territory of the authority, and to the activities exercised there.* " My emphasis.

[171] "*The Republic exercises sovereign and exclusive rights over the seabed and its subsoil on the continental shelf for the purposes of its exploration and the exploitation of its natural mineral, fossil or biological resources. The French authorities further exercise the competence recognised by international law in respect of (1) the construction, exploitation and use of artificial islands, installations or structures, (2) marine scientific research, (3) the approval of the layout of any pipeline or cables installed or used as part of the exploration of its continental shelf or the exploitation of its resources.* " Article 15, order no 2016-1687 of 8 December 2016 on marine areas under the sovereignty or jurisdiction of the Republic of France. Note in this respect that in accordance with article 19, competence over the continental shelf is not transferred, and therefore activities such as artificial islands, installations and structures are regulated by the French Mining Code and not by the Mining Code of New Caledonia.

[172] "*The sovereign rights mentioned in articles 12 and 15 are exercised by the State, subject to the competence attributed to the overseas authorities mentioned in article 74 of the Constitution, and to New Caledonia.* " Article 55, paragraph 1, ibid.

[173] Article 21, I, 3; ibid. To be articulated with point 6 of the same article, particularly as regards the deployment of submarine cables or submarine Wi-Fi.

[174] In particular, see the case of piracy and the action on the seas of the State. Article 6, Act no 94-589 of 15 July 1994 amended by Act no 2011-13 of 5 January 2011, applicable to Wallis and Futuna. Also see the circular of 13 July 2011 on measures against piracy and the exercise of the policing powers of the State on the sea, JUSD1119584C.

[175] Article 21, II, 7, ibid. Particularly see articles L. 251-1 et sequentes of the Research Code.

[176] Also see article 19, section 1, title II, order no 2016-1687 of 8 December 2016, op. cit.

[177] For an interpretation of the constitutionality of the expression "research and exploitation work" of article LP 142-10 of the Mining Code of New Caledonia, see Constitutional Council, Decision no 2013-308 QPC of 26 April 2013.

[178] Article 21, I, 7, Act no 99-209 of 19 March 1999 relating to New Caledonia. Also see the French Mining Code, title VIII, applicable to New Caledonia within a single section dedicated to the provisions applicable to substances useful to atomic energy.

	Residual competence for foreign policy In the areas of competence of the State, the authorities of the Republic may grant to the president of the government the powers enabling them to negotiate and sign agreements with one or more States, territories or regional bodies of the Pacific Ocean, and with regional bodies depending on the specialised institutions of the United Nations. In the areas of competence of New Caledonia, the Congress may deliberate to authorise a president of the government to negotiate, in accordance with the international commitments of the Republic, agreements with one or more States, territories or regional bodies of the Pacific Ocean and with regional bodies depending on the specialised institutions of the United Nations[179]. New Caledonia can also, with the consent of the authorities of the Republic, be a member, an associate member of international organisations or an observer. It may have a representation with the European Union[180].	**Foreign policy** The exercise, outside territorial waters, of competence resulting from international conventions, subject to provisions relating to the resources of the EEZ
		Communications and telecommunications Maritime and air communications between New Caledonia and other points of the territory of the Republic, governmental links and communications, defence and security of post and telecommunications[181], regulation of radio-electric frequencies, status of ships, registration and aircraft
	Social protection, public hygiene and health[182] This ordinary law competence is of particular interest in the case of assessments of the impact of maritime activities on the local population.	

B. Specific context of New Caledonia and perspectives for seabeds

In October 2010, the agency for protected marine areas and the government of New Caledonia carried out a strategic analysis of the maritime area of New Caledonia, encompassing the case of deep ecosystems. The study puts forward the following, which are relevant to this study:

[179] Article 29, section 2, ibid. Also see paragraphs 2 and 3 for more clarifications.
[180] Article 31, section 2, ibid.
[181] Also see in this respect the announcement in 2024 of the provision of €18 million as part of the programme France 2030, Deep Sea section, for a cable project known as the smart cable project, making oceanic observations, chiefly for the observation of climate change and the prevention of tsunamis, in collaboration with the governments of New Caledonia and Vanuatu. The project will be carried out by French industry, IFREMER and the partners of Vanuatu.
[182] Article 22, (4), Organic law no 99-209, op. cit.

- High biological diversity of New Caledonia, exceptional in respect of some taxa in the whole world;
- Remarkable fauna, many relict species;
- New Caledonia, with Vanuatu and the Solomon Islands, belongs to a distinct bio-geographical sub-region that is distinct on the regional scale;
- Presence of deep habitats made up of undersea mountains, island slopes and canyons, abyssal plains, and a trench. Suspected presence of active hydrothermal springs;
- Habitats that are potentially favourable to the presence of remarkable communities represent a significant proportion of the seabeds of the maritime area;
- Undersea mountains are areas that are highly productive and diverse and are also characterised by the presence of vulnerable species;
- Good general taxonomic knowledge, but limited knowledge of communities and the distribution of species or communities within the maritime area;
- No knowledge beyond 1500 m and in habitats with steep gradients;
- Complementary analyses are required for exploiting potentially available data.

The study notes the overlap between conservation issues and the future exploitation of living and non-living resources. In that respect, it emphasises the case of (inactive) hydrothermal sites located in areas with economic interest, where, firstly, the biological potential was not known at the time of the study and secondly, the measurement of the impact of potential exploitation would be uncertain because of the fact that these activities are not yet in existence. The role of undersea mountains, which are exceptionally numerous in the maritime space of New Caledonia, is emphasised (particularly in view of biodiversity and the food chain).

Lastly, the study notes the potential value of aragonite sand in the Chesterfield-Bellona area, and of phosphates (but which have not been studied to date).

Based on a very detailed and particularly well illustrated analysis, the study recommends the following in respect of seabeds:

- Preventing usage conflicts;
- Limiting potential impacts in order to provide the conditions for the sustainable development of these emerging activities;
- Acquiring new data to characterise the potential resources and specify the areas with cross implications, with the following resources as a priority: hydrocarbons, sulphides, crusts and nodules;
- Putting in place the best practices for preventing or limiting damage to these deep ecosystems "*if the exploitation of hydrocarbon or mineral resources were to be undertaken*";
- Not exploiting these non-living resources at present.

On the basis of that study, New Caledonia elected to manage its marine area by preferring the environmental approach. In 2014, it created the Coral Sea Natural Park, which, according to P.-Y. Le Meur and V. Muni Toke, "*leaves no room for an open debate on deep mineral resources (or on hydrocarbons)*"[183], with the subject of mining left for now restricted to the land.

Lastly, it must be noted that part of the marine mineral resources identified are located in an area of the seabed that is currently disputed by France and Vanuatu (Matthew and Hunter Islands), thus hampering any exploration or exploitation initiative by the French State in these areas.

C. Miscellaneous management measures for the marine area in New Caledonia and impact of the exploration and exploitation of mineral resources

Table 8: Miscellaneous measures for managing the marine area in New Caledonia

Marine area management measures	EEZ (New Caledonia)	Continental shelf (French State)	Comments
Protected area	**Coral Sea Natural Park (since 2014)** The park encompasses the EEZ and the territorial and internal waters of remote islands[184]. It sets up miscellaneous protection zones (integral reserves and natural reserves)[185] aimed at reducing the pressure of fishing activities. To date, fishing is forbidden in all these protected areas[186]. No integral reserve is located in the EEZ for now, and access is thus free for ships passing through these reserves. A new plan for the management of the park is being prepared (the last having	**N/A** The French State could put in place measures to protect "sites of geological interest" as part of its rights over the continental shelf[189].	These protective measures reflect the strong values of New Caledonia, particularly highlighted as a result of the extensive transfers of competence and the three self-determination referendums. Even though New Caledonia is not subject to European law as part of the management of the resources of the EEZ, it must be noted that the extension of the highly protected area of the EEZ from 2.4% to 10%

[183] P.-Y. Le Meur and V. Muni Toke, "Une frontière virtuelle : l'exploitation des ressources minérales profondes dans le Pacifique", *VertigO*, special issue 33, March 2021, paragraph 30. The authors of the study specify that the management committee of the park includes several colleges and the extractive industry is represented by Total Pacific and indirectly by the Mining and Energy Directorate of New Caledonia.
[184] Considered during its creation in 2014 as the second largest protected marine area after Hawaii.
[185] Country law no 2022-01 of 12 January 2022 on the protection of protected marine areas of New Caledonia. Also see the amended order no 2014-1063/GNC of 23 April 2014 setting up the Coral Sea Natural Park and order no 2023-2955/GNC of 18 October 2023 on the reserves of the Coral Sea Natural Park. For a map of these areas, particularly see the Explo Carto platform: https://georep-dtsi-sgt.opendata.arcgis.com/datasets/dtsi-sgt::r%C3%A9serves-du-parc-naturel-de-la-mer-de-corail-1/explore (viewed in April 2024).
[186] See Secretariat General of New Caledonia, *Planned extension of the reserves of the Coral Sea Natural Park raising the highly protected area of the park to over 10%*, report of the government of New Caledonia, 2023.

	expired in 2021), extending the highly protected area of the marine park from 2.4% to 10%, particularly by categorising some undersea mountains as reserves. Besides, the report from the Coral Sea Natural Park department to the government of New Caledonia stresses the significance of this marine area for Kanak culture[187], as some undersea mountains are considered to be sacred areas where souls go to rest[188].		corresponds to European goals under the biodiversity strategy for 2030[190]. These management measures overlap the rights of the French State over the continental shelf, restricting its exploration and exploitation activities to within 200 nautical miles.
Moratorium	**Planned moratorium on the exploration and exploitation of mineral resources in the EEZ (currently under review)** A bill is currently being discussed at the Congress of New Caledonia in order to propose a moratorium on these mining activities in the EEZ. The current version of the moratorium provides for a ten-year ban on exploration and exploitation, permission for research work, sanctions for illegal activities and a public enquiry within 10 years from the setting up of the moratorium to take stock of the measure and decide whether it should be extended.	**Resolution of the national assembly calling upon the government to defend a moratorium on seabed mining (2023)[191]** This resolution does not apply to the continental shelf, as the instrument explicitly mentions "*the ban on mining in deep seabeds*. Since then, Hervé Bréville, Secretary of State for the Sea, has stated on several occasions his intention to extend the moratorium to the continent shelf area, but nothing is effective or legally binding for now. Further, it must be noted that France had in the past adopted different strategies indicating its interest in exploring and exploiting the	If the planned moratorium applicable to the EEZ is adopted by the Congress of New Caledonia, the French State would not be able to carry out exploration and exploitation activities on the soil and subsoil within 200 nautical miles without violating the sovereign rights of New Caledonia over its EEZ. For the extended continental shelf, it appears that the French State is leaving the door open to exploration and exploitation, in line with the goals clearly indicated as part of its strategy for the exploration and exploitation of mineral resources of 2015 and 2021[193]. The realisation of these ambitions could however be difficult because of the

[189] See in this regard decree no 2015-1787 of 28 December 2015 on the protection of sites of geological interest. A note from the Ministry for the Environment, Energy and the Sea, in charge of international relations on climate (not published in the official journal), was issued on 1 December 2016, mentioning the exclusion of the scope of application of the decree to New Caledonia. Even though that is legally correct, because of the articulation of competence between that territory and the French State, the State can however apply this decree to the continental shelf located off the shores of these territories (within and beyond), as the coastal State is responsible for the environmental policy on the continental shelf.

[187] Ibid. Also see *Avis sur la place des peuples autochtones dans les territoires ultra-marins français : la situation des Kanak de Nouvelle-Calédonie et des Amérindiens de Guyane*, text no 33, NOR: CHDX1706464V, 12 March 2017.

[188] In this respect, see the Kanak vision of oceans and the contribution from J.-Y. Poedi at the regional platform on large seabeds organised from 19 to 21 March 2024 by the Secretariat of the Pacific Community. Available via the following link: https://www.youtube.com/watch?v=-ISPFYTSY7o (viewed in May 2024).

[190] The target is that of strictly protecting "*at least 10 % of the EU's marine and terrestrial areas*." The European Commission emphasises in that respect that "*strict protection does not necessarily imply prohibiting access, but does not permit any significant disruption of natural processes in order to address the environmental requirements of the areas in question*". Biodiversity strategy 2030, p. 5.

[191] National assembly, *Resolution calling upon the government to defend a moratorium on seabed mining*, 17 January 2023. This move follows resolution no 702 of the National Assembly for the conservation and sustainable use of the ocean, adopted on 25 November 2021.

		resources of its continental shelf, particularly as regards the OCTs covered by this study[192].	particular restrictions resulting from the protection of biodiversity in areas that communicate directly with the extended continental shelf (highly protected EEZ, and biodiversity of the high seas under the new protection of the BBNJ agreement). There would thus be a heavy responsibility on France, particularly for putting in place impact assessments relevant to these activities, which must address the requirements of the French Environmental Charter (particularly impact assessment and public participation), and also the mechanism of the BBNJ Agreement (article 28) and the EU law that applies in the area[194].

II. French Polynesia

French Polynesia is an overseas authority with strengthened autonomy (the greatest within the Republic of France), governed by Act no 2004-192 of 27 February 2004 as amended, relating to the autonomous status of French Polynesia[195].

[193] "*The definition of the French model [of access to deep seabeds] must first take account of the particularities of these resources: – potential resources, whether under national jurisdiction or under that of the International Seabed Authority, will be far away from the manufacturing industry of the mainland, or for now of the DOM-COM […] – in view of their closeness to the extraction sites, some overseas authorities could take advantage, if they wish, of this perspective for mineral resources; – the need for consolidating the knowledge of these mineral resources and their environment requires in-depth exploration missions; - the perspectives for starting extraction are of about ten to twenty years at best; – the consistent analysis of French industry which considers that the likelihood of results is much higher for massive sulphide deposits than for nodules or even crusts.*" Prime Minister, Circular on the national strategy for the exploration and mining of deep seabeds, 5 May 2021, p. 7. Also see the National strategy for the exploration and mining of deep seabeds, approved by an interdepartmental committee on the sea, 22 October 2015.

[192] Strategy for the exploration and exploitation of mineral resources, 2015 and 2021, op. cit.; Ministry for the Army, *Ministerial Strategy for Seabed Control,* February 2022. In respect of the France 2030 investment plan and its deep seabeds component, see the regular updates of the Secretariat of State for the Sea and Biodiversity: https://mer.gouv.fr/la-connaissance-de-locean-sera-enrichie-par-lobjectif-grands-fonds-marins-de-france-2030 (viewed in April 2024).

[194] In view of the distribution of competence between the European Union and member States.

[195] Organic law no 2004-192 of 27 February 2004 relating to the autonomous status of French Polynesia, organic law no 2007-223 of 21 February 2007 with status and institutional provisions relating to overseas territories, organic law no 2007-223 of 21 February 2007 with status and institutional provisions relating to overseas territories (amended), organic law no 2011-918 of 1 August 2011 relating to the functioning of the institutions of French Polynesia, organic law no 2011-918 of 1 August 2011 relating to the functioning of the institutions of French Polynesia (amended).

A. Distribution of competence (Polynesia/French State)

In general, French Polynesia is subject to the principle of legislative speciality[196], according to which the laws and regulations of the French State only apply if expressly mentioned.

Table 9: Distribution of competence between French Polynesia and the French State in respect of marine areas

Territory	Distribution of competence	
	French Polynesia	**French State**
Polynesia	**Exclusive economic zone, territorial sea and internal waters** Regulation and exercise of rights to the exploration and exploitation, management and conservation of natural, living and non-living resources[197], particularly rare earth minerals[198], interior waters, particularly outer harbours and lagoons, soil, subsoil and superjacent waters of the territorial sea and the exclusive economic zone[199]	**Continental shelf** *A contrario* reading of the organic law of 27 February 2004 + order of 8 December 2016, articles 15[201]

[196] Article 74, French Constitution.
[197] Particularly see the regulations applicable to waste immersion (articles LP 213-1 to 213-17 of the Environmental Code of French Polynesia providing for authorisation from the president of French Polynesia and the minister responsible for the Environment for immersions in the territorial sea in determined places at a depth above 2000 metres. A list of the waste that may be immersed is provided). Also see the regulations applicable to facilities listed for the protection of the environment (ICPE) subject to a specific authorisation mechanism. For general information, see, C. David and A. Troianiello, "Contraintes et référentiels juridiques de l'exploitation minière sous-marine en Polynésie française", *Les ressources minérales profondes en Polynésie française*, HAL open science, 2016, pp. 11-16.
[198] One difficulty of articulation occurs between the competence over rare earth minerals and the residual competence of the French State in respect of "strategic raw materials". The reference piece of legislation in France for such strategic raw materials does not include rare earth minerals, but they are included in the concept of "critical raw materials" of the European Union. In this regard, see aforementioned Regulation 2023 on critical raw materials. The transfer of competence in these areas to Polynesia rules out any regression or taking back of this competence by the French State. However, as pointed out by some authors, questions remain unanswered about the articulation of the residual competence of the State with the competence of Polynesia on these issues, which in fact form part of the basis of the distribution of competence between the two entities. The application of EU law will therefore depend on the clarification of that distribution of competence. See A. Troianiello et C. David, "La répartition des compétences entre l'État et la Polynésie française s'agissant des ressources minérales marines profondes : un besoin de clarification", in P.-Y. Le Meur, P. Cochonat, C. David et al. (dir.), *Les ressources minérales profondes en Polynésie française*, op. cit., pp. 227-235.
[199] Article 47, Organic law no 2004-192 of 27 February 2004 relating to the autonomous status of French Polynesia. Article 19, section 1, title II, order no 2016-1687 of 8 December 2016, op. cit. "*Where the competence of the State for regulating the exploration and exploitation of the resources of the exclusive economic zone and continental shelf are transferred, under national law to an authority identified in article 74 of the Constitution or French Polynesia, all the laws and regulations applicable in the territory of that authority apply to the artificial islands, installations, structures and their related installations located in the exclusive economic zone or on the continental shelf as if they were on the territory of the authority, and to the activities exercised there.*" My emphasis. Article L. 622-1 of the French Environmental Code (in view of the amendment of article L. 218-1 by Act no 2021-1308 of 8 October 2021, article 17) makes the MARPOL Convention applicable to the EEZ of French Polynesia particularly in the event of pollution by discharge from ships on the occasion of the exploration and exploitation of marine soil and subsoil (part C "Control of hydrocarbon discharge resulting from exploitation"). The article also makes applicable the methods for reducing sulphur emissions that address the requirements of Directive (EU) 2016/802 of the European Parliament and of the Council of 11 May 2016 relating to a reduction in the sulphur content of certain liquid fuels that are verifiable, quantifiable and applicable.

	Regulation on artificial islands, installations, structures and their related installations[200]	
	Residual competence for maritime safety and security For all vessels below 24 metres, except passenger vessels, and for all other vessels in interior waters, particularly lagoons	**Policing and security** Relating to maritime traffic[202], surveillance of maritime fishing, navigation security and coordination of emergency resources on the seas, registration of vessels, security of vessels (on some conditions), implementation of airport structures and installations of national interest[203]
	Mining law "*The authorities of French Polynesia are competent in all the areas that are not attributed to the State under article 14, subject to the competence attributed to municipalities or exercised by them under this organic law.*"[204] This first Mining Code adopted by the Assembly of French Polynesia dates from 1985[205]. This code is extremely brief[206], and a revision became necessary, particularly in view of the adoption of the Environment Charter in 2005. An organic law proposed by the Senate in 2012 called for the complete transfer of competence over mining to French Polynesia, that is including strategic raw materials, and particularly rare earth minerals, but that proposition did not go further[207].	**Defence and strategic raw materials**[211] Competence on strategic raw materials, with the exception of liquid or gaseous hydrocarbons[212] Residual mining competence relating to natural resources of the continental shelf.

[201] Order no 2016-1687 of 8 December 2016, op. cit. In this regard, note that competence over the continental shelf is not transferred to French Polynesia, and the Mining Code applies to this area, particularly artificial islands, installations and structures used as part of the exercise of sovereign rights over the exploration and exploitation of the continental shelf (because of the overlapping competence). In reality, that competence is very unlikely to be exercised by the French State, in view of the management measures of the various EEZs (New Caledonia and French Polynesia) and in order to avoid any overlap/dispute with the overseas territory.
[200] Article 19, section 1, title II, order no 2016-1687 of 8 December 2016, op. cit.
[202] Particularly piracy. See article 6, Act no 94-589 of 15 July 1994 amended by Act no 2011-13 of 5 January 2011, applicable to French Polynesia. Also see the circular of 13 July 2011 on measures against piracy and the exercise of the policing powers of the State on the sea, JUSD1119584C.
[203] Article 14, (9), ibid. In 2023, France deployed a number of nautical and airborne initiatives, particularly the national navy and maritime gendarmerie (Prairial surveillance frigate and on-board helicopter, Arago high sea patrol vessel; Bougainville overseas support and assistance vessel; two port and coastal towing vessels, Manini and Maroa; three Gardian aircraft; two inter-agency Dauphin helicopters armed by the national navy, the patrol vessel Jasmin), two Casa transport aircraft of the air and space force, and a nautical brigade of the national gendarmerie in Tahiti and some fifteen speed boats on the islands. The competence of France particularly includes: surveillance of navigation and control/surveillance of maritime fishing, policing and traffic security on the sea, nautical information, knowledge and bathymetry, coordination with sea emergency and rescue resources, overall surveillance of maritime approaches and the security of some vessels. The POLMAR plans (assistance to vessels in trouble, measures against sea pollution) and the ORSEC system (organisation of the civil protection response) are also applicable in Polynesia.
[204] Article 23, ibid.
[205] Deliberation no 85-1051 AT of 25 June 1985.
[206] The Mining Code does not include the possibility of undersea mining, which is also not envisaged by the local regulations.
[207] Senate, no 473, *Proposed organic law relating to the updating of certain provisions of the autonomous status of French Polynesia in the area of sustainable endogenous development and the updating of certain provisions of the national Mining Code*, 9 March 2012. That proposal was formulated by a political party favourable to the independence of French Polynesia.

	Since then, in 2020, the Mining Code was reformed[208]. It continues to apply in the EEZ (art. LP 1100-3), and takes account of the environmental interests[209] and heritage interests (art. LP 1500), but does not include the specificity of activities relating to undersea mineral resources[210].	
	Foreign policy The Assembly of French Polynesia is consulted on bills authorising the ratification or approval of international commitments that fall within the scope of the competence of French Polynesia[213].	**Foreign policy** Acts authorising the ratification or approval of international commitments and the decrees in which they are published and any law or regulation that, in view of its subject, is necessarily intended to govern all of the territory of the Republic[214]
	Public health and hygiene The president of Polynesia and the council of ministers and ministers have competence in respect of authorisations or declarations that are issued or made under the regulations relating to facilities listed for environment protection because of their dangers or disadvantages for the convenience of the	**Communications and telecommunications**[216] Relating to governmental activities for defence or the security of post and telecommunications[217]

[211] Article 14, (4), Organic law no 2004-192 of 27 February 2004 relating to the autonomous status of French Polynesia.
[212] Ibid. In that respect, see the Mining Code of French Polynesia, article 671-1 which reads: "*For the exploration, search and exploitation of strategic raw materials as defined for the whole territory of the Republic, with the exception of liquid and gaseous hydrocarbons, and where the deposits of these raw materials are located in the subsoil of the continental shelf or the exclusive economic zone adjacent to French Polynesia or on their surface, the transport of such raw materials through pipes is subject to the provisions of book 1 and books III to V of this Code, in accordance with the competence attributed to that Authority.* " Also see the French Mining Code, title VII, applicable to French Polynesia as regards the provisions applicable to the exploration, search and exploitation of strategic raw materials.
[208] In particular, see the last update by the country law no 2020-5 of 16 January 2020, and order no 1189 CM of 4 August 2020.
[209] The Assembly of Polynesia further declared, in respect of the Environmental Code applicable to mining, that "*the precautionary principle [...] must prevail before any decision with an impact*". Citing article LP 1100-3 of the Environmental Code, it lists the applicable principles in the area, on the occasion of the examination of the proposed moratorium on exploitation. These include: the precautionary principle, the principle of preventive and corrective action, the polluter pays principle, the participation principle and the non-regression principle. See Assembly of French Polynesia, *Report on the planned deliberations on a moratorium on deep seabed mining, presented on behalf of the marine resources, mining and research commission*, no 126-2022, 23 November 2022.
[210] These comments have also been made as part of the French mining law reform: "*It is as if the general rules applied to the land could be transposed ipso facto to offshore activities. For example, it is as if the rules for the consultation of the population living close to a continental mine ought to apply to activities located more than 200 kilometres away from the coasts. It goes without saying that the conclusions of the working group do not either address the rules relating to minerals of the extended continental shelf, even though Mr Gérard Grignon has reminded us that they require a particular legal framework, to the extent that they are located in international waters and that any activity on the seabed is thus likely to generate nuisance in the areas that are not under national jurisdiction* " J.E. Antoinette, J. Guerriau and R. Tuheiava, *Les zones économiques exclusives ultra-marines : le moment de vérité*, Report no 430 (2013-2014) prepared on behalf of the overseas senatorial delegation, 9 April 2014, p. 85. See in this respect Senate, *L'exploration, la protection et l'exploitation des fonds marins : quelle stratégie pour la France ?,* Information report no 725, 21 June 2022. Besides, in 2022, the CESEC of Polynesia recommended, as part of the review of the proposed moratorium on exploitation the "*definition, identification and clarification of the concepts and the terminology, from the technical and legal standpoints, of "rare earth minerals", "rare metals", "strategic metals" and "strategic raw materials"*", noting that the "*implementation of an ambitious future policy on deep seabeds naturally calls for the clarification of the distribution of competence and the roles between the different institutions and players involved*", p. 3. Lastly, see the Assembly of French Polynesia (Commission for marine resources, mining and research), *Compte rendu du projet de délibération relative à un moratoire sur l'exploitation minière des grands fonds marins*, Meeting of Wednesday 23 November 2022, no 42-2022/CR/COM, 29 November 2022.
[213] Article 9, (3) Organic law no 2004-192 of 27 February 2004 relating to the autonomous status of French Polynesia.
[214] Article 7, title II, ibid.

	surrounding area or for the health, safety, public health or for agriculture, or for environment protection, or for the conservation of sites and monuments[215].	
		Marine scientific research[218]

B. Specific context of French Polynesia and perspectives for seabeds

In spite of phosphate mining on the raised atoll of Makatea between 1908 and 1966, French Polynesia has not developed a strong appetite for mining. Some of the phosphate deposits, located in Mataiva, were not exploited following the refusal of the local population. For its part, the exploitation of the resources of Makatea had significant environmental consequences[219], leaving a deep mark on Polynesia. Military nuclear testing in the atolls of Tuamotu from 1966 to 1996 was added to that earlier experience, and in a complex manner, both strengthened local economic development to some extent and also made Polynesia more wary of the French State, as a result of the disastrous consequences of testing on the health of local populations. That lack of trust, which is still very much in existence today, is what drives the movement for independence[220], which is radically opposed to any exploitation of the natural resources of the seabeds[221].

Given that particular context and the potential mineral wealth of the seabeds in one of the largest EEZs in the world[222], the government of French Polynesia and the French State asked the Institute for Research on Development (IRD) to undertake a study aimed at bringing out the issues relating to the conservation and sustainable use of mineral resources in French Polynesia. The overall aim of the study, published in 2016, was to strengthen the acquisition of

[216] Article 14, (4), ibid. Particularly see the role of the national agency for frequencies.
[217] Particularly see article 28, section III, title II, order no 2016-1687, op. cit.
[215] Article 171, II, (8), ibid. Included in this table in order to emphasise the social dimension, particularly the implementation of the human right to a clean, healthy and sustainable environment.
[218] Particularly see articles L. 251-1 et sequentes of the Research Code.
[219] "*The sheer scale and spectacular nature of the damage done to the environment have, however, inevitably been a source of concern for the inhabitants, despite the compensation obtained, and have prompted other observers to ponder the future of these environments.* " United Nations Programme for the Environment, Regional Oceania Programme for the Environment and South Pacific Commission, *Environment: case studies, South Pacific*, Study 4, no 31775, B, date unknown.
[220] In August 2011, the Assembly of Polynesia adopted, by 30 votes, a resolution calling for the re-inscription of Polynesia into the UN list of countries to decolonise, presented on 7 February 2013 by the Solomon Islands, Tuvalu and Nauru to the UN Secretary General. That move was on the agenda of the UN general assembly on 13 May 2023. However, following an internal policy change, the Assembly of Polynesia voted on 16 May 2013 to oppose that re-inscription, by sending a letter to the chairman of the general assembly asking for a postponement. The UN general assembly voted for such re-inscription of Polynesia by a consensus. It is now the 17th State on the list.
[221] For more details about the historical and political context, see P.-Y. Le Meur and V. Muni Toke, "Une frontière virtuelle : l'exploitation des ressources minérales profondes dans le Pacifique", op. cit., paragraph 38.
[222] Estimated to be as large as Europe, covering about 5 million square kilometres. In that respect see report no 152/CESC, "L'avenir de la Polynésie française face à une gouvernance durable de son patrimoine marin", 21 January 2015.

knowledge in order to support the definition of a suitable policy to exploit the undersea mineral assets of that territory. Three key questions were asked of the body of experts who took part in the study:

1. What are the current state of knowledge, protocols and methods, technology and impacts of the exploration and exploitation of sub-oceanic mineral resources?
2. What are the implications of the exploitation of these resources in the medium and long term (mapping, pilot sites, investment, processing streams, local fallout, risks)?
3. What are the options for guiding the preparation of a master plan for the sustainable exploitation of the sub-oceanic mineral resources of French Polynesia?

This very rich study led to the formulation of the following general conclusions:

- World class potential of the cobalt-rich polymetallic crusts in the EEZ;
- Specific risks relating to their exploitation[223];
- Need to develop knowledge as yet inadequate at the time of the study;
- Need to prepare and implement a policy to exploit that potential.

The study further noted that any exploration or exploitation would require significant effort in terms of governance and legal reform, as the current legal and regulatory framework does not allow the regulation of these activities or the determination of their impacts on the whole economic, environmental and social chain. On that basis, 9 measures were recommended[224]:

- Building an information system to ensure consistency and organise access to existing data;
- Conducting exploration campaigns for the development of appropriate technologies[225];
- Defining the strategy for developing an undersea mining industry or deciding to give up on it;
- Associating the stakeholders and organising the governance systems;

[223] In this regard, see S. Samadi and C. Jost, "Écosystèmes et milieux concernés : état des connaissances", *Les ressources minérales profondes en Polynésie française*, 2016, pp. 443-458; also see S. Samadi and C. Jost, "Impacts écologiques : vulnérabilité et résilience", idem; T. Bambridge and C. Jost, "Interférences de l'exploration/exploitation minière sous-marine avec les autres activités", idem; and T. Bambridge et al., "Recommandations socio-environnementales". These different studies stress the urgent need for acquiring knowledge, not just about the geology and environment, but also social and industrial.

[224] In that respect, see the conclusions of information mission of the French Senate in 2022, which particularly mention the inadequate legal regulation of the exploration and exploitation of mineral resources, op. cit.

[225] That lack of knowledge of the mining potential of the extended continental shelf (under French jurisdiction) is also stressed. See in this regard P. Cochonat, "Quels potentiels supplémentaires apporterait une extension du plateau continental juridique ?", *Les ressources minérales profondes en Polynésie française*, 2016, pp. 158-170. Also see N. Arndt et al., "Que sait-on du patrimoine géologique sous-marin de la Polynésie française ?", idem, pp. 70-111. The latter article particularly includes a comparison between four potential sites for undersea mining, confirming that the potential mineral resources of interest are cobalt-rich crusts.

- Bringing the country into regional, European and international dynamics for cooperation, research and innovation;
- Conducting technological research and development programmes for exploration and exploitation and metallurgy;
- Building effective and attractive administrative and regulatory systems for an undersea mining industry;
- Defining the standards for selecting, monitoring and assessing mining projects for the purpose of control and transparency in public communication;
- Organising and monitoring the assessment of the undersea mineral resource policy to measure its effects and readjust it if necessary.

The results of that study have been challenged by the independence movement. The study has however largely contributed to bringing out some key elements of the potential of Polynesia, and the risks associated with any exploitation work.

Other studies have been conducted since then, which identify the very high uncertainty about the tonnage values of the crusts in Polynesia. The SystExt report prepared in partnership with the IUCN notes in this area that "*the assessment of the potential of Polynesia is based on the application of cross multiplication and the assumption that mineralisation is similar in an area that is 500 times larger than that in Tuamotu. Besides, environments favourable to the installation of crusts are not necessarily exploitable deposits*[226]*.* " The study therefore notes that the use of tonnage and metal quantity values "*is thus particularly disputable, particularly since they are compared with terrestrial reserves (of known and exploitable resources) or annual worldwide consumption*".[227]

In 2018, French Polynesia created one of the largest protected marine areas in the world at the time, covering all of its EEZ. This initiative is a sign of the impact of the IRD study carried out in 2016, supporting the development of a clear policy for the exploitation of resources under the jurisdiction of Polynesia as originally hoped.

[226] SysText, op. cit., p. 25.
[227] Ibid, p. 26.

C. Miscellaneous measures for managing the marine area in French Polynesia

Table 10: Miscellaneous measures for managing the marine area in French Polynesia

Marine area management measures	EEZ (Polynesia)	Continental shelf (French State)	Comments
Protected area	**Natural resources area named "Tainui Atea" (since 2018)**[228] This protected area covers all of the EEZ. It is in category VI of the Environmental Code of the French Polynesia as a protected area, managed chiefly for the sustainable use of marine resources and ecosystems. Subject to the competence of the State, the area thus protected includes the superjacent waters, the seabed and the subsoil. One of the main goals of this area is that of "*developing sustainable marine activities based on the reasoned exploitation of living, mineral or energy resources of the sea, recreational uses and traditional uses of the sea that carry the Polynesian identity, finding harmonious coexistence between all these uses and remaining open to new uses*"[229]. A new plan for managing the area was approved in 2023, setting out a framework for the next 15 years[230]. It will be implemented through action plans spanning a five-year period. Four goals support this management plan:	**N/A** The French State could put in place measures to protect "sites of geological interest" as part of its rights over the continental shelf[231].	The protected area put in place by Polynesia does not appear to rule out the economic development of the area, unlike the other protected marine areas of the region. A strong commitment is however made in respect of the seabeds, putting forward their environmental, social and cultural dimension.

[228] Order no 507 CM of 3 April 2018 relating to the classification of the exclusive economic zone of French Polynesia as a managed marine area.
[229] Article 2, (3), ibid. The order further mentions another goal of interest for mineral resources *"(4) Improving knowledge through research, participative sciences or traditional knowledge systems, disseminating, raising awareness and popularising to contribute to the conservation of marine and submarine landscapes, traditional practices and know-how relating to the sea, cultural values and assets associated with the sea*".
[230] Order no 2272 MCE of 14 March 2023 relating to the approval of the 2023-2037 management plan for Tainui Atea, the managed marine area of French Polynesia.
[231] See in this regard decree no 2015-1787 of 28 December 2015 on the protection of sites of geological interest. A note from the Ministry for the Environment, Energy and the Sea, in charge of international relations on climate (not published in the official journal), was issued on 1 December 2016, mentioning the exclusion of the scope of application of the decree to French Polynesia. Even though that is legally correct, because of the articulation of competence between these territories and the French State, the State can however apply this decree to the continental shelf located off the shores of Polynesia (within and beyond), as the coastal State is responsible for the environmental policy on the continental shelf.

	1. Conserving iconic marine species by mitigating the pressure generated by maritime activities 2. Reinforcing the protection of deep ecosystems, based on scientific research and traditional knowledge 3. Maintaining the species targeted by offshore fishery in a good condition of conservation 4. Providing spatial partnership management of Tainui Atea		
Moratorium	**Moratorium on deep sea mining (2022)** Adopted in 2022 by the Assembly of French Polynesia, the reference to deep seas in the moratorium declaration does not make it possible to establish the geographic scope of application of the moratorium or its duration with any certainty. The work of the Economic, Social, Environmental and Cultural Council and the report from the Assembly of French Polynesia clearly establish a link between the moratorium and the wish to protect the EEZ[232]. The duration of the moratorium has not been specified, which was criticised by many stakeholders, particularly the ESEC itself. For its part, the Assembly of Polynesia declared that the moratorium "*must last long enough*" to meet a certain number of goals that feature in the declaration of the moratorium[233]. The moratorium calls for strengthening "*the acquisition of rigorous knowledge*" in a certain number of areas[234], where such	**Resolution of the national assembly calling upon the government to defend a moratorium on seabed mining (2023)[235]** ⇨See comments in the corresponding table for New Caledonia	The current scope of the moratorium on marine mineral resources applies to the EEZ of Polynesia, as the extended continental shelf is not covered by a French moratorium. The moratorium relating to the EEZ only covers the exploitation of seabeds. As a result, exploration activities and marine scientific research must be carried out in accordance with the stated guidance. Therefore, the moratorium ought to benefit from France 2030 funds (€300 million) provided by France to cover these activities for the acquisition of knowledge of seabeds[236]. Note that the term "acquisition of knowledge" does not clearly indicate the type of activity

[232]See Assembly of French Polynesia, *Report on the planned deliberations on a moratorium on deep seabed mining, presented on behalf of the marine resources, mining and research commission*, no 126-2022, 23 November 2022.

[233] The Assembly of Polynesia lists the following in this regard (not referenced as such among the goals): "*– rigorous and transparent impact assessments, the understanding and control of environmental, social and economic risks and the guarantee of effective protection for the marine environment, its restoration or the compensation for loss of natural assets; – the implementation of the precautionary principle, the ecosystem-based approach, and the polluter pays principle; – the development and implementation of policies to guarantee the responsible production and use of metals, and also the reduction of demand for primary metals, the passage to a circular economy that is resource-efficient, and responsible terrestrial mining practices; – the inclusion of public mechanisms for consultation in all the decision-making processes relating to deep sea mining, guaranteeing an effective commitment that allows independent assessment and ensures that the free, prior consent in full knowledge of the facts of the local populations is obtained and followed*". Assembly of French Polynesia, report no 126-2022, op. cit., p. 4.

[234] The acquisition of rigorous knowledge is required in the following areas: biology, endemism, ecology and the connectivity of the species and ecosystems of deep seas and the ecosystem services provided by them. It must also cover the geology and mineral resources of seabeds, noting in this respect that significant efforts will be required in order to discover, make an inventory of and

	acquisition does not just relate to scientific or ecosystem knowledge, and must include traditional knowledge. It must be noted that the term "acquisition of knowledge" does not indicate whether this relates to marine scientific research or exploration.		carried out (marine scientific research or exploitation), or make it possible to understand how the collected data will serve the purposes of the moratorium (particularly rigorous and transparent impact assessments).

III. Wallis and Futuna

Wallis and Futuna (including Wallis, Futuna and Alofi islands and the islets depending on them) is an overseas territory which is a legal entity with financial and administrative autonomy in accordance with Act no 61-814 of 29 July 1961.

Besides, Wallis and Futuna is one of the OCTs with an association agreement with the European Union[237]. Council Decision 2013/755/EU of 25 November 2013 reiterates that association of Wallis and Futuna for the coming years.

A. Distribution of competence

The question of the distribution of competence is a particularly sensitive one in the territory. Indeed, there are significant sovereignty conflicts between chiefdoms and the French State, signs of a conflict of standards (customary law vs. French law). To date, these conflicts have not been settled.

In general, Wallis and Futuna Islands are subject to the principle of legislative speciality[238], according to which the laws and regulations of the French State only apply if expressly mentioned.

map these seabeds. The acquisition of knowledge is declared to be "*a source of wealth, progress and innovations that can find applications in many areas, particularly food safety, medicine, pharmacology and bioscience*".

[235]National assembly, *Resolution calling upon the government to defend a moratorium on seabed mining*, 17 January 2023. This move follows resolution no 702 of the National Assembly for the conservation and sustainable use of the ocean, adopted on 25 November 2021.

[236]For more information about this programme, see the following link: https://www.info.gouv.fr/actualite/france-2030-repondre-aux-defis-ecologiques-et-d-attractivite (viewed in April 2024).

[237] Articles 198 to 204, Treaty on the functioning of the European Union.

[238] Article 74, French Constitution.

Table 11: Distribution of competence between Wallis and Futuna and the French State in respect of marine areas

Territory	Wallis and Futuna	French State
Wallis and Futuna	**Interior waters**[239] The competence is residual here and limited to regulating the interior waters within the baseline.	**Interior waters**[240] Ordinary law competence over all the other aspects of the regulation/management of this area
	Maritime fisheries[241] The competence must not affect the regime for territorial waters, the general laws and regulations for offshore fishery and river fishery.	**Territorial sea**[242] Ordinary law competence over all aspects of the regulation/management of this area
	Navigation on lagoons[243] This competence in the area of navigation applies to lagoons, and also to water courses and canals.	**Contiguous zone**[244] Ordinary law competence over all aspects of the regulation/management of this area
	Interior maritime and air transport This competence must be exercised as part of general safety and standardisation rules.	**Exclusive economic zone**[245] Ordinary law competence over all aspects of the regulation/management of this area[246]
	Minerals This competence is however limited and suffers from the lack of clarity relating to the sharing of competence with the French State[247].	**Continental shelf**[249] Ordinary law competence over all aspects of the regulation/management of this area[250] An extension of the application of the Mining Code and the law on the exploration and exploitation of

[239] Article 40, (11), decree no 57-811 of 22 July 1957 on the duties of the territorial assembly, the territorial council and the higher administrator of Wallis and Futuna.
[240] Article 4 and article 55 (II), order no 2016-1687 of 8 December 2016 relating to maritime species under the sovereignty or jurisdiction of the Republic of France, subject to the competence devolved to the overseas authorities mentioned in article 74 of the French Constitution.
[241] Article 40, (13), and article 55 (II), ibid.
[242] Articles 7, 8, 9, and article 55 (II), ibid.
[243] Article 40, (18), and article 55 (II), ibid.
[244] Article 10 and article 55 (II), ibid.
[245] Articles, 11-12, and article 55 (II), ibid.
[246] Particularly see title V, article 55, II and II bis, order no 2016-1687 of 8 December 2016, op. cit.
[247]Article 19, section 1, title II, order no 2016-1687 of 8 December 2016 on marine areas under the sovereignty or jurisdiction of the Republic of France. "*Where the competence of the State for regulating the exploration and exploitation of the resources of the exclusive economic zone and continental shelf are transferred, under national law, to an authority identified in article 74 of the Constitution or New Caledonia, all the laws and regulations applicable in the territory of that authority apply to artificial islands, installations, structures and their related installations located in the exclusive economic zone or on the continental shelf as if they were on the territory of the authority, and to the activities exercised there*". My emphasis. The French decrees applicable in the area, which are required for processing applications, do not explicitly refer to Wallis and Futuna. See in this respect the implementing instruments of the Mining Code relating to mining work and rights: decree no 2006-648 of 2 June 2006 (relating to mining rights and underground storage rights) and decree no 2006-649 of 2 June 2006 (relating to mining work, underground storage work and the policing of mines and underground storage). Also see the implementing instruments of Act no 68-1181 of 30 December 1968

	Since a French law of 2017, this competence no longer relates to liquid or gaseous hydrocarbons or to coal[248].	the continental shelf was proposed in 2014[251], but was opposed by the territorial assembly of Wallis and Futuna.
		Defence, public order and safety[252] Ordinary law competence, particularly covering the entire dimension of these areas of competence over the seabeds of the EEZ and the continental shelf, and also, for example, piracy[253]
		External relations[254] Refers to the external policy and bilateral regional and international agreements, particularly those applicable to marine areas
		External communications[255] This competence, mentioned briefly, includes telecommunications and applies for instance to the case of undersea cables laid on the soil of the EEZ or the continental shelf
		Public health and hygiene[256] Ordinary law competence of interest to this study because of the social dimension and the human right to a clean, healthy and sustainable environment.
		Marine scientific research[257]

(decree no 71-360 of 6 May 1971 on the implementation of act no 68-1181, idem; decree no 71-361 of 6 May 1971 on the criminal provisions for the implementation of act no 68-1181, idem; and decree no 71-362 of 6 May 1971 on the preliminary authorisations for exploration for mineral substances and fossils in the subsoil of the continental shelf. P.-Y. Le Meur et V. Muni Toke indicate besides that "*the current status quo is a fragile balance with an uncertain future, essentially a legal grey area which characterises the attempts to change the Mining Code applicable to Wallis and Futuna*". P.-Y. Le Meur and V. Muni Toke, "Une frontière virtuelle : l'exploitation des ressources minérales profondes dans le Pacifique", op. cit. p. 19.

[249] Articles 14 and 15, and article 55 (II), ibid.

[250] Particularly see title V, article 55, II and II bis, order no 2016-1687 of 8 December 2016, op. cit. Also see article 1: "*The continental shelf on which the Republic of France exercises the rights defined below is, over its entire extent and regardless of the geographical location and status of the territories to which it is adjacent, subject to a single legal regime set under this law subject to the provisions of 35 and 36*." Act 68-1181 of 30 December 1968 on the exploration of the continental shelf and the exploitation of natural resources. My emphasis.

[248] See article 25, section VI, act no 2017-1839 of 30 December 2017 putting an end to the search and exploitation of hydrocarbons and making miscellaneous provisions relating to energy and the environment. Note in this regard that this act does not apply in New Caledonia or Polynesia.

[251] The reform was intended to fill a legal loophole relating to the application of the Mining Code to these islands.

[252] Article 7, act no 61-814 of 29 July 1961, op. cit.

[253] Article 6, Act no 94-589 of 15 July 1994 amended by Act no 2011-13 of 5 January 2011, applicable in Wallis and Futuna. Also see the circular of 13 July 2011 on measures against piracy and the exercise of the policing powers of the State on the sea, JUSD1119584C.

[254] Ibid.

[255] Ibid.

[256] Ibid. This competence is listed because of the potential impact on public health of activities in the sea.

[257] Particularly see articles L. 251-1 et sequentes of the Research Code.

B. Miscellaneous measures for managing the marine area of Wallis and Futuna

Table 12: Miscellaneous measures for managing the marine area of Wallis and Futuna

Marine area management measures	EEZ (Wallis and Futuna)	Continental shelf (French State)	Comments
Protected area	**N/A**	**N/A** The French State could put in place measures to protect "sites of geological interest" as part of its rights over the continental shelf[258].	For now, there is no measure for the protection of the marine area of the EEZ or continental shelf of Wallis and Futuna. However, a project is under way since 2022 in the north of Uvéa in order to protect fishery resources and marine biodiversity. Besides, the territorial assembly plans to cooperate with Fiji and Tuvalu in order to create a marine park with ecological and biological importance covering the three EEZs of these territories.[259]
Moratorium	**"Statement on the ocean" (2019)** Following discussions from 2015, the territorial assembly stated its "wish to protect and sustainably manage the maritime area" through a statement of 2019 aimed at establishing a moratorium on deep mining, for a period of 50 years[260]. The statement has not been made enforceable and is still being discussed with customary authorities in order to	**Resolution of the national assembly calling upon the government to defend a moratorium on seabed mining (2023)[261]** ⇨See comments in the corresponding table for New Caledonia	The statement on the ocean reflects the conflicts of sovereignty between the chiefdoms and the State in respect of marine resources. Wallis and Futuna has generally initiated a review of the terms of the customary sovereignty over the marine area[262].

[258] See in this regard decree no 2015-1787 of 28 December 2015 on the protection of sites of geological interest. A note from the Ministry for the Environment, Energy and the Sea, in charge of international relations on climate (not published in the official journal), was issued on 1 December 2016, mentioning the exclusion of French Polynesia from the scope of application of the decree. Even though that is legally correct, because of the articulation of competence between these territories and the French State, the State can however apply this decree to the continental shelf located off the shores of Polynesia (within and beyond), as the coastal State is responsible for the environmental policy on the continental shelf.

[259] Senate, *L'exploration, la protection et l'exploitation des fonds marins : quelle stratégie pour la France ?,* op.cit.,p. 50

[260] Territorial assembly, deliberation no 86/AT/2019 of 3 December 2019.

[261]National assembly*, Resolution calling upon the government to defend a moratorium on seabed mining*, 17 January 2023. This move follows resolution no 702 of the National Assembly for the conservation and sustainable use of the ocean, adopted on 25 November 2021.

[262] Particularly see P.-Y. Le Meur and V. Muni Toke, "Une frontière virtuelle : l'exploitation des ressources minérales profondes dans le Pacifique", op. cit. p. 17.

	specify its content.		

C. Comments

Wallis and Futuna Islands are based on the same tectonic plate, but are located on either side of a deep (over 4500 metres) fossil subduction zone, and have a different geological history.

The review of the submission for the extension of the continental shelf filed jointly with New Zealand and Tuvalu is not scheduled before 2030. To date, no exploration campaign is envisaged in this region. Indeed, relations between Wallis and Futuna and the French State are not based on trust, because of the silence surrounding the exploration campaigns conducted by France between 2010 and 2012. That is because while these campaigns were conducted in accordance with the sovereign rights of the State over the EEZ and the continental shelf, the local population and chiefdoms were not first informed or consulted[263].

Since that time, there is not much trust in the intentions of the French State, spurring the territorial assembly, in 2016, to call for the appointment of experts to advise the higher authorities in order to assess the potential of exploration and exploitation resources and activities[264]. That is why the Institute for Development Research (IRD) was appointed to study the feasibility of collective expertise on deep sea mineral resources.

Following a number of difficulties, this expertise mission was however rejected. P.-Y. Le Meur and V. Muni Toke conclude that "*very clearly, any form of debate on the mining issue has been*

[263] Let us note that such failure to consult with and secure the consent of local populations is a regular criticism made by the OCTs vis-à-vis the French State, particularly in its preparation of policies for access to and exploitation of the mineral resources. In this regard, see the contributions of NGOs, and particularly of the IUCN at a hearing before the French Senate on the occasion of the information mission "Exploration, protection and exploitation of seabeds: what strategy for France?" op. cit. In respect of the French national strategy for exploration and mining on seabeds, prepared in 2021: "*The national strategy was developed with no public consultation, or involvement of the environmental civil society. The French IUCN committee only became aware of the strategy after it had been adopted. While the priority goal of this strategy is indeed closer association with the stakeholders, its basis is already fragile. In view of the impact of exploration and exploitation activities on overseas territories, particularly French Polynesia and New Caledonia, it would be necessary to consult local authorities, voluntary organisations, local communities and the representatives of traditional knowledge in order to bring them into the development of the strategy, which appears to serve industry first and foremost. These consultations should not just cover the issue of acceptability, but also the economic, social, environmental and cultural impact. Lastly, and generally, the different players and experts invited by the CESE in 2013, not necessarily affiliated with the interests of industry, also appeared to have been kept at a distance while developing the strategy. This approach is surprising, in view of the fact that the CESE had carried out innovative in-depth work, which should have been capitalised. The French committee of the IUCN thus calls for effective information to and involvement of the different stakeholders, particularly environmental organisations and the scientific community, regarding this important issue of seabed exploration and exploitation.*"

[264] For more details on these points, see Le Meur and Muni Toke, op. cit.

rejected out of hand, even as the indigenous people have insistently restated their claims to the land, terrestrial and marine alike"[265].

To date, that wariness about the political and economic intentions of the French State still remain, and sovereignty conflicts are not settled.

In view of that particular climate, the deployment of exploration activities without consulting with and securing the consent of the local population would only heighten sovereignty disputes and endanger the relationship between Wallis and Futuna and France. Scientific research activities along with Wallis and Futuna in order to integrate scientific and traditional knowledge could however be envisaged, providing, once again, that the territory is consulted and that its consent is secured, with the aim of creating a healthy and lasting basis for cooperation.

IV. Clipperton

In accordance with Act no 55-1052 of 6 August 1955 relating to the status of the French Southern and Antarctic Lands and Clipperton Island, the laws and regulations of the Republic of France apply as of right in that island, which is under direct rule by the French government[266]. For its part, Constitutional Act no 2008-724 of 23 July 2008[267], inserting a reference to Clipperton in article 72-3 of the Constitution, has lifted legal doubts about the status of the island.

A. Distribution of competence between Clipperton and the French State in respect of marine areas

Since 2022[268], the Minister for Overseas Territories has administrative powers over the Island, particularly consisting in ensuring "*the conservation of the different physical environments, particularly maritime environments, and the protection of the environmental balances and natural heritage*"[269]. Besides, the French Mining Code applies to this territory, particularly the amendments of 2017 which put an end to the search and exploitation of conventional and unconventional hydrocarbons and contained several provisions relating to energy and the environment[270]. The various laws and regulations applicable to the activities covered by the

[265] Ibid, p. 16.
[266] Title II, articles 9 to 16, Act no 55-1052 of 6 August 1955 on the status of French Southern and Antarctic Lands and Clipperton Island.
[267] Article 37, Constitutional Act no 2008-724 of 23 July 2008 for modernising the institutions of the Fifth Republic.
[268] Act no 2022-217 of 21 February 2022, article 263.
[269] Article 11, ibid.
[270] Article L. 666-1, French Mining Code.

Mining Code apply to Clipperton "*as if they were in the metropolitan territory*"[271]. Lastly, the provisions of the Environmental Code also apply to Clipperton, subject to the application of more restrictive provisions to that territory (which is not currently so)[272].

For clarity, it must be noted that the Clarion-Clipperton fracture zone is not located in the EEZ or the continental shelf of France, but in the international seabed zone which is managed by the International Seabed Authority. That fracture, in which many exploration activities are currently under way[273], is located to the north of Clipperton Island. France was thus granted a mining permit for 75,000 km^2 in 1987 for the zone as a pioneer investor (that is to say before the coming into force of the UNCLOS).

To date, the island is uninhabited since the departure of the French Bougainville missions. It is the site of numerous illegal activities (fishing, drug trafficking) and suffers from significant pollution, due to all types of waste, particularly plastic. Besides, a regional specificity must be noted: the island is administered by the representative of the State in Papeete, Polynesia, for practical reasons.

B. Miscellaneous measures for managing the marine area of Clipperton

Table 13: Miscellaneous measures for managing the marine area of Clipperton

Marine area management measures	EEZ (Clipperton)	Continental shelf (French State)	Comments
Protected area	N/A[274]	N/A	There are no protected areas covering the seabed belonging to the EEZ and the continental shelf.
Moratorium	N/A	**Resolution of the national assembly - moratorium on seabed mining (2023)[275]** ⇨See comments in the	As discussed above, the French moratorium on mining does not cover the French continental shelf.

[271] Article L. 661-2, French Mining Code.
[272] Ibid.
[273] See in this respect the various exploration permits in the international seabed zone.
[274] A protected marine area has been set up in Clipperton since 2016, but it is located in territorial waters. For more information, see the following in particular: https://www.maia-network.org/accueil/les_aires_marines_protegees/fiches_didentite_des_amp/fiche_didentite_dune_amp_popup?wdpaid=555597299&gid=8268 (viewed in May 2024).
[275] National assembly, *Resolution calling upon the government to defend a moratorium on seabed mining*, 17 January 2023. This move follows resolution no 702 of the National Assembly for the conservation and sustainable use of the ocean, adopted on 25 November 2021.

		corresponding table for New Caledonia	

C. Comments

Clipperton Island has been the destination of several scientific expeditions to study its terrestrial and marine biodiversity. To date, the enclosed lagoon is particularly degraded, described as "*eutrophic and virtually lifeless*", with a lagoon marine environment that is "*dying and turning into a desert like the terrestrial ecosystem*[276]". The depths are however rich in hydrogen sulphide and the island is in reality one of the richest areas in the world for tuna fishing.

In recent years, several proposals were made for the establishment of a permanent scientific base on the island, particularly for studying the ocean-climate interface, corals, the movement of migratory species, tectonic plate movement etc. Besides, some authors propose the setting up of a deep-sea base in the deep waters of the trench, establishing a small specialised military section, or a limited tourist base[277]. However, these projects all appear to face common obstacles, i.e. the gradual desertification of the island, particularly violent cyclones and rising water levels. All the same, the island continues to be a prime location for surveillance and observation of the region, as a result of its location in the Northern Pacific.

The island is also ideally located, within a radius close to the Clarion-Clipperton fracture zone, one of the most coveted in the world in terms of seabed drilling. It might play a role in the activities carried out beyond national jurisdiction, as a terrestrial anchor for processing/storage/coordination or as a scientific base for the continuous and regular study of these deep seas. To date, both France and Mexico have come out in favour of a moratorium on the exploitation of the international seabed zone, and it is thus unlikely that it will be considered in the short or medium term as a possible anchor or relay for these exploitation activities. Options may however be studied as regards exploration and scientific research, which would thus be in line with the political positions of France and Mexico.

Regarding the continental shelf and potentially the existence of an extended continental shelf, this last option must not be ruled out. The extension may be in the interests of both France and Mexico, to make sure that these seabeds do not fall under the regime of the international seabed zone, where exploration and exploitation would be subject to a complicated procedure

[276] C. Jost, "Risques environnementaux et enjeux à Clipperton (Pacifique français)", *Cybergeo: European Journal of Geography* [Online], Environment, Nature, Landscape, document 314, online since 1 July 2005, available via the following link: https://doi.org/10.4000/cybergeo.3552 (viewed in May 2024). Also see A. Tchékémian, "Clipperton, seul territoire français dans l'océan Pacifique nord-oriental : quels enjeux environnementaux et géopolitiques ?" Études caribéennes, April 2022. Available via the following link https://doi.org/10.4000/etudescaribeennes.23485 (viewed in May 2024).
[277] Jost and Tchékémian, ibid.

that is economically and strategically disadvantageous. If France has any particular concerns about a potential block by Mexico to a submission for the extension of the continental shelf, a compromise could be found with Mexico in order to set up a joint development zone, which could relate to scientific research or exploration activities in the common interest[278].

V. Similarities, grey areas and perspectives for the development of seabed exploration and exploitation activities

A. Similarities and grey areas

Table 14: Similarities and grey areas between the different territories studied

Territory	Marine areas in which EU law could apply[279]	Non-living resources with potential	Moratorium on the exploitation of mineral resources	Protection measures for marine areas[280]	Priority action for grey areas and gaps
New Caledonia	Continental shelf	Hydrothermal vents Aragonite sand Phosphate (to be confirmed)	Under review (NB: this moratorium also covers exploration activities)	Coral Sea Natural Park	• No legal framework suited to the exploration and exploitation of mineral resources. • Lack of clarity in the distribution of competence between New Caledonia and the French State in respect of rare earths and substances of use for atomic energy. • Reinforcement of scientific and traditional knowledge for the governance and planning of the marine area, particularly in view of the overlapping competence over seabeds within 200 nautical miles, and the lack of knowledge of marine ecosystems beyond 1500 metres. The knowledge will be fed into the reference data used to assess the environmental, social and cultural environment of marine areas. • Gaining more knowledge about the economic and social perspectives of the development and marketing of seabed minerals (market, quantity, processing,

[278] In accordance with the mechanism of article 83, paragraph 3, UNCLOS.
[279] The list of marine areas is limited to this study, and only covers the EEZ and the continental shelf. The application in question is indirect, as explained earlier in the report.
[280] Measures for the protection of marine areas place particular restrictions for the protection of areas if seabed exploration and exploitation activities are deployed.

					sale, sustainability assessment, setting up of scenarios). • Consultation and preliminary consent of local communities and indigenous peoples for the governance and planning of the marine area, particularly in view of the overlapping competence over seabeds within 200 nautical miles, and the gradual transfer of sovereign competence to New Caledonia.
French Polynesia	Continental shelf	Polymetallic crusts	Yes	Natural resources area named "Tainui Atea"	• No legal framework suited to the exploration and exploitation of mineral resources. • Legal uncertainty about the distribution of competence between French Polynesia and the State in respect of strategic raw materials. • Scientific and traditional knowledge to be strengthened, in view of the governance and planning of the marine area, particularly within 200 nautical miles. The knowledge will be fed into the reference data used to assess the environmental, social and cultural environment of marine areas. • Consultation and preliminary consent of local communities and indigenous peoples for the governance of the marine area, particularly in view of the overlapping competence over seabeds within 200 nautical miles.
Wallis and Futuna	EEZ and continental shelf	Lack of knowledge	Under preparation	No[281]	• No legal framework suited to the exploration and exploitation of mineral resources. • Articulation between customary law and French ordinary law, particularly in view of sovereignty conflicts over the marine area. • Scientific and traditional knowledge to be strengthened, in view of the governance of the seabeds and planning of the marine area. • Consultation and preliminary consent of local communities and indigenous peoples to be strengthened, in view of the governance of the seabeds and

[281] Because it does not apply to the EEZ or the continental shelf.

					planning of the marine area. • Setting up of a governance framework prepared in partnership with the chiefdoms in view of the pending sovereignty disputes over the marine area.
Clipperton	EEZ and continental shelf	Lack of knowledge	No	No	• No legal framework suited to the exploration and exploitation of mineral resources. • Lack of action by the French state in the area and inconsistency of the explanations supplied by the government. • Inadequacy of scientific knowledge regarding seabed ecosystems.

B. Perspectives for the development of activities in these territories

i) General remarks

From a general point of view, with the exception of Clipperton, the three OCTs (New Caledonia, French Polynesia and Wallis and Futuna) have turned towards the protection and conservation of biodiversity, with varyingly strong and advanced positions on a moratorium on seabed mining.

To date, only the moratorium of New Caledonia includes both exploration and exploitation, while that of Polynesia only relates to exploitation. Attention must be paid to the progress made on the planned moratorium of Wallis and Futuna, as its field of application can still vary. The pending sovereignty conflict with the French State over the marine area of Wallis and Futuna could become more acute in those islands, particularly if the French State wants to exercise its rights over the continental shelf to deploy exploration and exploitation activities.

The policy selected for managing the marine area through a moratorium may be explained in different ways: the lack of adequate and appropriate scientific knowledge, the strong cultural dimension of these areas, the desire to secure and protect natural resources from the potential appetite of the French State, and also the fact that the Mining Code applicable to these activities in the EEZ is not at all suitable for regulating exploration and exploitation activities. Indeed, neither the Mining Code of New Caledonia nor that of Polynesia allows the regulation of the exploration and exploitation of mineral resources in their EEZs[282]. For its part, the Mining Code

[282] See tables of the respective territories above. Note in this regard that only the moratorium of New Caledonia covers both exploration and exploitation. Polynesia thus remains open to the exploration of mining resources in its EEZ in spite of the

of Wallis and Futuna does not apply to the EEZ, which is under the exclusive competence of the French State[283]. What is more, the French Mining Code, applicable to Clipperton and overseas continental shelves due to the exclusive competence of France, is not adequate for regulating such activities relating to such resources, in a deep sea environment[284] that is potentially very rich in biodiversity[285], particularly in the specific case of the exercise of these rights in overseas territories[286].

ii) Stratification of competence: between distribution and overlaps

The distribution of competence between the OCTs and the French State, characterised by a lack of clarity about strategic minerals, suffers from its total unsuitability to address the issues of the exploration and exploitation of seabed mineral resources.

As a result, the development of exploration or exploitation activities on the continental shelf would expose the French State to significant legal and financial risks, both domestically and under international law[287].

Besides, the overlapping competence within the 200 nautical miles of firstly the French State (on its continental shelf within 200 nautical miles) and secondly Polynesia and New Caledonia (area of the EEZ) would result in particular restrictions on the French State in the exercise of its sovereign rights over the continental shelf within 200 nautical miles. New Caledonia and

inappropriateness of its Mining Code, which can expose it to significant legal and financial consequences if these activities are deployed.

[283] Title 2 of Order no 2016-1687 of 8 December 2016, op.cit, applies to Wallis and Futuna and Clipperton with some exceptions. For more details, see article 55, paragraph 2, of said order.

[284] French law does not regulate the regime of responsibility for the unmanned vehicles used for exploration and exploitation. However, such equipment can suffer from failures, as shown by the accident of Patania II.

[285] The different types of pollution or disruption of the marine environment created on the occasion of the exploration and exploitation of mineral resources are covered neither by French law nor by EU law. The same applies to emergency measures and the prevention of accidents on the seas as a result of these activities. However, the UNCLOS provides for a specific obligation on States to prevent, reduce and control pollution of the marine environment from installations or equipment used for the exploration and exploitation of the natural resources of seabeds. See Article 194, paragraph 3 (c).

[286] "*The laws and regulations apply while the activities authorised under articles 20 and 40 and those authorised under the Mining Code are carried out in the exclusive economic zone or the continental shelf, on artificial islands, installations, structures and their related installations, as if they were in metropolitan France. They also apply in the same conditions to artificial islands, installations, structures and their related installations themselves.* " Article 19, paragraph 1, applicable to New Caledonia and French Polynesia (under article 55 of the same order), Order no 2016-1687 of 8 December 2016 on marine areas under the sovereignty or jurisdiction of the Republic of France. The Senate believes that "*the recent reform of our Mining Code is in this respect a missed opportunity for clarifying a legal regime that is largely wanting*". The search for mining deposits in the sea and their exploitation are subject to the regime for mining substances which is quite inappropriate for the challenges of the exploration and exploitation of deep-sea mineral resources. Also see the analysis of the Senate, *L'exploration, la protection et l'exploitation des fonds marins : quelle stratégie pour la France ?,* op.cit., pp. 39-46. The adaptation of Act no 68-1181 of 30 December 1968, op. cit, to overseas territories is set by a decree in the Council of State (article 36, Act no 68-1181). Several decrees have been adopted, but none of them has permitted to date the regulation of the exploration and exploitation of the mining resources of the continental shelf in accordance with aforementioned article 19.

[287] For example, failure by the State to fulfil its duty of precaution and vigilance in respect of the regulation of these activities, the responsibility and liability of players for the protection/conservation of the environment in view of the risks of these activities could be envisaged, particularly by the neighbouring Pacific States.

Polynesia must thus exercise their respective sovereign rights taking due account of the rights and obligations of other States, particularly those of the French State on the continental shelf[288]. The exercise of these rights of the French State over its continental shelf must not besides affect the legal regime for the superjacent waters, or harm navigation or the rights and freedoms recognised for the other States (particularly New Caledonia and Polynesia) or unjustifiably hinder their being exercised[289]. The French State must further exercise its sovereign rights "*subject to the competence attributed to the overseas authorities mentioned in article 74 of the Constitution, and to New Caledonia.*[290]". That results in the existence of particularly strong reciprocal obligations in view of the overlapping competence in the 200 nautical miles area. Therefore, the deployment of exploration and exploitation activities on the continental shelf within 200 nautical miles in the protected areas created by New Caledonia and Polynesia may be considered to be a violation of the UNCLOS.

Further, the distribution of competence between the French State on the continental shelf, on the one hand, and New Caledonia and Polynesia in the EEZ on the other, sets up a difference in jurisdiction between the two marine areas, potentially allowing the impact of activities in one of the areas on the other area to be described as a "transboundary" impact. Such a description could be envisaged under the definition of "transboundary impact" of the *Convention on Environmental Impact Assessment in a Transboundary Context* ("Espoo Convention"), which uses the criterion of difference in jurisdiction to determine the transboundary nature[291].

VI. Application of EU law to these territories: avenues to explore

The territories covered by this study stand out because of the heterogeneity of their legal statuses and therefore the laws applicable to the seabeds located in the EEZ and on the continental shelf.

To understand the application of EU law, one needs to first take into consideration the principles of association between the Union and the overseas countries and territories ("OCTs") and secondly the distribution of competence between the European Union and the member States (see tables above), and lastly the distribution of competence between the member State and its overseas territories (see tables below).

[288] Article 58, UNCLOS.
[289] Article 78, UNCLOS.
[290] Article 55, Order no 2016-1687 of 8 December 2016, op. cit.
[291] "*'Transboundary impact' means any impact, not exclusively of a global nature, within an area under the jurisdiction of a Party caused by a proposed activity the physical origin of which is situated wholly or in part within the area under the jurisdiction of another Party.* " Article 1, (8) Espoo Convention. Note in this regard that the Espoo Convention does not apply to the exploration and exploitation of mineral resources. However, its application and influence in the world could suggest that its definitions are part of customary law. A closer study of the formation of custom in the area must be studied to confirm that hypothesis. Note in this regard that the aforementioned BBNJ Agreement does not define the concept of transboundary impact.

A. Goals and priorities

Generally speaking, EU law, namely the treaty on the functioning of the European Union and secondary legislation, "*do not automatically apply to the OCTs, with the exception of a number of provisions which explicitly provide for their application*[292]. These OCTs are not considered to be third countries, but are not part of the single market[293]. However, they are required to comply with a certain number of rules, particularly as regards plant protection products, banking and finance.

The treaty on the functioning of the European Union expressly states the principle of association of overseas territories, which aims to "*promote the economic and social development of the countries and territories and to establish close economic relations between them and the Union as a whole*[294]". Besides, these countries and territories are subject to the instruments adopted by the Council to establish the modalities and procedure of their association with the Union[295]. For its part, the Council adopted a Decision in 2021 that updated the principles of association of the Union with these countries and territories following the withdrawal of the United Kingdom from the European Union. Supporting the overall goal of the Union of promoting sustainable development, and its values and standards, across the world, this decision mentions several general goals of interest to this study:

- the significant contribution of the OCTs to compliance with the Union's commitments under Multilateral Environmental Agreements[296];
- the consideration and preservation of the cultural diversity and identity of the OCTs in the association between the Union and the OCTs[297];
- the conservation, restoration and sustainable use of biological diversity and ecosystem services as a key element for the achievement of sustainable development as a guarantee under the association[298].

[292]Paragraph 10, Council Decision (EU) 2021/1764 of 5 October 2021 on the association of the Overseas Countries and Territories with the European Union including relations between the European Union on the one hand, and Greenland and the Kingdom of Denmark on the other. On the other hand, EU law applies directly to these territories, unless otherwise provided expressly.
[293] The single market is generally recognised to be a border-free area allowing the free movement of goods, services, capital and people.
[294] Article 198, Treaty on the functioning of the European Union.
[295] That is subject to the provisions governing public health, public safety and order, the free movement of workers from these countries and territories in the member States and workers from the member States in the countries and territories. Article 202-203, ibid.
[296] Paragraph 25, Decision (EU) 2021/1764 of the Council of 5 October 2021.
[297] Paragraph 27, ibid.
[298] Paragraph 22, ibid. In that respect, the Council stresses that "*Actions in the fields of conservation of biodiversity and ecosystem services, disaster risk reduction, sustainable management of natural resources and the promotion of sustainable energy and environmental security contribute to adaptation to and mitigation of climate change in the OCTs*".

More precisely, the Decision of 2021 recognises this alignment of the goals, principles and values of the association and the right of each partner (European Union and the OCTs) to determine their sustainable development policies and priorities, to establish their own levels of domestic environmental and labour protection, and to adopt or amend accordingly the relevant laws and modify the relevant policies[299].

The association is based on broad cooperation and dialogue in areas concerning, inter alia, energy, environment, the blue economy, natural resources, including raw materials and fish stocks, as well as research and innovation[300]. Some of these mutual interests include the blue economy, the sustainable management of natural resources, the promotion of research, innovation and scientific cooperation, and the development of cooperation within the Pacific region[301].

The association is managed by the European Commission and the authorities of the OCTs, and, if needed, by the member State to which the OCT is linked, *in accordance with their respective institutional, legal and financial competences*[302]. The importance of compliance with competence is besides integrated into the guiding principles of the dialogue which must be "*conducted in full compliance with the respective institutional, legal and financial powers of the Union, of the OCTs and of the Member States to which they are linked*[303]". Besides, consultation and dialogue bring together three parties, namely the OCTs, member States and the Commission, and are to be conducted "*in full compliance with the respective institutional, legal and financial powers of each of the three partners*[304]". That restriction of the association of the OCTs to their own competence is not new in reality, but is particularly strengthened by the Decision of 2021[305].

B. Principles of application of EU law to the OCTs: between direct and indirect application

When the provisions applicable to the exploration and exploitation of marine mineral resources in the relevant territories are studied, it appears that the regulating instruments overlap significantly. The points below are intended to reveal that complexity, which is particularly acute when it comes to activities in overseas marine areas.

[299] Article 3, paragraph 2, ibid.
[300] Article 13, paragraph 5, ibid.
[301] Article 5, paragraph 2.
[302] Article 4, ibid.
[303] Article 13, paragraph 2.
[304] Article 7, paragraph 4, Decision 2001/822/EC, ibid.
[305] Particularly see Council Decision 2013/755/EU of 25 November 2013 on the association of the overseas countries and territories with the European Union, and Council Decision of 27 November 2001 on the association of the overseas countries and territories with the European Community, 2001/822/EC.

To come back to the basics, the principles for the distribution of competence between the Union and the member States are stated in the treaty on the functioning of the European Union (TFEU) on the basis of competence based on the subject (*ratione materiae*), and not competence based on geography or territory (*ratione loci*). That *ratione materiae* competence thus applies by default to the whole territory of member States, in accordance with article 29 of the Vienna Convention on the Law of Treaties; such application is subject to a special rule, that of the association between the OCTs and the European Union. The fifth part of said treaty thus indicates a different intention that may deviate from the general rule of application of law of treaties to the whole territory[306].

In addition to that distribution of competence between the Union and member States, there is a new level of distribution of competence: that between a member State and its overseas territories. In the case of France, that distribution with the three OCTs studied generally preserves the sovereign competence of the French State (mainly relating to policing, defence, security, sovereign rights, foreign policy and diplomacy). As a result, the signing and ratification by France of an international agreement entails the obligation to apply it in the OCTs. Such an international agreement can be implemented in the light of the distribution of competence with the OCTs in question (for example, Polynesia will be competent for implementing international obligations as part of the EEZ). However, in the meaning of international law, by signing and ratifying an international agreement, the French State thus exercises its power over its territory, particularly its OCTs.

EU law may therefore be applied in two different ways, depending on the distribution of competence between the member State and the overseas territory. It therefore applies "*non-automatically*", as referrals are made. Several cases must be differentiated.

Firstly, European law can apply directly. That is so of exploration and exploitation on the continental shelf, where several areas of competence of the Union and member States are involved. Some areas like the environment, energy or security on the seas (of people and/or infrastructure) fall within the competence shared between the European Union and member States. As a result, EU law is transposed into domestic law, which, in the case of France, can be applied to activities on the continental shelf in the studied OCTs. France has not transferred its competence over the continental shelf, and the laws and regulations of France indeed apply "*as if they were in metropolitan France*", where EU law is applicable. For example, the Environmental Code applicable to the activities governed by the French Mining Code applies directly to Clipperton "*as if [the activities] were located in metropolitan France […] subject to the application of the more restrictive provisions applicable to the territory*"[307].

[306] In accordance with article 29 of the Vienna Convention on the Law of Treaties.
[307] Article L. 661-2, French Mining Code (created under order no 2011-91 of 20 January 2011).

EU law may also apply indirectly through French law which is applied in the OCTs. For example, in 2013, the European Union adopted a Directive for strengthening the security of operations on the seas in order to prevent incidents of the Deepwater Horizon type[308]. This directive was transposed into French law by Act no 2015-1567 of 2 December 2015[309] and applies to New Caledonia, French Polynesia, Wallis and Futuna and Clipperton Island, also subject to the competence devolved to the different OCTs. EU law is thus in this case applied indirectly to some OCTs, through the French law that transposes it, since it can apply in the areas of competence specific to these OCTs.

Even though this directive is only applicable to oil and gas operations, a similar directive on the safety of mineral resource exploration and exploitation would also be transposed into domestic French law, and could then apply to the OCTs in the same way as the directive of 2013. Besides, this example has the particularity of emphasising the complex overlap between areas of *ratione loci* and *ratione materiae* competence. Indeed, even though the EEZ is under the competence of New Caledonia and French Polynesia, and the laws and regulations of these territories apply to artificial islands, installations and structures in the EEZ[310], security issues are within the competence of the French State[311], which may, therefore, extend its laws in the area to the geographical areas of competence of the OCTs in question. We can see here that the distribution of competence, which at first glance appears clearly established, may turn out to be particularly complex in its implementation due to the articulation between *ratione loci* and *ratione materiae* competence.

Lastly, a last case of the indirect application of the European law and values is to be noted. In this respect, the various programmes in support of research and development funded by the European Union in the OCTs require the action of the beneficiaries to be in line with European values and standards. It goes without saying that these many programmes, which apply in some overseas territories, are deployed in order to promote the influence of the European Union throughout the world.

[308] Directive 2013/30/EU of the European Parliament and of the Council of 12 June 2013 on safety of offshore oil and gas operations and amending Directive 2004/35/EC.
[309] Act no 2015-1567 of 2 December 2015 containing miscellaneous provisions for adaptation to European Union law in the areas of risk prevention.
[310] In accordance with article 19, paragraph 2 of order no 2016-1687 of 8 December 2016, op. cit. "*Where the competence of the State for regulating the exploration and exploitation of the resources of the exclusive economic zone and continental shelf are transferred, under national law, to an authority identified in article 74 of the Constitution or New Caledonia, all the laws and regulations applicable in the territory of that authority apply to artificial islands, installations, structures and their related installations located in the exclusive economic zone or on the continental shelf as if they were on the territory of the authority, and to the activities exercised there*". This extension of the Directive of 2013 on the safety of oil operations in the OCTs thus makes it possible to avoid any distortion of standards, within the same geographical area, between the activities carried out in the EEZ and those on the continental shelf.
[311] The French State is thus competent for policing and the safety and security of maritime traffic all over New Caledonia: sea rescue operations in the territorial waters. It is also competent for civil protection. See article 21, III, (1) b and (5). Organic law no 99-209 of 19 March 1999, op. cit. That competency is similar in French Polynesia. See article 14, (9), organic law no 2004-192 of 27 February 2004, op. cit.

VII. Unsuitability of European and national legal frameworks

The complex overlap of competence between the European Union and its member States on the one hand and the member States and their overseas territories on the other must not make us lose sight of the main issue: the regional legal framework of the European Union and that of France and its many OCTs studied does not to date regulate the exploration and exploitation of mineral resources in the marine areas under national jurisdiction, or address the specificities of the economic, social, environmental and cultural risks relating to these activities, failing sufficient and appropriate knowledge.

The current legal frameworks are indeed chiefly adapted to the conventional activities of offshore oil and gas extraction, and are generally marked by a terrestrial view of mining, whether for the regulation of exploration and exploitation (particularly the technological dimension and the use of unmanned vehicles), the understanding of risks, particularly environmental risks, or the arbitration procedures/policies in the event of a conflict of interest or usage between the living and non-living resources of seabeds (how can this be prioritised?)[312]. That conclusion, which is not surprising because it is typical of the difficulties encountered in the world by many States and legal frameworks, is one of the reasons driving some States or OCTs to potentially seek to adopt moratorium measures within the areas under their national jurisdiction.

[312] See, in this regard, the various regional and national studies carried out in respect of the regulation of exploration and exploitation on the continental shelf and the zone in V. Tassin Campanella (ed), *Routledge Handbook on Seabed Mining and the Law of the Sea,* Routledge, London, 2023, 494 p.

Part V – Perspectives for development and exploration and exploitation in the region

I. Regional context: applicable instruments

The regional vision of Oceania is currently represented by Strategy 2050 for the blue Pacific continent[313]. That strategy explicitly recognises the importance of the ocean and its resources as a link between territories, cultures and identities, now and in future.

That framework of influence, applicable in its broad principles to all types of activity, particularly marine activities, does not however allow a clear understanding of the status of the regional policy and law vis-à-vis exploration and exploitation. In view of the complexity of regional issues, and the diversity of the profiles of the territories studied, future developments will focus on bringing out the legal and political particularities vis-à-vis these activities.

A. Regional framework applicable to exploration and exploitation activities under national jurisdiction

Exploration and exploitation activities have been in the spotlight in the region since 1999. The Pacific States have adopted guidelines known as the Madang Guidelines[314] which include 19 recommendations aimed at supporting the development of policies and legal instruments for regulating exploration and exploitation activities. These recommendations, which are very innovative and the only ones of their kind in the world, as pointed out by C. Diver, have brought out the importance of environmental impact assessments, and the difficulties relating to the relations between industry and marine scientific research[315].

That innovative nature of the instruments developed in the region was confirmed subsequently by the series of (non-binding) regional frameworks specifically dedicated to the exploration and exploitation of mineral resources. These include the following frameworks:

- 2012: Pacific-ACP States Regional Legislative and Regulatory Framework for Deep Sea Mineral Exploration and Exploitation

[313] Pacific Islands Forum Secretariat, 2050 Strategy for the Blue Pacific Continent, Suva, Fiji.
[314] Secretariat of the Pacific Community, The Madang Guidelines: Principles for the Development of National Offshore Mineral Policies, Report 362, December 1999.
[315] C. Diver, "The Pacific Islands Region and Seabed Mining", in V. Tassin Campanella (ed), *Routledge Handbook on Seabed Mining and the Law of the Sea*, Routledge, London, 2023, p. 318.

- 2016: Regional Environmental Management Framework for Deep Sea Minerals Exploration and Exploitation
- 2016: Regional Financial Framework for Deep Sea Minerals Exploration and Exploitation
- 2016: Regional Scientific Research Guidelines for Deep Sea Minerals

Along with these efforts, the Secretariat of the Pacific Community, based on consultations with member States, has prepared a Deep Sea Mining Agreement[316] that sets up a common basis for the possible development of these activities in the region. Among the principles adopted, States have the obligation to harmonise their legal instruments and policies with respect to exploration and exploitation, cooperate with each other, particularly as regards marine scientific research, and put in place a national mechanism for granting exploration and exploitation permits, with potentially the creation of a regional institution responsible for granting such permits[317].

The agreement has not been ratified to date. The member States of the Secretariat of the Pacific Community decided in 2019 to suspend its adoption, until the finalisation and the subsequent adoption of the Mining Code currently being prepared by the International Seabed Authority (for exploitation outside national jurisdiction). That wait, which is totally legitimate, is indeed aimed at ensuring that the agreement is in line with the Mining Code.

Today, the adoption of this regional deep sea mining agreement does not appear as secure as it did when the agreement was drafted. That is because sweeping political changes have been observed in recent years in the region, and opinions are split between States in favour of marine mining in the short term[318] and those opposed to such plans. That split only became sharper during the COVID-19 pandemic, as some undecided States now appear to be in favour of developing these activities because of their economic potential.

In June 2021, Nauru called upon the International Seabed Authority to finalise the adoption of its Mining Code within two years, thus indicating very clearly its short-term ambitions in the waters outside national jurisdiction. The call had significant repercussions on the international level, and also in the region.

On the regional level, a planned moratorium was discussed and prepared, a few months before the initiative of Nauru, by the Secretariat of the Pacific Regional Environment Programme

[316] Deep Sea Mining Agreement. For more details, particularly on the content of the key provisions of the agreement, see C. Diver, op. cit. In that regard, note that the agreement is not available for public reference.
[317] For more details, see C. Diver, op. cit.
[318] See in this regard the Cook Islands, Kiribati, Tonga and Nauru.

(SPREP)[319], which addressed the issue through a working document[320] and a draft recommendation calling for a 10-year moratorium for the purpose of implementing the precautionary principle. Observing the regional conflict between the commitments of the islands of the Pacific to protect and sustainably manage the ocean and the wish to benefit from mining revenue, the recommendation proposed a moratorium with certain goals: (1) a comprehensive assessment of the environmental, social and economic risks, (2) assessments to determine that such activities can be carried out while effectively managing the marine environment and protecting biodiversity and (3) time for developing and strengthening the circular economy in order to recycle scarce mineral resources. However, that proposal was not retained at the time of its presentation in 2021[321].

On 14 April 2022, a new political alliance bringing together the autonomous region of Bougainville, Fiji, French Polynesia, Guam, New Zealand, Palau, Papua New Guinea, and the Solomon Islands, Tuvalu[322] and Vanuatu, thus called for a "total" ban on these activities[323] covering the territorial seas, the EEZs and the areas under national jurisdiction, as well as the Pacific region and areas outside national jurisdiction. That ban also calls for the strengthening of scientific knowledge about the impacts of these activities[324].

The arguments put forward in support of the call for a ban include allegations about greenwashing by the mining industry, the false promises of land-based mining (particularly for phosphate, copper, gold and bauxite), and the disastrous environmental and social impact of these activities on the region, and also nuclear testing, and the absence of the free, prior and informed consent of communities[325]. The call for a ban is thus firmly rooted in the Pacific experience of the exploration and exploitation of areas and resources.

Lastly, a regional declaration, the Udaune Declaration on climate change, was adopted on 24 August 2023[326] within the Melanesian spearhead group[327], by a group of States (Fiji, Papua

[319] Inter-governmental organisation created by the treaty on the setting up of the Secretariat of the Pacific Regional Environment Programme (SPREP) in 1993. The organisation has the task of promoting cooperation in the Pacific region, and assisting the protection and improvement of its environment, while ensuring and securing sustainable development for current and future generations. New Caledonia, French Polynesia, Wallis and Futuna and France are members of the organisation.
[320] SPREP, "Deep-Seabed Mining: A Pacific Environmental and Governance Challenge", 30SM/officials/WP.8.4.3/Att.1.
[321] SPREP, Working document 30SM/officials/WP.8.4.3, paragraph 14. For more details, see C. Diver, op. cit.
[322] On that same date, 14 April, Tuvalu withdrew its financial support to Circular Metals Tuvalu Tld, ending the exploration activities carried out in international seabed areas. Particularly see the following blog: A. Pecoraro, Tuvalu cancels its sponsorship: the role of international law, *DSM Observer*, 2 May 2022. Available via the following link: https://dsmobserver.com/2022/05/tuvalu-cancels-its-sponsorship-the-role-of-international-law/ (viewed in May 2024).
[323] The call is for a total ban, which is not the same as a moratorium. In this regard, it must be noted that the technical terms used in the call are not consistent.
[324] See the statement "Our Ocean Call".
[325] For more details, see the call available through the following link: https://www.pacificblueline.org/pacific-blue-line-statement (viewed in May 2024).
[326] Udaune Declaration on Climate Change, 24 August 2023. Available via the following link: https://msgsec.info/wp-content/uploads/documentsofcooperation/2023-Aug-24-UDAUNE-DECLARATION-on-Climate-Change-by-Members-of-MSG.pdf (viewed in May 2024).

New Guinea, Solomon Islands, Vanuatu) and the Kanak and socialist national liberation front. The declaration also includes a strong commitment to the non-development of mining activities within national jurisdictions and calls for more rigorous and transparent marine scientific research on mining, and a moratorium applicable to these activities in the whole Pacific region. Besides, the declaration restates the principle of the protection of the territorial integrity and sovereignty of States, with no interference in their domestic affairs.

To date, the positions of the Pacific States remains very divided, with contrary opinions relating to the development of exploration and exploitation. Besides, no binding regional legal framework for regulating these exploration and exploitation activities is in place to date. The cooperation goals of States, restated through many voluntary and binding instruments, appear particularly difficult to implement in view of the conflicting positions, especially with the potential entry into force of the BBNJ Agreement[328]. The fear is that the potential start of exploitation activities by Nauru in the international seabed zone would harden stances further and affect the regional balance.

B. Pacific Islands Framework for Nature Conservation and Protected Areas 2021-2025[329]

This action plan was approved at the 30th meeting of the Secretariat of the Pacific Regional Environment Programme in 2021 by 26 States and member territories. In particular, it is based on a 30-year "*ambition for Pacific conservation*", adopted in 2002 at the 7th Pacific Islands Conference for Nature Conservation and Protected Areas, articulating the following mission: "*To protect and preserve the rich natural and cultural heritage of the Pacific islands forever for the benefit of the people of the Pacific and the world*"[330].

This framework is of interest for this study because it identifies a certain number of elements shared with studies on the exploration and exploitation of seabeds. That means that it makes it possible to grasp the challenges faced by this region holistically, tally the global issues and

[327] The group is an alliance set up in March 1988 in Port-Vila by three founding members: the Solomon Islands, Papua New Guinea and Vanuatu. For more information, see the following link: https://msgsec.info/ (viewed in May 2024).
[328] In May 2024, 12 Pacific States had signed the BBNJ Agreement, and only Palau has put in place the process for ratification under its internal law.
[329] In this regard, see the Pacific Islands Framework for Nature Conservation and Protected Areas 2021-2025, Samoa: SPREP, 2021.
[330] Ibid, p. 8. Three goals accompany that ambition: 1) Environment: the biodiversity and natural environment of the Pacific are conserved in perpetuity; 2) Society: Pacific peoples are leading activities for the conservation and sustainable use of natural resources and the preservation of cultural heritage for the benefit of present and future generations; 3) Economy: Nature conservation and sustainable resource use are the foundation of all island economies. Several principles have been adopted to guide the implementation of nature conservation programmes. Principle 1: Community rights; Principle 2: Conservation from Pacific perspectives; Principle 3: Ownership of conservation programmes; *Principle 4: Resourcing for longevity*; Principle 5: Good governance and accountability; Principle 6: Coordination and collaboration. Italics added.

those more specifically related to the exploration and exploitation of seabeds, identify the inadequacies and the grey areas in the region, and the way in which environmental, social, economic and cultural issues are perceived and can be applied to this study.

In that respect, even though all the objectives of this framework are listed, the various areas for action and issues will be selected based on their relevance. References to the different issues of the territories covered by this study are provided in footnotes.

Objective 1 Empower our people to take action for nature conservation, based on our understanding of nature's importance for our cultures, economies, and communities

Commenté [TI1]: Les traductions reprennent la formulation du Pacific Islands Framework

- Our people at the centre of conservation action. Some challenges have been identified, particularly[331]:
  - Community rights over territories and resources may be insufficiently recognised, respected or enforced by other parties[332]
  - Some community members, or entire communities, may be excluded from decision making processes[333]
  - There may be conflict between the differing economic, social-cultural, and environmental aspirations of community members and other parties[334]
- Behaviour change for nature conservation through identity, traditional knowledge, education, heritage, and cultural expressions. Some challenges have been identified, particularly[335]:
  - The importance of local cultural expressions and knowledge is sometimes not recognised within conservation narratives and behaviour change interventions[336]

Objective 2: Integrate environmental and cultural considerations into the goals, processes, and trajectories of economic development in the Pacific

- Sustainable and resilient ocean economies[337]
  - Current economic models promote short-term use of natural resources, with a lack of accountability for social or environmental consequences[338]
  - National legislation and policy is often sectoral rather than holistic, and may not reflect regional or international agreements

[331] Non-exhaustive list of priority action tracks.
[332] Issue that was raised particularly in Wallis and Futuna in the context of sovereignty conflicts over the marine area.
[333] With a particular reference to the comments stated by the IUCN about the formulation of the national strategy for exploration and exploitation 2021 of the French State and the lack of consultation of the various stakeholders, particularly local communities.
[334] Reference to the divergent positions on the short and medium-term development of seabed exploration and exploitation.
[335] Ibid.
[336] Issue raised indirectly by the case of Wallis and Futuna.
[337] Raised by French Polynesia in the context of the area protected in the EEZ.
[338] Raised generally in the three OCTs.

Objective 3: Identify, conserve, sustainably manage and restore ecosystems, habitats, and priority natural and cultural sites[339]

- Effectively protected marine areas (MPAs)[340]
  - There are challenges in assessment, monitoring, and enforcement of MPAs at all scales. Most MPA data focuses on spatial coverage, but it is much harder to measure the quality, effectiveness or equity implications of protection.
  - It is a continuing challenge to ensure that MPAs are adequately designed and sited to achieve multiple social, cultural, economic and ecological objectives
  - Some local communities are reluctant to share protected area data or formally register their protected areas, due to concerns that this may impact their autonomy and customary rights[341]
  - There are ongoing challenges in integrating deep sea habitats into networks of MPAs
- Marine ecological integrity
  - Across the Pacific there are relatively few long-term monitoring programs, or easily accessible datasets, for many key marine ecological indicators
  - Vulnerable marine ecosystems may not be explicitly mentioned in policy frameworks

Objective 4: Protect and recover threatened species and preserve genetic diversity, focusing on those of particular ecological, cultural and economic significance

- Reducing threats to threatened and migratory marine species
  - There is a relative lack of scientific data on the status, connectivity, and threats to many IUCN Red List marine species in the Pacific. Scarcity of information about offshore species.
  - There are challenges in ensuring that research data is adequately disseminated to governments and regional organisations in ways that are useful for management decisions

Objective 5: Manage and reduce threats to Pacific environments and drivers of biodiversity loss

- Ecosystem-based approaches to climate change, pandemic and disaster response
  - National legislation and planning, including that related to ecosystem-based approaches, sometimes does not sufficiently align with local livelihoods and customary law

[339] Ibid.
[340] General issue that affects the marine areas of the Pacific, particularly Polynesia and New Caledonia.
[341] Issue particularly raised in the context of the Oceans Declarations in Wallis and Futuna.

  - Across much of the Pacific there is poor-quality baseline data at the local scale
  - In some contexts there may be significant uncertainty about the effectiveness and longevity of ecosystem-based approaches

- Deep sea mining[342]. The main issues listed are the following:
  - There is limited information available on the potential impacts of DSM, including its spatial and temporal effects and the nature of cumulative impacts with other types of threat
  - Vast areas of the deep sea have not been explored and the biodiversity or functioning of these ecosystems is yet to be understood
  - Across the region there is a widespread lack of awareness of the potential impacts of DSM among decision-makers and other stakeholders, including communities
  - The economic stress of the COVID-19 pandemic may make DSM more attractive to decision-makers as a new industrial opportunity for the Pacific, despite there being no guaranteed economic benefits of DSM to Pacific island countries and territories

Concerning that last point, the framework for action lists three best practices:

1) Government agencies and regional partners should establish and enforce requirements for *rigorous and independent* environmental impact assessments, and strategic environmental assessments. Compliance with the recommendations of these assessments must be rigorously enforced.

2) All parties must uphold the rights of Pacific communities and civil society organisations to meaningfully participate in decisions about prospecting or mining in deep-sea environments, and ensure that these activities include *robust* processes for seeking free, prior, and informed consent from communities.

3) A precautionary approach should be applied to DSM and prospecting activity, including ensuring that the environmental, social and economic risks are comprehensively understood, and not proceeding until it can be clearly demonstrated that impacts can be managed to ensure the effective protection of ocean ecosystems[343].

[342] Several partners and programmes are identified to support these goals: (1) Pacific Network on Globalisation (PANG) initiatives (2) WWF-Deep Sea Conservation Coalition 'No Deep Seabed Mining' Initiative (3) IUCN Pacific Centre for Environmental Governance (PCEG) and (4) ISPC-PEW collaboration 'Improving engagement with the International Seabed Authority on DSM governance'. It must be noted once again that the term "deep sea mining" does not clearly indicate whether it covers areas under jurisdiction or if these objectives only relate to seabeds outside national jurisdiction.
[343] Italics have been applied to stress the salient points of these best practices as stated in the action plan.

Objective 6: Grow Pacific capacity and partnerships to effectively monitor, govern and finance nature conservation action

- Science and traditional knowledge for target-setting and monitoring. This item particularly considers the following challenges[344]:
  - Capacity to collect, analyse, interpret and share data for diverse audiences and decision making
  - Relevant regional indicators are needed that can be used to inform real time decision making for adaptive management
  - The expertise of local people in the theory and practice of conservation often goes unrecognised
  - It is very difficult to quantify the importance of nature for people within national or regional indicators
  - Regional indicators that draw on data from diverse environmental and cultural contexts may risk oversimplify complex trends
- Governance that works for nature conservation. The following priorities are to be addressed in the period 2021-2025[345]:
  - There are regional challenges in ensuring accountability and transparency in governance processes
  - There are complex jurisdiction issues for transboundary hazards
  - Transparency and accountability in decision making remains a challenge, at all scales of governance and within all kinds of organisations
  - Potential inadequacy of national, regional and global legal frameworks to face environmental crises in the Pacific
- Sustainable financing for nature conservation[346]
  - The sources of conservation finance are inadequate

II. Impact of the BBNJ Agreement in the studied territories

A. Ways for implementation in the region

The BBNJ Agreement applies to areas that are not under national jurisdiction, that is to say both the high seas and the international seabed area. The agreement addresses four broad issues

[344]List not comprehensive. General issues encountered at the international and regional level.
[345]List not comprehensive.
[346] Ibid.

(marine genetic resources, environmental impact assessment, transfer of technology and measures for managing the marine area, including protected marine areas), but comprises two obligations tending to erase the artificial dialectics between the areas under jurisdiction and areas outside jurisdiction. These two questions are of capital importance for the studied OCTs and of great interest for EU law.

i) The planned activity impact assessment in areas under national jurisdiction

This mechanism addresses any "*planned activity that is to be conducted*" and requires, prior to the carrying out of these activities, that the state exercising jurisdiction or control over the activity (coastal or flag) determines that the activity may cause *substantial* pollution or *significant and harmful* changes to the marine environment in areas beyond national jurisdiction and control[347]. The impact assessment must be carried out either in accordance with the BBNJ Agreement or in accordance with the national procedure[348].

If the assessment follows the national process, the BBNJ Agreement requires all *relevant* information and assessment and monitoring reports to be made available through the Clearing-House Mechanism (set up by the BBNJ Agreement), to allow the Scientific and Technical Body (set up by the BBNJ Agreement) to provide comments to the Party with jurisdiction or control over said activity. This mechanism calls for the making of several comments, particularly in view of the position of the Pacific islands:

- The provision of comments by an international body on information and reports submitted by the relevant State would make it necessary for the body to know domestic law, particularly the criteria and indicators used by the State to assess the impact of the activity concerned. As a result, the comments of that body may reveal significant differences between the standards of the BBNJ Agreement (BBNJ Agreement assessment procedure) and those applicable by the different Parties under their national jurisdiction[349]. The BBNJ Agreement says nothing of the case of national processes for impact assessment using trigger thresholds below those set by the Agreement[350], and it

[347] My italics.
[348] See, in general, article 28, BBNJ Agreement.
[349]There is therefore some difficulty in the interaction between article 28 and article 30 of the BBNJ Agreement. Indeed, nothing in the BBNJ Agreement subjects "national processes" governing the activities in areas under national jurisdiction to the criteria of the BBNJ Agreement applicable to areas located beyond national jurisdiction. Several diverging interpretations can be found: (1) This could mean that impact assessments for measuring damage in areas beyond national jurisdiction ought to use the criteria of the BBNJ Agreement, applicable to the protection and sustainable use of the biodiversity in these areas. That would potentially mean putting in place different impact criteria for areas under national jurisdiction and those beyond it, or harmonising all the criteria with those of the BBNJ Agreement. (2) It could mean that impact assessments for measuring damage to marine biodiversity beyond national jurisdiction but applicable within areas under it ought to comply with national processes (and national criteria) since these areas are not included in the field of application of the BBNJ Agreement.
[350] See, in this respect, article 29, BBNJ Agreement.

is likely that interpretation disputes arise while implementing the Agreement, particularly in regions where there are pockets of high seas surrounded by EEZs, as is the case in the Pacific region.

- The obligation to determine the impact of an activity in an area under national jurisdiction could then apply to all types of seabed activity, particularly marine scientific research, and also the exploration and exploitation of mineral or living resources in the EEZ and on the continental shelf. To that end, the impact determination would require significant knowledge of the marine environment and ecosystems (characteristics, specificities of the role of the marine environment).

In the case of the Pacific region, regional cooperation between States in view of the sharing of such data and information will be necessary, well before the planned start of said activity. A map of the status of such legislation and the possible harmonisation of the criteria for the impact assessment within the different national legislations may be necessary in order to determine the impact identically and consistently throughout the marine areas concerned. The obligations under the regional agreement for seabed exploitation (not yet adopted) could allow such harmonisation, but would only be effective if the coordination and cooperation initiatives are implemented well before the activities are planned, as setting up the sharing of data and information is a lengthy process.

The European Union, as a special partner of the region and the OCTs since several years, could play a major part in the achievement of these objectives and in the effective implementation of the BBNJ Agreement by supporting, through funding, the scientific research required for acquiring and/or consolidating knowledge about the seabeds, innovation projects and reinforced partnerships between the players of the region and the European Union. On the basis of the potential adoption and ratification of the regional seabed agreement and the ratification of the BBNJ Agreement by Pacific States and in view of its experience of the Copernicus Marine Service programme, the European Union could also support the formation and development of services for the observation of regional marine areas, becoming a special player in the region, in line with its goals for international ocean governance.

ii) Duty to consult with coastal States in the case of high seas activities affecting the EEZs

During the negotiations for the BBNJ Agreement, Pacific States pushed for the recognition of their particular situation. Geographically speaking, these States are indeed grouped so that their EEZs and continental shelves form a whole with only a few high seas pockets here and there.

As the legal regime for activities is not the same under national jurisdiction and beyond it, the Pacific States were concerned about the possible development of activities at the outer limit of their EEZs and continental shelves (mining, and also artificial islands or infrastructure) that

could affect their marine environment and biodiversity[351]. Consequently, they proposed to insert a particular obligation within the BBNJ Agreement on States wishing to develop activities in these high seas pockets, requiring them firstly to undertake proactive and targeted consultations, particularly preliminary notifications, with the affected coastal States and secondly to examine the views and comments of those States on the planned activities and provide *written* responses and, as appropriate, revise the planned activity accordingly[352].

This would affect three of the territories covered by this study:

- New Caledonia (regarding the high seas located between New Caledonia, Australia and New Zealand)[353];
- French Polynesia (regarding the high seas pocket located between Polynesia and the Cook Islands, Samoa and Line);
- Wallis and Futuna (regarding the high seas pocket located between Wallis and Futuna, Tokelau, Phoenix, Howland & Backer, Tuvalu and Kiribati).

Several obligations would then arise for these three territories:

- New Caledonia: preliminary notifications would have to be sent by the State planning activities in the high seas pockets adjacent to areas under national jurisdiction to both New Caledonia (EEZ) and France (continental shelf);
- French Polynesia: preliminary notifications would have to be sent by the State planning activities in the high seas pockets adjacent to areas under national jurisdiction to both French Polynesia (EEZ) and France (continental shelf);
- Wallis and Futuna: only the French State would have to be consulted and notified by the State planning activities in the high seas pockets adjacent to areas under national jurisdiction.

Even though the agreement on the distribution of competence between the European Union and member States is not yet finalised, one could reasonably think that in view of current European law, these notification procedures would be left to the coastal State. In accordance with its objectives for international ocean governance, the European Union could however have a role to play in the reinforcement of intra-regional cooperation, particularly by providing support for setting up a data sharing platform, such as Copernicus Marine, for the Oceania region in order

[351] Those concerns were the result of their unfortunate experience with fisheries.
[352] Article 32, paragraph 6, BBNJ Agreement.
[353] It must be noted in this respect that the high seas pocket in question is semi-enclosed, and does not fulfil the characteristics of the pockets described in the other two cases. In view of the failure to define what makes up a "*high seas pocket*" in the BBNJ Agreement, interpretation issues are bound to be raised. A decision by the Conference of the Parties to the BBNJ Agreement would clear away any doubts and potentially provide for a particular policy for these cases.

to make sure that all the States can best assess the environmental risks within their national jurisdictions and thus understand those risks and address them consistently[354].

iii) Uncertainties about the scenario of the implementation of the BBNJ Agreement as part of relations between Parties and non-Parties in the Pacific region

At the regional level, the deployment of exploration and exploitation activities within national jurisdictions could be slowed down if the BBNJ Agreement is ratified by the Pacific States.

Indeed, the obligation to assess the environmental impact within areas under national jurisdiction, applicable to activities with an impact beyond national jurisdiction (article 28 of the BBNJ Agreement) subjects environmental impact studies carried out as part of internal law processes, previously left to the entire appreciation of the coastal State, to a now international process allowing review/comments by all stakeholders (public and private, particularly civil society) via the clearing-house mechanism provided by the Agreement[355].

The procedure further submits these impact assessments, which are required for the development of such activities, to a review by the scientific and technical body which can then make comments[356]. It goes without saying that the activities concerned would therefore be subject to the opinion of a larger number of stakeholders (and thus potentially a larger number of objections[357]), and also subject to timing requirements that could be particularly cumbersome, in view of the different notification requirements within the system set up by the BBNJ Agreement.

That burden could drive some Pacific States, who wish to deploy exploration and exploitation activities within their national jurisdiction, to not ratify the agreement in order to retain more flexibility. In this case, the complex dynamics for implementing the BBNJ Agreement must be studied in order to understand its impact on any relations between Parties and non-Parties.

[354] Such a mechanism for sharing environmental data could require a regional agreement and particular restrictions on the access to the data by the States in the region. The know-how, and especially the knowledge and technology of the European Union in this respect could however make a valuable contribution to such an initiative, in line with its ambitions in the area of international ocean governance.
[355] See article 28, paragraph 2, (a) and (c), BBNJ Agreement.
[356] Article 28, paragraph 3, ibid.
[357] A comparison may be made with the procedure set up by the Commission on the Limits of the Continental Shelf, where the different extension submissions may be opposed by other States because of maritime or territorial conflicts. This procedure has revealed disputes, which is in itself encouraging for resolving them. For more details on this point, see Tassin, *Les défis de l'extension du plateau continental*, op. cit.

B. BBNJ Agreement and European challenges in the Pacific region

The European Union played a key role in the negotiations of the BBNJ Agreement, and firmly supported the importance of the precautionary approach, the ecosystem-based approach and the formulation of ambitious criteria for environmental impact assessments and measures for managing the marine area[358].

In view of its ambitions in respect of international ocean governance, it goes without saying that a rapid ratification of the agreement would allow the Union not only to project its leadership in the area of biodiversity protection, but also allow it to deploy a large number of initiatives and action (cooperation, funding) through its external action policy.

As mentioned earlier, the BBNJ Agreement provides for mechanisms applicable in zones under national jurisdiction, thus directly impacting existing European law. For its application to the Pacific region and the case of exploration and exploitation within the national jurisdiction of the studied territories (New Caledonia, Polynesia, Wallis and Futuna and also Clipperton), some preliminary remarks may be made.

Regarding the transboundary impact caused by activities carried out within national jurisdiction, the directive 2011/92/EU of the European Parliament on the assessment of effects stresses the importance of that transboundary dimension and the need "*to lay down strengthened provisions [...] to take account of developments at international level*[359]." That objective is however not expressly materialised in the directive. Its article 3 prefers the general formulation of "*direct and indirect effects*" on a series of factors. The lack of precision of that formulation does of course allow its application to the transboundary impact, but it could prevent the transposition of transboundary impact assessment case studies into the internal law of member States. Strengthening would very probably be required in order to implement the obligations under the BBNJ Agreement within European law, particularly its strategy in view of the ecosystem-based approach.

In the case of exploration and exploitation activities on the continental shelf deployed in the OCTs, in the medium or long term, it would besides be of interest to analyse the implementation of the BBNJ Agreement by France, given the overlap of competence between the State and these OCTs[360].

[358] For more details, particularly see Singh, Tassin Campanella and Maes, op. cit.
[359] Paragraph 15, Directive 2011/92/EU, op.cit.
[360] Also see the transboundary impact qualification scenario between the State and the OCTs, in view of the distribution of competence in the marine area within 200 nautical miles. It must however be noted that the concept of transboundary impact under the BBNJ Agreement does not cover the case of an impact between an area under national jurisdiction and an area outside it.

III. Regional geopolitical challenges for Europe

A. The Samoa Agreement 2021-2041 and the consideration of the marine issues of the Pacific

As part of its external action, in 2021, the European Union renewed the Cotonou agreement[361], now called the "Samoa Agreement"[362]. That agreement, which was temporarily applied from 1 January 2024, aims to strengthen the capacity of the European Union and 79 African, Caribbean and Pacific countries to rise to global challenges together. It is deeply marked by the values of the European Union and of course covers its objectives in terms of leadership in the governance of the oceans.

This new agreement includes six priority areas: (1) democracy and human rights, (2) sustainable economic growth and development, (3) climate change, (4) human and social development, (5) peace and security and (6) migrations and mobility.

The implementation of the agreement is organised around a common core of obligations and regional protocols. The regional protocol of the Pacific region, which is of interest for this study, was prepared in view of Strategy 2050 for the blue Pacific continent. The protocol is the only one of the three to include priority over the oceans, the seas and fisheries[363]. However, no details are available to date about the protocol or the exact measures aimed at implementing the oceans/seas/fisheries priority.

B. Strategy of the European Union for cooperation in the Indo-Pacific region: an incomplete strategy for Oceania

The strategy of the European Union for cooperation in the Indo-Pacific region[364] also includes the dimension of international ocean governance as one of the seven pillars of that strategy. When read in combination with the strategy for ocean governance revised in 2022 and the

[361] *Partnership Agreement between the members of the African, Caribbean and Pacific (ACP) Group of States of the one part and the European Union and its Member States of the other part*, signed in Cotonou on 23 June 2000.
[362] Decision No 1/2022 of the ACP-EU Committee of Ambassadors of 21 June 2022 to amend Decision No 3/2019 of the ACP-EU Committee of Ambassadors to adopt transitional measures pursuant to Article 95(4) of the ACP-EU Partnership Agreement.
[363] European Commission, *Proposal for a Council Decision on the conclusion, on behalf of the European Union, of the Partnership Agreement between the members of the African, Caribbean and Pacific (ACP) Group of States of the one part and the European Union and its Member States of the other part*, COM(2023) 791 final, 19 December 2023.
[364] European Commission, *Joint Communication to the European Parliament and the Council, The EU strategy for cooperation in the Indo-Pacific*, JOIN(2021) 24 final, 16 September 2021.

revised maritime security strategy of the European Union 2023[365], there are however few explicit details about the means for implementing this strategy in the Pacific region and particularly Oceania. It is mainly focused on the Indian Ocean and the Asia region. However, the Oceania region is one of the most affected in the world by climate change, the biodiversity crisis and sustainable development issues. Those issues, particularly those relating to environmental security, are not unrelated to a strategic security vision.

Considering, firstly, the complex issues for the implementation of the BBNJ Agreement in the Pacific region and the ambitions of the European Union in that respect, and secondly the importance of cooperation for the implementation of the agreement, a more precise roadmap of action and initiatives in the region could be prepared, emphasising the need to develop the tools for its implementation. The way in which the European Union could contribute in terms of research and innovation, transfer of technology, strengthened cooperation and the monitoring and security of marine areas and resources, particularly to support the presence of France in Oceania, should not be neglected.

[365] The protection of natural resources and the marine environment, the resilience of critical maritime infrastructure and the protection of the external borders of the EU, including unauthorised activities of exploration and drilling for hydrocarbons, are identified as “EU maritime security interests”. JOIN (2023) 8 final, op. cit. In view of the strategic issues relating to the mineral resources of seabeds, and the potential wealth of those resources in the OCTs studied here, it would be useful for the European Union to not limit security issues to exploration and drilling for hydrocarbons, and to generally include living and non-living resources.

Summary

The continental shelf is an area that encompasses the soil and subsoil of seabeds close to coasts. After World War II, it began to arouse the interest of States because of its rich resources, which had become essential for the efforts to build back post-war societies.

Its legal regime, which is very unique in international law, was fashioned so as to establish an exclusive and preferential right for the coastal State, allowing that State to access, benefit from and protect the natural resources (mainly hydrocarbons and mineral resources) of the seabeds close to its coasts. That is how the concept of 'sovereign rights' was developed. It is neither entirely an expression of sovereignty, since it is limited to the exploration and exploitation of natural resources, nor entirely an expression of a simple exclusive right, since it incorporates the dimension of the monopoly of the State through the concept of 'sovereignty'. The Geneva Convention on the continental shelf of 1958, which was the first international framework to cover the continental shelf regime, was however not largely implemented due to the challenges relating to the geographical definition of the continental shelf.

For its part, the UN Convention on the Law of the Sea (UNCLOS) brought in a geographical redefinition of the continental shelf area based on a new type of negotiation bringing together developed nations and newly independent ones. While the sovereign rights of exploration and exploitation were kept unchanged, the geographic extent of the continental shelf was considerably enlarged, offering the benefit of rights over a fixed geographical distance to all coastal States (up to 200 nautical miles, regardless of the geological reality of the seabeds) and entitling States that could demonstrate the natural extension of their land territory over their seabeds[366] to extend the outer limits of their shelf to a maximum of about 350 nautical miles.

Along with that enlargement of the geographical extent of the continental shelf, another legal regime was created and established as part of the UNCLOS: that of the exclusive economic zone ("EEZ"). Often better known than the continental shelf - or even mixed up with it - this regime, which chiefly addresses the establishment of the exclusive and preferential rights of the coastal State over its biological resources, has the particularity of being geographically superimposed onto that of the continental shelf. On that geographical superimposition, the sovereign rights of the coastal State are superimposed in addition. Indeed, as part of an EEZ, the coastal State has extended sovereign rights, including over the exploration and exploitation of non-living resources (therefore similar to those established as part of the continental shelf regime) and living resources, and over the conservation and management of living and non-living resources. There is thus some 'duplication', which does not raise any problems if there is

[366] The definition of the outer limits of the continental shelf beyond 200 nautical miles is subject to compliance with a number of scientific criteria that can demonstrate the natural extension of the territory over the part beyond 200 nautical miles.

only one managing entity (the coastal State). But if competence is distributed between the coastal State (France in this case) and an overseas territory, that distribution may be complex to implement, especially when considerations foreign to implementation come into the picture, particularly the articulation between local customary law and French law.

A study of the distribution of competence between the French State and four Pacific Ocean territories (New Caledonia, French Polynesia, Wallis and Futuna and Clipperton) shows the great heterogeneity of legal statuses and the way in which competence is distributed. Some similarities can however be brought out:

i) In the four territories studied, the French State has not transferred its sovereign rights to the continental shelf. For three of them, it has even filed submissions for extending the shelf.

ii) In New Caledonia and French Polynesia, the French State has transferred to these territories the sovereign rights of the EEZ, thus allowing the 'cohabitation' of rights over the area of 200 nautical miles between the French State (continental shelf) and the relevant territory (New Caledonia or French Polynesia for the EEZ).

iii) Regarding Wallis and Futuna and Clipperton, in spite of a different legal status, the State has retained sovereignty, control and complete jurisdiction over its marine area in these territories.

In addition to this geographical distribution of competence, distribution by domains has been applied. Generally speaking, the French State remains competent in all sovereign domains, which means that instruments applicable to the domains of defence, policing and security (people and infrastructure) could also apply in the geographical area of competence of the territories.

From the point of view of activity development, the geographical superimposition of competence between the EEZ and the continental shelf - in New Caledonia and Polynesia - necessarily leads to a reciprocal limitation of the exercise of sovereign rights. In that respect, regarding the exercise of sovereign rights over exploration and exploitation on the continental shelf in particular, a moratorium on the exploitation of mineral resources in the EEZ has been set up by French Polynesia. A moratorium on the exploration and exploitation of the same resources in the EEZ is being examined in New Caledonia, and another is under preparation in Wallis and Futuna.

All of which results in an unprecedented situation. With these measures for the management and protection of resources applicable within 200 nautical miles, the French State will not be able to exercise its sovereign rights to exploration and exploitation in that same area without violating the sovereign rights of New Caledonia and Polynesia (in Wallis and Futuna, the moratorium plan reflects a conflict of sovereignty over the seabeds). On the other hand, the

French State will face fewer restrictions in the extended continental shelf, but restrictions will remain in view of the high level of protection of marine areas and biodiversity, and the lack of knowledge about resources and ecosystems.

Besides, France is no stranger to the concept of a moratorium on deep sea mining, since it has come out in favour of such a measure relating to areas outside its national jurisdiction. Despite political statements indicating the willingness of the present government to declare a moratorium on the French continental shelf, nothing has been enacted to date to turn those political statements into legally binding commitments. There is also some uncertainty about these intentions, and it is not easy to say if such a project will ever materialise, in view of the different strategic French plans for the continental shelf that have been published to date. Lastly, and surprisingly, the French State appears to neglect the matter of the biological resources of the continental shelf (sedentary resources, potentially very rich in genetic resources) and focuses solely on the question of exploiting the mineral resources of deep seas. Sedentary biological resources, particularly genetic resources, could however also be explored and exploited, with fewer environmental risks, and make direct contributions to overseas territories, local communities and indigenous peoples as part of the Nagoya Protocol (convention on biological diversity).

For its part, European Union law does not 'automatically' apply to overseas countries and territories. The relations between the European Union and these territories are mainly managed through an association agreement, for the sharing of European values and goals, and through support for these territories through a regularly revised roadmap. This *à la carte* association is based on the principles of common respective competence, which may imply a tripartite relationship between the European Union, the relevant territory and the member State to which it is attached. Setting aside some areas where EU law applies directly, particularly plant protection products, banking or finance, it thus appears at first sight that EU law does not affect these territories, which enjoy a special status, reflecting the principle of self-determination of peoples and a decolonisation process that has been initiated to varying degrees in the OCTs.

The reality is quite different, and far more complex than one might think. Firstly, because the distribution of competence between the European Union and the member State is based on *ratione materiae* jurisdiction. Secondly, because the distribution of competence between the member State and the territory in question is based on a dual mechanism, that of *ratione materiae* and *ratione loci*. When applied to marine environments, themselves regulated by law based on the same competence mechanism, in some cases there is a competence overlap between the French State and the overseas territory, allowing the application of European Union law, directly or indirectly.

Such application is direct when the member State - France in our case - has *ratione loci* competence (on its continental shelf). Consequently, all activities connected to its exclusive

sovereign rights are approached as if they were taking place in metropolitan territory. For its part, the indirect application of European Union law relates to cases where EU law is transposed into French law, and application is extended to overseas territories, as part of their respective competence. For example, that means that EU law on maritime security, transposed into the laws of France, could apply in a geographical area that comes under the competence of an overseas territory (EEZ).

The entanglement of these legal instruments is of interest in order to understand the (geo)strategic significance of seabeds. Indeed, the issue of regulating the exploration and exploitation of mineral resources of seabeds is particularly complex, as it covers several domains, some of which are excluded from EU competence (that is so of mining), whilst others are shared (for instance environmental matters or energy).

Besides the European Union has been stating its commitment to an ambitious implementation of the precautionary principle for several years (as part of the treaty on the functioning of the European Union) and to an ecosystem-based approach (particularly under the BBNJ Agreement adopted recently). In recent years, the European Union has taken up a clearer and stronger position in favour of a moratorium on exploration and exploitation, both in areas beyond national jurisdiction and also within national jurisdiction (EEZ and continental shelf). Even though EU law has put in place innovative instruments for the management and conservation of marine environments, to date these are not well adapted to the challenges and risks of exploration and exploitation activities, particularly when it comes to overseas territories. That lack of adaptation of instruments can also be found at the level of the French State, and of the overseas territories; in some cases, there is a need for clarifying the distribution of competence, particularly as regards the definition of the content of the concepts of ‘strategic raw materials’ and ‘substances useful for research and work in nuclear energy’.

Therefore, the complex entanglement of competence must not conceal the main difficulty, that of the inappropriateness of the legal framework of the EU, the State and overseas territories to regulate these activities, if only those of exploration. The current legal framework of the Pacific region, particularly advanced in terms of soft law as a result of the many regional frameworks applicable to the exploration and exploitation of mineral resources, does not to date provide any binding regional framework, with ever greater division between neighbouring States as regards the interpretation of the common regional interest and the development of these activities in the short or medium term.

And yet, the common interest could gradually clear away these difficulties. Indeed, the implementation of the precautionary principle (or precautionary approach, depending on the legal instrument) requires the existence of baseline environmental data to measure the impact of activities. In accordance with their international obligations, regardless of the political parties in power, States are equal in the implementation of this principle and could therefore find a

common interest for a regionally applicable strategy that is meant to be consistent and effective. Besides, the BBNJ Agreement, which enjoys strong EU support, sets up obligations that have an effect on activities carried out under national jurisdiction, and in some cases, requires the performance of transboundary environmental impact assessments in addition to others. That means that environmental data and information are of crucial importance while planning and implementing activities, particularly exploration and exploitation, within the national jurisdiction.

In that regard, the European Union, France and a number of States in the Pacific region, particularly New Caledonia and French Polynesia, have stressed the inadequate scientific knowledge of seabeds, which affects the planning of activities and of the marine environment as a whole. The Pacific States, particularly the three OCTs, similarly emphasise the importance of traditional knowledge and cultural rights over these marine ecosystems. That scientific and traditional knowledge of these seabeds must cover the entire chain of players (public and private), and the services and technologies used to collect, analyse and use the data and information for the purposes of planning the marine environment. With its commitment under association agreements with the OCTs and also as a long-standing partner of the Pacific region, the European Union thus has a role to play in order to support such research and innovation, in accordance with its goals for the international governance of oceans and its strategy in the region. However, such a commitment would make it necessary to have a more precise roadmap of the resources to be deployed in Oceania in order to consolidate the role of the EU in the face of competition from other large players, particularly the US and China. In that regard, an understanding of the projection of its law and values in the region through the French OCTs could enable it to fine-tune its action, particularly in view of its support for the implementation of the BBNJ, and would require the development of implementation tools that are capable of taking up the challenges encountered in the Pacific region.

Recommendations

- In view of the non-binding nature of European moratoriums on the exploration and exploitation of mineral resources, and the divergence in their field of application within member States, including France, ***uncertainties remain as regards the geographical scope of these moratoriums. European Union member States are not legally bound by European moratoriums, and exploration and exploitation activities can therefore develop within their territories or under their jurisdiction or control. In view of the international obligations of the European Union, particularly the precautionary principle which is part of the treaty on the functioning of the European Union, there is therefore a need to strengthen EU law in order to regulate the exploration and exploitation of mineral resources.*** That includes the maritime security of exploration and exploitation operations, particularly unmanned marine vehicles, infrastructure safety and also the environmental, social, cultural and economic impact of these activities.
- To that end, because of the multidisciplinary nature of the management of marine areas in international law, involving a variety of complementary branches of that law (law of the sea, environmental law, international trade law, investment law, intellectual property law, human rights etc.), ***there is a need to map these seabed activities and carry out a more complete review of the implementation of international law in EU law and the transposition of EU law into the laws of member States, taking account of the subject of seabed activities and the synergies or inconsistencies between the different international and European frameworks. Further, the study should not just focus on the exploration and exploitation of mineral resources, but should also incorporate the issues of biological and genetic resources, which are very present in Pacific seabeds.*** That could guide changes in the law and the development of European policies for the regulation of exploration and exploitation of seabeds, in accordance with the international obligations of the European Union.
- Because of the many commitments of the European Union in the Pacific region and the complexity of marine issues (environmental, climatic, security and cooperation), ***a more precise roadmap of EU action in the Oceania region needs to be developed***.
- Based on its experience and know-how of marine observation (space technologies), the sharing of environmental and modelling data (Copernicus Marine Service and development of the Ocean Digital Twin), ***the European Union could acquire a position as a special partner in the Pacific region.*** *In particular,* ***through the OCTs studied and their association agreement, and also Clipperton, the EU could support (marine scientific) research and innovation in seabeds under national jurisdiction. That would both strengthen its presence and influence in the region and also indirectly support the***

implementation of the BBNJ Agreement, while giving the studied territories the benefit of the knowledge required to plan and manage marine spaces.

- Based on its experience and know-how of regional cooperation and governance, ***the European Union could support the implementation in the Pacific region of instruments for the application of international law (products, services, technology), particularly the law of the sea and the BBNJ Agreement, through a variety of actions (technology transfer, education, external action).*** In accordance with the precautionary principle, which is at the core of the legal corpus of the European Union, there is a need to collect more data and information about the marine environment in order to plan and develop activities that comply with sustainable development goals. Such collection of data and information must be accompanied by an ***in-depth approach to the modalities of access to and sharing of data, particularly those relating to seabeds, the responsibility of players and the modalities of governance to put in place***. That would guarantee that the collection and use of data are in line with the wishes of States (particularly their defence and security requirements) and those of local communities and indigenous peoples in the Pacific region.

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