



## ***Briefing for December 2021 Meeting of the International Seabed Authority***

**Contacts:** Duncan Currie [duncanc@globelaw.com](mailto:duncanc@globelaw.com) Whatsapp +64-2163 2335  
Matthew Gianni [matthewgianni@gmail.com](mailto:matthewgianni@gmail.com) Whatsapp +31-646 168 899

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## **Recommendations**

### **Overall**

- 1. The Council Members should not fall into the trap set by the triggering of the two year rule to rush through inadequate rules, regulations and procedures (RRPs), including draft exploitation regulations.*
- 2. The regulations are far from acceptable and will take more than 18 months to finalize. There are many regulations and standards and guidelines, including the financial mechanism/payment regime, and benefit sharing, that are far from being developed, let alone finalized, and the NORI EIS shows that there is insufficient information to allow deep-sea mining to start. These must not be developed in a rush.*
- 3. Once regulations are in place, applications will be made, contracts issued for 30 years plus 10 year renewals and seabed mining will start, and it will be all but irrevocable.*
- 4. We recall the positions espoused by a number of Members in 2019 that regulations should not be made in haste.*

### **Specific Recommendations**

**The broader debate about Deep Seabed Mining:** *That members welcome the recent ISA Report's invitation to debate a moratorium (page 45) and whether seabed mining should start imminently, and instruct the Secretariat to remain neutral in the debate.*

**The "Road Map" (Item 12 of Indicative Programme):** *delegates are invited to bear in mind the requirements of protecting the environment and the common heritage of (hu)mankind and should not be pressured into an impossible schedule and to undue haste towards approving what may be the most potentially damaging new industrial activity in the ocean to date.*

**Standards and Guidelines:** *Standards and Guidelines are a crucial aspect of rules, regulations and procedures (RRPs) and must not be rushed.*

*Council members should establish a working group on Standards and Guidelines, with its first order of business being to review comments on the standards and guidelines to date.*

*Standards and Guidelines cannot be developed before the Exploitation Regulations are completed, since they depend on them and will have to be changed when the draft Regulations change. Members should instruct the secretariat accordingly.*

**Article 154 Review (Assembly Item 9: General Debate):** *Assembly members should initiate an Article 154 Review during 2022, being 5 years from the previous review.*

**Environmental Impact Assessments (Council LTC report: Item 13):** *Council members could (1) call for the NORI EIS (environmental impact statement) to be withdrawn on the basis that it is missing the crucial environmental baseline and is therefore not complete;*

*(2) decide that the Council should have the opportunity to review and approve exploration activities requiring environmental impact assessments and*

*(3) request the LTC to amend its Recommendations to provide for public comments to be called for and to be taken into account prior to review by ISA bodies, and a substantive review of all EIS.*

**Effective Control (Council Item 13 LTC/Assembly Item 9: General Debate):** *Council members could insist on debating the crucial issue of effective control, and if necessary asking for an Advisory Opinion from the Seabed Disputes Chamber of ITLOS.*

## **Summary**

1. The triggering by Nauru of the 2 year rule in the middle of a global pandemic, after a nearly 2 year period when a meeting was not physically possible due to the COVID-19 pandemic, and when the draft Regulations, Standards and Guidelines are far from acceptable or effective, and in some cases (such as the financial and equitable distribution regulations) have not even been started, was premature and potentially invalid according to article 300 of the Convention. It was apparently intended to provide the parent company of its contractor, Nauru Offshore Resources Inc (NORI), The Metals Company, with an assurance for the benefit of the merger and subsequent listing in NASDAQ that it will be able to obtain a contract in 2023 in order to facilitate its stated intention to commence seabed mining and thereby producing revenue in 2024.
2. The triggering by Nauru of the 2 year rule cannot override the environmental protection requirements of international law, including article 145 of the Convention and its requirement for effective protection for the marine environment from harmful effects from any seabed mining or other Part XI activities and the precautionary principle.
3. The 2 year rule (Paragraph 15 of Section 1 of the 1994 Implementing Agreement) states in subparagraph (b) that Council shall, in accordance with article 162, paragraph 2(o), of the Convention, complete the adoption of such rules, regulations and procedures within two years of the request. But it also contemplates in paragraph (c) that it may not do so (“if the Council has not completed the elaboration of the rules, regulations and procedures relating to exploitation within the prescribed time and an application for approval of a plan of work for exploitation is pending, it shall nonetheless consider and provisionally approve such plan of work....”)
4. There are numerous legal questions including what constitutes “elaboration” in subparagraph (c) and is that different from “elaborate and adopt” in the chapeau of paragraph 15; and what are the “any additional rules, regulations and procedures necessary to facilitate the approval of plans of work” in the chapeau.
5. There are many reasons that the regulations cannot and should not be completed by the end of June 2023. As the African Group noted in its submission [ISBA/26/C/40](#), (a) financial regime has not been agreed; (b) the payment regime remains a subject of intense negotiation, and discussions are yet to open regarding the methods for distributing funds collected; (c) other key sections of the exploitation regulations have yet to be agreed; (d) most comments made during earlier sessions of the Council have not been included in the draft regulations and have received no response, and member State working groups established to further the development of the regulations have yet to meet; (e) sufficient time is needed for due consideration to ensure a regime that balances the rights and obligations of the ISA and its stakeholders; and (f) noting the critical importance of scientific knowledge in the deep ocean and its connection to coastal States and the broader ocean ecosystem, effective governance requires sound science which is also not yet available. Costa Rica for Latin American and Caribbean States in [ISBA/26/C/47](#) has provided a helpful list of outstanding matters.<sup>1</sup>

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<sup>1</sup> (a) The financial mechanism;  
(b) The benefit sharing mechanism;  
(c) The operationalization of the Enterprise;  
(d) The establishment of regional environmental management plans;

6. If rules, regulations and procedures (RRPs) are not completed by June 30 2023, it does not follow that a plan of work shall be approved by Council, provisional or otherwise. Council must retain a discretion to refuse a substandard plan of work which will breach the Convention. There are numerous outstanding legal questions, including the respective roles of the Legal and Technical Commission (LTC), including what does Council “shall nonetheless consider and provisionally approve such plan of work” mean; what is the role of Section 1 paragraph 11 of the 1994 Agreement; what does a ‘provisional approval’ mean; can a Contract be later amended; what principles would apply to such approval; what voting procedures would apply; etc.
7. Conversely, if RRP are “elaborated” or “approved” by Council, any applications must be considered by Council, almost certainly under RRP which are not fit for purpose, and such applications if recommended by the LTC are exceptionally difficult for Council to disapprove under paragraph 11 of Section 1 due to the requirement for a 2/3 majority of Council including a majority of each Council chamber.
8. For these and other reasons, this headlong rush towards seabed mining initiated by The Metals Company for its subsidiary NORI under the sponsorship of Nauru is exceptionally ill-conceived, contrary to the protection of the environment and common heritage of (hu)mankind and must not be facilitated by the Council. The proposed “Road Map” ([ISBA/26/C/44](#)) should be read in this light.
9. NORI’s environmental impact statement (EIS) for its intended collector test did not include the required environmental baseline and this underlines the fact that scientific information necessary for the effective regulation of deep seabed mining is simply not available. DSCC wrote to the LTC asking that the EIS be withdrawn, and also asking the LTC to revise the procedures to avoid a repetition of this EIS: it was sent to the LTC even though it was clearly deficient, lacking the crucial environmental baseline, there was no consultation during the EIA, and the EIS was sent to the LTC before stakeholder comments had even opened, let alone closed. The Council does not have an opportunity to review the EIS, and even the LTC’s review is not substantive - it is reviewed only for “completeness, accuracy and statistical reliability”.

## **The broader debate about Deep Seabed Mining**

### **Recommendation:**

*That Members welcome the recent ISA Report’s invitation to debate a moratorium (page 45) and whether seabed mining should start imminently, and instruct the Secretariat to remain neutral in the debate.*

The ISA Secretariat has just commissioned, under the direction of the Secretary-General’s office, and launched a [report](#)<sup>2</sup> which calls on Members to lobby in favour of DSM (e.g. “If deep-sea mining has an important role to play in supplying the minerals urgently required for

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(e) The rules for inspection, compliance and enforcement;

(f) The discussion and adoption of the standards and guidelines;

(g) The revision of the draft regulations of March 2019, to include the comments and proposals of stakeholders;

(h) The adoption of a geographically balanced process for the election of the members of the Legal and Technical Commission, without which the new members cannot be elected

<sup>2</sup> ISA. The contribution of the International Seabed Authority to the Achievement of the 2030 Agenda for Sustainable Development. © International Seabed Authority 2021. At [https://isa.org.jm/files/files/documents/ISA\\_Contribution\\_to\\_the\\_SDGs\\_2021.pdf](https://isa.org.jm/files/files/documents/ISA_Contribution_to_the_SDGs_2021.pdf).

decarbonisation (promoted under SDG 13), then the failure of ISA’s Members to engage with critics may hinder progress towards the SDGs” and “ISA’s Members should be helping to frame the debate and ensuring that the benefits of deep-sea mining are widely understood”). While of course States are free to take and express their own views, DSCC finds it surprising that the Secretariat should be actively encouraging Members to take a specific position in favour of seabed mining. However the Secretary-General in an ISA report has in effect invited Members to engage in the debate whether seabed mining should take place, and we welcome this debate.

The report states that (page 45)

ISA is already making clear contributions to the SDGs and has the potential to make further contributions when exploitation begins. However, its contributions are sometimes overshadowed within a wider debate, led by conservation organizations, about the necessity of deep-sea mining. From its inception, ISA has had a central role for civil society engagement in its processes, and the 30 NGOs among its formal observers have an influential voice. NGOs have made valuable contributions to the framing of environmental regulations. Nevertheless, some are also simultaneously making a case outside ISA processes for a moratorium on deep-sea mining wherever it may occur. Many ISA Members who reach different conclusions on this issue, however, are currently shying away from engagement in the debate. If deep-sea mining has an important role to play in supplying the **minerals urgently required for decarbonisation** (promoted under SDG 13), then the failure of ISA’s Members to engage with critics may hinder progress towards the SDGs. ISA is already delivering on many of the environmental protection measures (related to SDG 14) being called for by marine scientists and NGOs. **ISA’s Members should be helping to frame the debate and ensuring that the benefits of deep-sea mining are widely understood, including the sharing of economic benefits (SDGs 1 and 8) and the potential to prevent impacts on land (SDG 15) as the demand for minerals grows.**

DSCC and its over 90 members welcome this debate. It however strongly contests the ISA report argument that minerals are “urgently required for decarbonisation” and its argument that deep-sea mining will prevent impacts on land, which is stated in various parts in the report (e.g. “Given the known impacts of weakly-regulated terrestrial mining, it might be harmful to do too little deep-sea mining” (page 47)). This narrative buys into the mind-set that new damaging extractive industries are necessary, whereas the climate and biodiversity crisis make it abundantly clear that we need to find new ways of using our scarce resources sustainably. It cannot be assumed that opening new seabed mining will close terrestrial mines; it will just as likely drive lower prices and increase metals consumption and mining both on land and in the ocean, rather than increasing a circular economy and reducing our reliance on new metals.

We also contest the ISA report narrative that impacts on land can be used to justify adverse impacts on the ocean. DSCC has published a fact sheet, [Deep-Sea Mining: What are the Alternatives](#). That briefing notes that deep-sea mining is out of step with the direction the world is taking as leaders across both public and private sectors seek nature-based solutions to the climate and biodiversity crises. Set within a circular economic model, this approach is in line with the United Nations (UN) Sustainable Development Goal (SDG) 12 – to ensure responsible consumption and production – and the UN’s designated decades of ocean science and habitat restoration. It is notable that the ISA report only mentioned SDG 12 once, and in passing. Yet alternatives to deep-sea mining are within reach providing we continue to invest in innovation in battery technology; increased reuse and recycling capacities; and the continued extraction of metals from terrestrial sources under greatly improved environmental

and social governance (ESG) frameworks. To cite two simple examples, China vehicle manufacturer BYD [announced](#) that it is adopting LFP (lithium-iron-phosphate) technology and removing cobalt, nickel and manganese from its vehicle batteries entirely.

It is not just DSCC saying this: The [World Economic Forum](#)<sup>3</sup> said that “The economic viability of exploration and extraction in the deep sea as of 2030 must be carefully evaluated in light of advances in battery and other technology as well as circular economy benefits. More research is required to thoroughly consider the environmental implications before increasing the exploitation of these resources.”

In fact just this week a suite of new companies [joined the call for a moratorium](#) on deep-sea mining, pledging not to source minerals from the deep sea. These companies have the foresight to know that their supply chains, be it for the electric mobility sector or tech sector, should not depend on minerals from the deep ocean. Companies such as Volvo Group, BMW Group, Volkswagen Group, Google, Samsung SDI and Philips to name a few, reject the idea that we must mine the deep sea for metals. Financial Institutions such as Triodos Bank, BBVA and Lloyds Bank are also steering clear of this industry. The commitment of the banks, vehicle manufacturers, fishing industry, the IT industry and others in the private sector, Parliaments and NGOs to a healthy ocean free of DSM can be found [here](#). Some are calling for an outright ban, while others, including the DSCC, are calling for a moratorium unless and until [a number of conditions](#) around environmental harm, good governance and social license can be met.

#### ***Are DSM metals required for “Decarbonization”***

The ISA report said that “minerals are “urgently required for decarbonisation”. This is false. In a side event in 2016, the DSCC brought to the attention of the ISA a report by Dr. Sven Teske et al, [“Renewable Energy and Deep-Sea Mining: Supply, Demand and Scenarios.”](#)<sup>4</sup> That report concluded that “A transition towards a 100% renewable energy supply can take place without deep-sea mining. Metal demand associated with the dominant renewable technologies evaluated in this report, even assuming very aggressive growth rates under the most ambitious future energy scenarios, do not require deep-sea mining activity. This is combined with the potential to increase recycling rates and sustained research and development into alternative technologies that reduce, or eliminate, the use of supply-constrained metals.” Since then Dr Teske has written a further report, [Responsible Minerals Sourcing for Renewable Energy](#),<sup>5</sup> which emphasized recycling and responsible sourcing are the key strategies to promote environmental stewardship and the respect of human rights in the supply chain.

Many additional ideas for drastically reducing the future demand for metals were brought together in Seas At Risk’s report [Breaking free from mining. A 2050 blueprint for a world without mining - on land and in the deep sea](#). This discusses existing and emerging alternatives – including the end of planned obsolescence and the rise of repair, reuse and

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<sup>3</sup> World Economic Forum. A Vision for a Sustainable Battery Value Chain in 2030 Unlocking the Full Potential to Power Sustainable Development and Climate Change Mitigation  
[https://www3.weforum.org/docs/WEF\\_A\\_Vision\\_for\\_a\\_Sustainable\\_Battery\\_Value\\_Chain\\_in\\_2030\\_Report.pdf](https://www3.weforum.org/docs/WEF_A_Vision_for_a_Sustainable_Battery_Value_Chain_in_2030_Report.pdf)

<sup>4</sup> Teske, S., Florin, N., Dominish, E. and Giurco, D. (2016) Renewable Energy and Deep Sea Mining: Supply, Demand and Scenarios. Report prepared by ISF for J.M.Kaplan Fund, Oceans 5 and Synchronicity Earth, July 2016. At [http://www.savethehighseas.org/publicdocs/DSM-RE-Resource-Report\\_UTS\\_July2016.pdf](http://www.savethehighseas.org/publicdocs/DSM-RE-Resource-Report_UTS_July2016.pdf).

<sup>5</sup> Dominish, E., Florin, N. and Teske, S., 2019, Responsible Minerals Sourcing for Renewable Energy. Report prepared for Earthworks by the Institute for Sustainable Futures, University of Technology Sydney. At [https://earthworks.org/assets/uploads/2019/04/MCEC\\_UTS\\_Report\\_lowres-1.pdf](https://earthworks.org/assets/uploads/2019/04/MCEC_UTS_Report_lowres-1.pdf).

remanufacturing of goods; the shift to distributed energy generation; and mobility systems less reliant on private cars, among many others – and how they are to become instrumental in a fundamental transformation towards a society based on needs rather than growth, on wellbeing, and on the use of resources within the limits of our planet.

### ***DSM and Climate Change***

The ISA report in several places mentions SDG 13 (Take urgent action to combat climate change and its impacts). This is an important issue, because DSM can threaten carbon sequestration as well as to release stored carbon. It is important to discuss the impacts of deep-sea mining on climate change in a holistic way.

- DSM could fundamentally change the chemistry that underpins the biological systems on which we rely, potentially causing knock-on effects that we cannot currently comprehend or anticipate - or in future manage in any sustainable way.
- Underwater dust clouds or ‘sediment plumes’ created by DSM operations risk smothering macroalgae ([Drazen et al., 2019](#)), which represent a significant proportion of all carbon sequestered in marine sediments and the deep ocean ([Jensen & Duarte 2016](#)), which could have serious consequences, potentially disrupting the transport of carbon into the deep.
- While there is no comparable study for seabed mining yet, a recent study found that fishing boats that bottom-trawl the ocean floor may release as much carbon dioxide as the entire aviation industry ([Sala et al, 2021](#)).
- Studies have shown that even after small-scale experimental DSM mining events, carbon cycling in the deep has not recovered after 26 years ([Stratmann et al., 2020](#)).
- DSM operations would likely add to already critical atmospheric greenhouse gas and pollution levels as well as ocean acidification. ([Heinrich et al., 2020](#))

### ***The Debate in Context***

At the IUCN World Conservation Congress in September, States and NGOs alike adopted [Motion 69](#), which called on all State Members, individually and through relevant international fora, to support and implement a moratorium on deep seabed mining, the issuing of new exploitation and new exploration contracts, and the adoption of seabed mining regulations for exploitation, including ‘exploitation’ regulations by the International Seabed Authority. Impacts include the destruction of deep-sea biodiversity, toxic sediment plumes and noise, which will be long term and from which deep-sea ecosystems may never recover or be restored.

This would be contrary to our commitments including the [Leaders’ Pledge for Nature](#) commitment to undertake urgent actions over the next ten years to put nature and biodiversity on a path to recovery by 2030, the [G7 2030 Nature Compact](#) commitment to reverse biodiversity loss and environmental degradation and the goals of the [United Nations Decade on ecosystem restoration](#).

The DSCC invites this debate, both within and outside the ISA.

## **Fundamental Approach to Environmental Protection Needed (Council Items 13, 14)**

Before the Regulations, Standards and Guidelines can be negotiated and adopted, the member States of the ISA must agree to a fundamental approach to the protection of the environment. That fundamental approach should be incorporated in the draft Regulations. It would then also guide the development of any standards and guidelines. For instance, that biodiversity loss should not be permitted is clear from the fact that almost 80 Heads of State have signed the [Leaders Pledge for Nature](#) to Reverse Biodiversity Loss by 2030 for Sustainable Development and to mainstream this commitment into extractive industries. Secondly, the Standards and Guidelines, as well as the regulations, must align with the SDGs, including, in particular, [SDG 14](#) and its Target 14.2 to “by 2020, sustainably manage, and protect marine and coastal ecosystems to avoid significant adverse impacts, including by strengthening their resilience and take action for their restoration, to achieve healthy and productive oceans.” States should ensure that the ISA standards, guidelines and regulations should not permit deep-sea mining unless significant adverse impacts on marine ecosystems; degradation of the resilience of marine ecosystems; and impacts from which recovery will be difficult or impossible over meaningful timeframes can all be prevented.

### **The “[Road Map](#)” (Item 12 of [Indicative Programme](#))**

Notably, the Road Map has no suggestions on working methods such as circulation of written comments on specific text before the meeting, incorporation of comments made to date, online meetings, textual or red-line proposals etc. Nowhere is there analysis of the feasibility of agreeing fit-for-purpose regulations, standards and guidelines by July 2023, and whether this can be done in the two three week and one possible two week meetings suggested in Annex III. There is no discussion of a stakeholder engagement strategy or procedures at the ISA. The inadequacy of public participation mechanisms are exemplified in the failure to include discussion of stakeholder comments made.

While paragraph 7 notes that there were discussions of Parts IV-VIII in the 25th and 26th session, but the Council discussions of the draft Regulations in the 25th and 26th session have not been incorporated into the Regulations, nor even recorded in any Council document. The informal working groups referred to in paragraph 7 have never met. The compilation referred to in paragraph 7, [ISBA/26/C/CRP.1](#), included only proposals made by Council Members. [ISBA/26/C/2](#) was a high level description rather than a compilation of proposals made by 8 other States members of the Authority, one observer State, 2 intergovernmental organizations, 6 non-governmental organizations, two ISA contractors and one other stakeholders.

As is noted in the Road Map, “Owing to the impossibility of holding in-person meetings of the Council since February 2020, the Council has not been able to advance its consideration of the draft regulations.” This impossibility underlines the inappropriate nature of the triggering of the 2 year rule by Nauru: it had been impossible to hold meetings.

Delegations in the 2019 session emphasised the need for quality over haste with the Regulation development.<sup>6</sup> These considerations have not changed despite the two year rule. Haste must not triumph over quality.

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<sup>6</sup> e.g. India said that any decision made in hurry and haste is not in the interest of anyone present in this hall. IISD, Summary report, 15–26 July 2019. At <https://enb.iisd.org/events/2nd-part-25th-annual-session-international-seabed-authority-isa/summary-report-15-26-july>. Brazil, for GRULAC, called for “quality over speed, sound responsibility, and full respect of the common heritage of humankind” in the development of exploitation regulations. IISD, Report of main proceedings for 25 July 2019. <https://enb.iisd.org/events/2nd-part-25th-annual-session-international-seabed-authority-isa/report-main-proceedings-25>

Nor does the Road Map describe essential components of the regulatory regime that are still outstanding including the payment regime, the benefit-sharing mechanism,<sup>7</sup> compensation to land-based miners, the Fund and elaboration of effective control requirements, inspection compliance and enforcement, and revision of the draft regulations of March 2019 to include the comments and proposals of stakeholders.<sup>8</sup>

***Recommendation***

*Delegates are invited to bear in mind the requirements of protecting the environment and the common heritage of (hu)mankind and should not be pressured into an impossible schedule and to undue haste towards approving what may be the most potentially damaging new industrial activity in the ocean to date.*

**What does the July 2023 deadline really mean?**

The proposed Road Map [ISBA/26/C/44](#) states that “The purpose of the present report is to outline a proposed roadmap and workplan for the Council in 2022 and 2023, aimed at completing the adoption of the draft regulations and associated Phase 1 standards and guidelines by July 2023.” Yet there is no discussion of whether the ISA should aim at completing the adoption of draft regulations and Phase 1 standards and guidelines by July 2023. We believe that it should not.

The two-year rule, Paragraph 15 of Section 1 of the Annex of the 1994 Implementing Agreement, provides that:

*(a) The Council may undertake such elaboration any time it deems that all or any of such rules, regulations or procedures are required for the conduct of activities in the Area, or when it determines that commercial exploitation is imminent, or at the request of a State whose national intends to apply for approval of a plan of work for exploitation;*

*(b) If a request is made by a State referred to in subparagraph (a) the Council shall, in accordance with article 162, paragraph 2(o), of the Convention, complete the adoption of such rules, regulations and procedures within two years of the request;*

*(c) If the Council has not completed the elaboration of the rules, regulations and procedures relating to exploitation within the prescribed time and an application for approval of a plan of work for exploitation is pending, it shall none the less consider and provisionally approve such plan of work based on the provisions of the Convention and any rules, regulations and procedures that the Council may have adopted provisionally, or on the basis of the norms contained in the Convention and the terms and principles contained in this Annex as well as the principle of non-discrimination among contractors.*

The first matter to note is paragraph (c): “If the Council has not completed the elaboration of the rules, regulations and procedures”... So the Agreement clearly contemplates that Council may not complete the elaboration of the RRP in two years.

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<sup>7</sup> ISBA/26/A/24–ISBA/26/C/39. Development of rules, regulations and procedures on the equitable sharing of financial and other economic benefits derived from activities in the Area pursuant to section 9, paragraph 7 (f), of the annex to the Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982. 6 July 2021. At [https://isa.org.jm/files/files/documents/ISBA\\_26\\_A\\_24-2109788E.pdf](https://isa.org.jm/files/files/documents/ISBA_26_A_24-2109788E.pdf).

<sup>8</sup> See ISBA/26/C/47, Submission by Costa Rica and other countries, 13 October 2021. At [https://isa.org.jm/files/files/documents/ISBA\\_26\\_C\\_47-2114954E.pdf](https://isa.org.jm/files/files/documents/ISBA_26_C_47-2114954E.pdf).

Delegates should bear that in mind, when considering statements such as that made in the Roadmap (para. 12) that paragraph (b) “requires the Council to complete the elaboration of the rules, regulations and procedures necessary to facilitate the approval of plans of work for exploitation in the Area within two years of the request.”

Paragraph (b) refers to “such” RRP. That must refer to “all or any of such rules, regulations or procedures are required for the conduct of activities in the Area” referred to in paragraph (a). There is a long list of these RRP.<sup>9</sup> The term ‘RRPs’ include, in the current terminology, draft regulations (regulations) and standards and guidelines (procedures). So “completion of elaboration” of all these RRP is recognised by the Agreement as something that may not occur by the end of the two year periods – which, as the African Group [ISBA/26/C/40](#) (13 July 2021) has noted, is both unlikely and undesirable: due consideration is required, and effective governance requires sound scientific knowledge that is not yet available.<sup>10</sup>

The environmental regulations in particular must meet the high bar of UNCLOS Article 145: “ensure effective protection for the marine environment from harmful effects which may arise from such activities”. In a similar manner, the New Zealand Supreme Court has ruled for seabed mining on its continental shelf, [Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board](#) [2021] NZSC 127, a marine consent for seabed mining cannot be granted if the decision-maker is not satisfied that material harm will be avoided, remedied or mitigated so that overall the harm is not material. The Environmental Impact Statement by seabed mining contractor Nauru Offshore Resources, Inc. (NORI) for its proposed collector test failed to include the required environmental baseline, underlining that the scientific knowledge does not yet exist. Without an environmental baseline there is no way the sponsoring State, Authority or anyone else can accurately predict, avoid or monitor impacts to the environment from the activity.

### **Why is this important?**

As noted above, and by the ISA [Report](#), there is an intense debate under way as to whether a moratorium on deep-sea mining should be adopted. The World Conservation Congress in September 2021 adopted [Resolution 069](#) on Protection of deep-ocean ecosystems and biodiversity through a moratorium on seabed mining<sup>11</sup> which called on States to support and

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<sup>9</sup> The Draft Regulations [ISBA/25/C/WP.1](#) (25 March 2019) includes in Appendix IV Determination of a Royalty Liability, but does not mention the RRP on equitable sharing of financial and other benefits derived from activities in the Area (Article 162(2)(o)(i)) as well as the RRP relating to the prospecting, exploration and exploitation in the Area and the financial management and internal administration of the Authority (Article 162(2)(o)(ii)) with priority to be given to the adoption of rules, regulations and procedures for the exploration for and exploitation of polymetallic nodules (Article 162(2)(o)(ii))

<sup>10</sup> 9. “Given the significant work on the regulations that still lies ahead, it may seem unlikely that a satisfactory agreement on this framework could be reached in two years. Sufficient time is needed for due consideration to ensure a regime that balances the rights and obligations of the Authority and its stakeholders.

10. The African Group also acknowledges the critical importance of scientific knowledge of the deep ocean and its connection to coastal States and the broader ocean ecosystem. Effective governance requires sound scientific knowledge that is also yet not available.”

<sup>11</sup> IUCN WCC Resolution 069 - Protection of deep-ocean ecosystems and biodiversity through a moratorium on seabed mining. <https://www.iucncongress2020.org/motion/069> (adopted by IUCN members in Marseille, France, 11 September 2021). The resolution called for State Members to:

“a. support and implement a moratorium on deep seabed mining, issuing of new exploitation and new exploration contracts, and the adoption of seabed mining regulations for exploitation, including ‘exploitation’ regulations by the International Seabed Authority (ISA), unless and until:

implement a moratorium on deep seabed mining, including exploitation regulations by the International Seabed Authority (ISA) adopted by the vast majority of IUCN members in September 2021.

Adoption of regulations in 2023 would not only contravene this resolution but would pave the way for seabed mining to start. Under Paragraph 11 of Section 3 of the 1994 Agreement, a two-third majority of Council Members, including a majority of each Chamber, is required to disapprove a LTC recommendation for a Plan of Work. This may make it extremely difficult for the Council to disapprove an LTC recommendation..

## **Standards and Guidelines: Putting the cart before the horse (Council Items 12, 13)**

Nor should Council adopt Standards and Guidelines by July 2023 as proposed. Firstly, the comments from the last round show there are many outstanding concerns and issues with the current draft Standards and Guidelines.

Secondly, the Standards and Guidelines consultation has shown that it is not possible to adopt standards and guidelines before adoption of the draft regulations. As many States, observers and other stakeholders observed, the standards and guidelines are dependent on the draft regulations: when they change, and they will, it is highly likely that the Standards and Guidelines on which they depend would have to change.

The first part of “Phase 1” of three Standards and Guidelines were commented on and are found [here](#). DSCC comments can be found [here](#).

DSCC commented then (in October 2020) that the Standards and Guidelines are premature in that critically, the Standards and Guidelines cannot be developed before the exploitation regulations are finalized. We cited one clear example, the current draft Regulation 26, the Environmental Performance Guarantee. So far, this only applies to mine closure, so has no applicability during the entire period of actual mining. The draft Standard and Guidelines follows the current draft text of Regulation 26, as is to be expected. As a result, the draft Standard and Guideline would only apply to mine closures, perpetuating the gap.

The second part of “Phase 1” of Standards and Guidelines were commented on during 2021 and those comments are available [here](#) including those of [DSCC](#). States said variously that the Guidelines can only be approved as part of a package, together with the Draft Exploitation Regulations (Regulations) and other Standards and Guidelines,<sup>12</sup> at least some aspects of the draft Standards and Guidelines appear to have been drafted on the assumption

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- i. rigorous and transparent impact assessments have been conducted, the environmental, social, cultural and economic risks of deep seabed mining are comprehensively understood, and the effective protection of the marine environment can be ensured;
  - ii. the precautionary principle, ecosystem approach, and the polluter pays principle have been implemented;
  - iii. policies to ensure the responsible production and use of metals, such as the reduction of demand for primary metals, a transformation to a resource-efficient circular economy, and responsible terrestrial mining practices, have been developed and implemented; and
  - iv. public consultation mechanisms have been incorporated into all decision-making processes related to deep-sea mining ensuring effective engagement allowing for independent review, and, where relevant, that the free, prior and informed consent of indigenous peoples is respected and consent from potentially affected communities is achieved; and
- b. promote the reform of the ISA to ensure transparent, accountable, inclusive, effective and environmentally responsible decision making and regulation.”

<sup>12</sup> Australia: see [EIA comments](#)

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that the Regulations will not change as a result of consultation;<sup>13</sup> that these draft documents refer to draft Regulations which have not yet been finalised and, in some cases, also refer to other Standards and Guidelines which may not yet have been drafted or agreed; and that the draft Standards and Guidelines will need to be reviewed again once the relevant exploitation Regulations have been agreed, and other relevant draft Standards and Guidelines are available.<sup>14</sup>

That this is the case is clear from the draft Regulations themselves, which provide in Draft Regulations 94 and 95 for the development of Standards and Guidelines. This is only logical: the Regulations should be adopted first, and then the Standards and Guidelines should be developed based on them.

These concerns are reflected throughout the draft Standards and Guidelines, but come through most clearly with the EIA Standard and Guideline.<sup>15</sup>

The consequence of this is that there is absolutely no requirement for public consultation in the EIA Standard, which is binding: consultation is only in the EIA Guidelines, leaving it up to the discretion of the Applicant. It is too late to ask the Applicant to go and acquire certain data, as it has already gone out to public consultation and to the LTC for review - this is one reason that public consultation, and independent scientific assessment is needed throughout the EIA stage, including at the scoping stage. This result is also at variance with DR 44, which requires the promotion of transparency, and the Fundamental Principles [and policies]

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<sup>13</sup> New Zealand, in [EIA comments](#)

<sup>14</sup> United Kingdom, in [EIA comments](#).

<sup>15</sup> The Background to the EIA draft Standard and Guideline (Draft Standard and Guidelines for environmental impact assessment process Developed by the Legal and Technical Commission) states that:

The Commission noted that the inclusion of stakeholder consultation in the Standard for an environmental impact assessment process would be inconsistent with the draft regulations on Exploitation of mineral resources in the Area (ISBA/25/C/WP.1) as the draft regulations on Exploitation recommends but does not require stakeholder consultation during the preparation of an environmental impact assessment. The Commission noted that the requirement for stakeholder consultation during the preparation of an environmental impact assessment represents best practice and that it would be difficult for an applicant to satisfy the requirements of an environmental impact assessment without conducting stakeholder consultation during the preparation of an environmental impact assessment. As such, the Commission agreed to retain sections on stakeholder involvement in the guidelines but not the Standard, and will raise this matter when presenting its recommendations on standards and guidelines as part of the Council's consideration of the draft regulations on exploitation of mineral resources in the Area (ISBA/25/C/WP.1).

Draft Regulation 11 states that "1. The Secretary-General shall, within 7 Days after determining that an application for the approval of a Plan of Work is complete under regulation 10:(a) Place the Environmental Plans on the Authority's website for a period of 60 Days, and invite members of the Authority and Stakeholders to submit comments in writing taking account of the relevant Guidelines." Most readers would assume that the Environmental Plans would include the EIA documentation and that consultation would cover the entire EIA process. Schedule 1 defines "Environmental Plans" to mean: "the Environmental Impact Statement, the Environmental Management and Monitoring Plan and the Closure Plan." Presumably therefore the LTC's position is based on a distinction between the Environmental Impact Assessment Report and Environmental Impact Assessment. Indeed, Regulation 47 provides that "(1) The purpose of the Environmental Impact Statement (EIS) is to document and report the results of the environmental impact assessment process (EIA process)." Annex VIII refers to (g) "an updated environmental impact assessment". If that is distinct from an Environmental Impact Statement, and different again from the "EIA Process", it is very unclear. The Environmental Impact Statement in Annex IV of the Draft Regulations refers to elements that "need to be emphasized in the environmental impact assessment". Is that different from the Environmental Impact Statement as well as from the EIA process?

These concerns are not minor terminology concerns, as the consequence of the LTC advice is that the EIA process attracts no mandatory public consultation during the process: only the final EIS does. Of course by the time the EIS is published, the EIA is complete.

in DR 2 (e)(vii), whereby “encouragement of effective public participation” is a Fundamental Principle. We note that there is no EIS Standard either - only a (non-binding) Guideline.

Moreover, there are ‘Phase 2’ standards and guidelines: Standards and guidelines deemed necessary to be in place prior to the receipt of an application of a plan of work for exploitation”,<sup>16</sup> including Guidelines for a risk-based approach to the development and assessment of environmental thresholds and indicators, deemed “Not feasible owing to the complexity and inadequacies of information in this regard”. Clearly these would be necessary before any plan of work is issued - including one to NORI.

***Recommendation***

*Council members should establish a working group on Standards and Guidelines, with its first order of business being to review comments on the standards and guidelines to date.*

*Standards and Guidelines are a crucial aspect of rules, regulations and procedures (RRPs) and must not be rushed.*

*Standards and Guidelines cannot be developed before the Exploitation Regulations are completed, since they depend on them and will have to be changed when the draft Regulations change. Members should instruct the secretariat accordingly.*

## **Article 154 Review (Assembly Item 9: General Debate)**

Every five years from the entry into force of the Convention, the Assembly is required to undertake a general and systematic review of the manner in which the international regime of the Area established in the Convention has operated in practice.

The last Article 154 Review was [commenced](#) in 2016 and the Assembly agreed decision [ISBA/23/A/13](#) in 2017. A further review should therefore be commenced in 2022 at the latest. The last review encouraged the Legal and Technical Commission (LTC) to hold more open meetings in order to allow for greater transparency in its work. That decision was not implemented and in the interests of transparency and the effective functioning of the LTC, it is important that a further review be held as is required by the Convention. That review should include consideration of the establishment of a Scientific Committee and/or Environment Committee which is long overdue.

***Recommendation***

*Assembly members should initiate an Article 154 Review during 2022, being 5 years from the previous review.*

## **Environmental Impact Assessments (Council LTC report: Item 13)**

Nauru Offshore Resources, Inc. (NORI) submitted an environmental impact statement (EIS) to the Authority in July. It did not undertake public consultations during the environmental impact assessment phase and in fact stated that it was not legally required to do so. That EIS did not include an environmental baseline as required, instead promising reports in the future. The Secretary-General in a [Note \(ISBA/26/LTC/10\)](#)<sup>17</sup> requested further information but did

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<sup>16</sup> See [ISBA/25/C/19/Add.1](#).

<sup>17</sup> [ISBA/26/LTC/10](#) Review of the environmental impact assessment statement submitted by Nauru Ocean Resources Inc. (31 August 2021)

not state that the EIS was incomplete, and sent it to the LTC for its review for completeness, accuracy and statistical reliability under paragraph 41(h) of the [Recommendations](#) in September. Yet NORI is undertaking a public comment [review exercise](#), which closed on November 19, which seems futile if the LTC indeed conducted its review in September. At no stage in the Recommendations is there a review by Council or even an opportunity for Council to take a decision that the activity not take place or take place in a different way. DSCC accordingly wrote to the Secretary-General on 9 November 2021 expressing these concerns.

So in summary, Council members may wish to initiate a review of the Recommendations to ensure that (1) contractors include public consultations during the EIA exercise; (2) the EIS be subject to a comment period after the Secretary-General has completed the completeness assessment; (3) the contractor takes comments into account and amends the EIS accordingly; and (4) only after these steps have been followed does the LTC review the EIS, and this should be a substantive review; and (5) LTC should report to Council on the outcome of the substantive review.

The outcome of this process should also ensure that, in pursuance of Regulation 31(4) of the Nodules Regulations,<sup>18</sup> the Commission does develop and implement procedures for determining, on the basis of the best available scientific and technical information, whether proposed exploration activities in the Area, including the testing of mining equipment by NORI, would have serious harmful effects on vulnerable marine ecosystems and ensure that, if it is determined that certain proposed exploration activities would have serious harmful effects on vulnerable marine ecosystems, those activities are managed to prevent such effects or not authorized to proceed, and that an EIS which lacks a baseline does not proceed.

### ***Recommendation***

*Council members could*

- (1) call for the NORI EIS (environmental impact statement) to be withdrawn on the basis that it is missing the crucial environmental baseline and is therefore not complete;*
- (2) decide that the Council should have the opportunity to review and approve exploration activities requiring environmental impact assessments and*
- (3) request the LTC to amend its Recommendations to provide for public comments to be called for and to be taken into account prior to review by ISA bodies, and a substantive review of all EIS.*

## **Effective Control (Council Item 13 LTC/Assembly Item 9: General Debate)**

*The acquisition of Tonga Offshore Mining Ltd, and lately the merger by DeepGreen to form The Metals Company raises crucial issues of effective control, which cannot be allowed to continue unresolved before RRP's are adopted.*

The effective control of a sponsoring State of its contractor is at the foundation of the control of activities in the area. The current de facto implementation of effective control leaves uncertainty about whether sponsoring States will be able to control their contractors and leaves sponsoring States vulnerable to future liabilities without recourse against contractors.

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<sup>18</sup> Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area. At [https://isa.org.jm/files/files/documents/isba-19c-17\\_0.pdf](https://isa.org.jm/files/files/documents/isba-19c-17_0.pdf).

The Seabed Disputes Chamber of the International Tribunal for the Law of the Sea (ITLOS) said in its [Advisory Opinion](#) on seabed mining:

“77. The connection between States Parties and domestic law entities required by the Convention is twofold, namely, that of nationality and that of effective control. All contractors and applicants for contracts must secure and maintain the sponsorship of the State or States of which they are nationals. If another State or its nationals exercises effective control, the sponsorship of that State is also necessary.”

Clearly nationality - being incorporated in the sponsoring State - is not enough on its own and effective control is something different. Yet nationality is in reality the only test that the ISA has been applying for contractors. A [paper](#) written as part of a series [developed by](#) inter alia the ISA) to assist in clarifying legal issues of responsibility and liability<sup>19</sup> suggests that an economic test is required by the Convention and suggests examining the following ownership of a majority of the applicant's shares; ownership of a majority of the applicant's capital; holding a majority of the applicant's voting rights; and holding the right to elect a majority of the applicant's board of directors or equivalent body having an influence over the applicant sufficient to determine its decisions.

However, the ISA's approach to 'effective control' in granting contracts to non-state entities to date has appeared to focus on the location of the registration of the contractor company only, applying what may be known as a regulatory test - but in reality is merely a formalistic test. i.e. the test for 'effective control' appears to have been satisfied merely by the entity signing the contract with the ISA having a registered company in the sponsoring State. This has led to ISA contracts being awarded to entities set up in a sponsoring State which in reality have very little local presence and are entirely or almost entirely owned and operated from overseas.

There are convincing arguments<sup>20</sup> that the correct and indeed logical interpretation of the 'effective control' criterion must look instead to economic control: the reality of the economic situation. This could also help to prevent forum shopping for sponsoring States (similar to the flags of convenience phenomenon that occurs with shipping).

The Metals Company (through its predecessor, SOAC) this year told the US Securities and Exchange Commission<sup>21</sup> that there is little jurisprudence on the issue of effective control, that they take the view that incorporation, registration and the grant of nationality are critical factors, notwithstanding the beneficial ownership of a subsidiary by its parent (“beneficial ownership”) and there are no guarantees that our interpretation will be universally accepted in the future.”

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<sup>19</sup> Rojas, A and Phillips, F-K ‘Effective Control and Deep Seabed Mining: Toward a Definition’ 2019, Centre for International Governance Innovation. At <https://www.cigionline.org/publications/effective-control-and-deep-seabed-mining-toward-definition-1>

<sup>20</sup> For example, made in the paper by Rojas and Phillips

<sup>21</sup> “Additionally, there is little jurisprudence or interpretative guidance regarding the application of the sponsorship regulations that are applicable to our business. For example, with respect to the question over the regulation of which State can impact the activities of any contractor (such as NORI or TOML), we have taken the view that incorporation, registration and the grant of nationality are critical factors, amongst others, notwithstanding the beneficial ownership of a subsidiary by its parent (“beneficial ownership”). While this position has not been challenged by our sponsoring States or the ISA, certain organizations that oppose the deep sea polymetallic exploration and collecting industry have advocated for the use of a beneficial ownership test for state sponsorship, and there are no guarantees that our interpretation will be universally accepted in the future.” [https://sec.report/Document/0001213900-21-040480/fs42021a5\\_sustainableopp.htm](https://sec.report/Document/0001213900-21-040480/fs42021a5_sustainableopp.htm) Page 48.

***Recommendation***

*Council members could insist on debating the crucial issue of effective control, and if necessary asking for an Advisory Opinion from the Seabed Disputes Chamber of ITLOS.*

**ITLOS Advisory Opinion Needed**

Under UNCLOS Art. 191 "The Sea-Bed Disputes Chamber shall give advisory opinions at the request of the Assembly or the Council on legal questions arising within the scope of their activities". The SDC said in the Seabed Mining *Advisory Opinion*: "As regards the present proceedings, the conditions to be met are: (a) that there is a request from the Council; (b) that the request concerns legal questions; and (c) that these legal questions have arisen within the scope of the Council's activities." Under the 1994 Implementing Agreement Annex, Section 1 para 12 "Where a dispute arises relating to the disapproval of a plan of work, such dispute shall be submitted to the dispute settlement procedures set out in the Convention." This appears to be broad enough to include potential disapproval of plans of work.

***Recommendation***

*There are numerous outstanding legal questions under the 2 year Rule, both with respect to RRP's and any plan of work. Council Members should consider a request to the Seabed Disputes Chamber of the International Tribunal for the Law of the Sea on these questions.*