

Recommendations for the UNCLOS Article 154 Review to be initiated by the ISA Assembly in 2022

The Assembly of the ISA is required, under Article 154 of UNCLOS, to “undertake a general and systematic review” every five years, “of the manner in which the international regime of the Area established in this Convention has operated in practice”. On the basis of the review “the Assembly may take, or recommend that other organs [of the ISA i.e., the Council, Secretariat, Legal and Technical Commission] take, measures... which will lead to the improvement of the operation of the regime.” The last Article 154 review was conducted between 2015-2017. Another is required to be initiated by the Assembly this year.

The Assembly should conduct a general and systematic review of the manner in which the international regime of the Area established in Part XI of UNCLOS (the seabed mining provisions of the Convention) as amended by the 1994 Part XI Agreement has operated in practice, including a review of the structure, functioning and bylaws of the International Seabed Authority, to ensure that it operates as a transparent, accountable, inclusive and environmentally responsible decision-making and regulatory body that best operationalizes its duty under UNCLOS to act ‘on behalf of’, and ‘for the benefit of’, humankind as a whole (e.g. UNCLOS Articles 137, 140, 143 and paragraph 6 of the Preamble)

The review should be conducted independently of the ISA Secretariat and involve consultation with a broad range of stakeholders as well as ISA members to provide recommendations for consideration by the Assembly. It is important that the members of the Assembly ensure a more ‘in depth’ review this time (compared to the previous review in 2015–2017) given the very different circumstances in which the ISA finds itself at present. Because of Nauru triggering the ‘2-year rule’ under paragraph 15 of Section 1 of the Annex to the 1994 Agreement, the member countries of the ISA will face critical decisions in the next few years regarding whether or not to adopt exploitation regulations; approve or deny applications for plans of work for exploitation (mining licenses); whether to approve provisional licenses for deep-sea mining and if so under what circumstances; how to decide on provisional, rules, regulations and procedures if any; and in regard to increased activities (e.g. testing of mining equipment) by contractors under the exploration contracts and the current lack of institutional capacity to independently monitor the activities of contractors.

The Article 154 review should encompass, inter alia, the following:

1. Review of the ISA's due diligence and oversight procedures for:

- a) preventing 'monopolization' of ownership or effective control over exploration licenses as required under UNCLOS Article 150(g).
- b) ensuring that Sponsoring States are capable of exercising effective control over contractors.
- c) evaluating EIAs submitted by contractors and ‘approving’ testing of mining equipment by both the LTC and the Council under regulation 31.4 of the exploration regulations for polymetallic nodules¹ and equivalent provisions under the exploration regulations for polymetallic sulphides and cobalt crusts. At present, neither the procedures required under regulation 31.4 appear to have been established nor does the Council exercise oversight of the

¹ Decision of the Council of the International Seabed Authority relating to amendments to the Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area and related matters
https://isa.org.jm/files/files/documents/isba-19c-17_0.pdf

recommendations and decisions taken by the LTC and Secretary-General in regard to approval of testing of mining equipment.

d) vetting contractors as part of the process of considering applications for plans of work for exploration, and periodically while the contract is in effect. An appropriate place to start would be to review the due diligence procedures that were employed in relation to the application for an exploration contract by the subsidiary (NORI) of The Metals Company (TMC), formerly known as DeepGreen, for whom Nauru triggered the 2-year rule. A number of published reports have raised questions regarding the practices of this company and its relationship with the Secretariat of the ISA, namely the New York Times which has published both an article² and a cache of internal documents, emails etc on the relationship between the principals associated with the contractor and the ISA Secretariat beginning in 2007³. Bloomberg news⁴ as well as other media⁵ have also reported on this and there are additional sources of information that should be considered such as letters to the US Securities and Exchange Commission (SEC) from the Deep Sea Mining Campaign, Deep Sea Conservation Coalition, Global Witness and Greenpeace⁶; the Campaign for Accountability complaint to the SEC⁷; and information published by Bonitas Research⁸. It would be important to determine whether and how the company was vetted by the ISA in awarding NORI an exploration contract and/or at any point during the time the contract has been in effect, and whether improvements to the due diligence procedures are warranted. TMC has stated it intends to apply for an exploitation license in 2023 or 2024. An investigation in the allegations published in the abovementioned articles and report would be timely.

2. The lack of transparency around the applications and the approvals of plans of work for exploration, and the annual reports of contractors, including the transparency of the applications, the preliminary EIAs and information on the companies and investors associated with contractors. This issue came up again during the meeting of the 27th Session of the Council of the ISA on 30 March 2022 when The Ambassador of Chile and an observer organization asked the Chair of the LTC, in plenary, whether a former founder of Nautilus Minerals and former CEO of DeepGreen/The Metals Company was involved with Circular Metals Tuvalu which submitted an application for an exploration license in the Clarion Clipperton Zone in December 2021. The LTC Chair responded to the Council that he would not answer the question because the information was confidential.

3. Whether there are improvements to the working methods of the ISA that would help ensure the Secretariat functions as an impartial, independent and transparent organ of the ISA.⁹

4. Whether the voting procedures effectively enable the Council and Assembly to take decisions on behalf of, and for the benefit of, humankind as a whole and, if not, how they could be improved.

² <https://www.nytimes.com/2022/08/29/world/deep-sea-mining.html>

³ <https://www.documentcloud.org/documents/22266044-seabed-mining-selected-documents-2022>

⁴ <https://www.bloomberg.com/news/articles/2021-06-24/a-mining-startup-s-rush-for-underwater-metals-comes-with-deep-risks>

⁵ <https://www.ft.com/content/6675ac1e-a9a0-48d8-b4e9-ae2ef27c7be> & <https://www.bairdmaritime.com/work-boat-world/offshore-world/column-disappearing-acts-mozambiques-tuna-money-the-metals-companys-alleged-big-investor-and-lng-co2-emissions-offshore-accounts/>

⁶ <https://www.greenpeace.org/usa/wp-content/uploads/2021/07/SEC-letter.pdf>

⁷ <https://campaignforaccountability.org/watchdog-requests-sec-investigate-undisclosed-histories-of-deep-sea-mining-companies-seeking-merger/>

⁸ <https://seekingalpha.com/news/3750453-tmc-slammed-in-short-seller-report> & <https://www.bonitasresearch.com/company/tmc-metals-co-nasdaq-tmc/>

⁹ <https://www.latimes.com/politics/story/2022-04-19/gold-rush-in-the-deep-sea-raises-questions-about-international-seabed-authority>

At issue, amongst other things, is the fact that under the current procedures, if a majority of the members of the LTC vote to recommend to the Council that a Sponsoring State and its contractor be given a mining license, as few as two members of the Council in one of Groups A, B, or C, could guarantee that the Sponsoring State and contractor obtain a license (an 'exploitation' contract) even if a large number, a majority, or in extreme cases, all 34 of the other members of the Council opposed granting the contractor a license. The same applies to the full membership of the ISA - even with the opposition of a large number or majority of the 167 (+EU) members of the Assembly of the ISA as a whole, the Sponsoring State/contractor would still get a license.¹⁰

One way to address this would be to 'decouple' the LTC recommendation from the voting process in Council or to simply require approval of plans of work (mining licenses) by a 2/3 majority of the Council and a 2/3rds majority of the Assembly, in addition to a positive recommendation from the Legal and Technical Commission. This would much better reflect the obligation of the ISA to act 'on behalf of', and 'for the benefit of', humankind as a whole as required by UNCLOS rather than leaving decisions of this magnitude to members of the LTC and a handful of countries on the Council (see Annex 2 below).

5. Whether access to legal review procedures, currently only available to contractors and States, should be expanded to include other stakeholders.

6. The Deep Sea Conservation Coalition (DSCC) has identified a number of additional issues related to the structure, functioning and bylaws of the ISA which it considers problematic. See the DSCC publication: Deep-sea mining: is the International Seabed Authority fit for purpose? Available on the DSCC website¹¹

Annex 1: UNCLOS Article 154 states as follows:

Article 154

Periodic review

Every five years from the entry into force of this Convention, the [ISA] Assembly shall undertake a general and systematic review of the manner in which the international regime of the Area established in this Convention has operated in practice. In the light of this review the Assembly may take, or recommend that other organs take, measures in accordance with the provisions and procedures of this Part and the Annexes relating thereto which will lead to the improvement of the operation of the regime.

Annex 2: Rule 70 of the RULES OF PROCEDURE OF THE COUNCIL OF THE INTERNATIONAL SEABED AUTHORITY

From the Rules of Procedure of the Council of the ISA the following (based on UNCLOS and the 1994 Amendments to Part XI). Note that the term "Approval of plans of work" means in this case approval of applications for exploration or exploitation licenses:

¹⁰ See Rule 70 of the RULES OF PROCEDURE OF THE COUNCIL OF THE INTERNATIONAL SEABED AUTHORITY <https://www.isa.org.jm/files/documents/EN/Regs/ROP-Council.pdf>

¹¹ http://www.savethehighseas.org/wp-content/uploads/2020/10/DSCC_FactSheet7_DSM_ISA_4pp_web.pdf



“XI. SPECIAL PROCEDURES

Approval of plans of work

Rule 70

"The Council shall approve a recommendation by the Legal and Technical commission for approval of a plan of work unless by a two-thirds majority of its members present and voting, including a majority of members present and voting in each of the chambers of the Council, the Council decides to disapprove a plan of work. If the Council does not take a decision on a recommendation for approval of a plan of work within a prescribed period, the recommendation shall be deemed to have been approved by the Council at the end of that period. The prescribed period shall normally be 60 days unless the Council decides to provide for a longer period. If the Commission recommends the disapproval of a plan of work or does not make a recommendation, the Council may nevertheless approve the plan of work in accordance with its rules of procedure for decision-making on questions of substance."

<https://www.isa.org.jm/documents/rules-procedure-council>

The composition of each of the chambers of the Council of the ISA can be found at <https://isa.org.jm/files/files/documents/Composition of the Council 1996-2024.pdf>

Chambers A, B, and C of the Council each consist of four members (the first three sets of four rows in yellow on the ISA site), Chamber D has six members and Chamber E has eighteen members, as well as one additional 'non-voting' member.

Membership in 2022: Chamber A: Italy, Russia, Japan, China; Chamber B: India, Korea, France, Germany; Chamber C: Australia, Chile, Canada, South Africa.

So, for example, if the LTC recommends that the Council "approve a plan of work" from a State which has applied for an exploitation/mining license on behalf of itself or a private company then a vote in support of the LTC recommendation by only 2 members in one of Chambers A, B or C (say China and Japan in Group A; or France and Korea in Group B) would result in the approval by the Council of the plan of work; that is, that the state or company could rely on as few as two member countries of the Council to be guaranteed to get a license, even if the other 34 members voted against the LTC recommendation.

The membership if the Assembly of the ISA consists of 167 countries plus the EU. The 131 member countries of the ISA that are not on the Council of the ISA have no vote. So, you could have a situation where a large number of ISA member countries are opposed to granting a mining license, a majority are opposed, a super majority are opposed or, in an extreme case, 165 member countries of the ISA are opposed, and the country or company would still get a license anyway if the LTC recommended it by a simple majority vote and two countries in either Chamber A, B, or C of the Council voted in support of the LTC recommendation.

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