



## **Briefing to the International Seabed Authority for the 23rd Session 7-18 August 2017**

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### **Introduction**

This briefing is submitted by the Deep Sea Conservation Coalition (DSCC), a coalition of over 70 non-governmental organizations concerned about the deep sea. DSCC has been an observer organization to the Authority since 2014.

Accompanying this briefing are the following documents:

*Deep-Sea Mining: A Briefing Paper from the Deep Sea Conservation Coalition*

*Summary of the Institute for Sustainable Futures report: Renewable Energy and Deep-Sea Mining: supply, demand and scenarios*

*Summary of the MIDAS project findings*

*Summary of Liability Issues*

*Some Comments on Environmental Regulations Discussion Paper*

The deep ocean is a vital force within the Earth system and must be protected from harm.<sup>1</sup> The priority global approach to the consumption of mineral resources should be one of sustainability, reuse, improved product design and recycling of materials. If deep-sea mining is permitted to occur, it should not take place until appropriate and effective regulations for exploration and exploitation are in place to ensure that the full range of

marine habitats, biodiversity and ecosystem functions are adequately and effectively protected, including through a network of marine protected areas and reserves.

The regulations and their framework must be robust and include:

- clear conservation and management objectives;
- transparent and enforceable procedures including access to information, public participation, and review procedures;
- requirements based on the precautionary and ecosystem approaches and the polluter pays principle;
- publicly available, comprehensive, prior environmental impact assessments, based on extensive, high quality environmental baseline information, public and independently scientifically verified environmental management and monitoring programs and independent, effective and accessible review procedures.

They should ensure that significant adverse impacts on vulnerable marine ecosystems (VMEs) are prevented, that appropriate management steps are taken to protect ecologically or biologically significant areas (EBSAs) and that other serious harm to the marine environment does not occur.

Protected areas must be established to achieve objectives established for the areas, and cumulative impacts from mining and other activities and sectors must be considered.

MPAs protect ecological functioning, such as providing resilience and preserving connectivity so protected features, such as habitats, species, hydrogeographic features (including benthic and pelagic and subdivisions therein) must in turn help to ensure ecosystem integrity and resilience.

Procedures to intervene to prevent serious harm, such as emergency stop work orders, need to be in place, together with liability regimes to address consequences of serious harm. Activities that are likely to cause serious harm should not be permitted: stop orders should be reserved in cases such as accidents and emergencies.

The development and adoption of any deep-sea mining exploration and exploitation regulations must be transparent and participatory and any mining activities permitted must respect the common heritage of humankind. They must ensure real benefits to society as a whole, must be fit for purpose and must be equitable. Mechanisms for liability and redress must be established, and research and other initiatives to promote conservation and sustainable management must be implemented. Management must be effective, accountable, and transparent with ongoing monitoring, compliance, enforcement and transparent review procedures. All this is in view of the Area and its resources being the common heritage of humankind.<sup>2</sup>

## **The Article 154 Report**

DSCC welcomes the article 154 Final Report<sup>3</sup> and wishes to highlight two important areas: transparency and the issue of a specialist Environmental body.

## **Transparency**

The final report of the Review Committee<sup>4</sup> contains two important recommendations on transparency. In recommendation 16, the Committee recommends that the Legal and Technical Commission should be encouraged to hold more open meetings in order to allow for greater transparency in its work. We welcome this recommendation, and would also observe that meetings should be participatory.

In Recommendation 19, the Committee recommends that “attention should be paid to transparency as the finance provisions in the rules and regulations of the Authority in connection with the regime of benefit sharing are developed, which will have an impact on the ability of the Authority to act on behalf of mankind, with special consideration given to the needs of developing States.” DSCC also welcomes this recommendation.

It is critical that the ISA follows best international practice on transparency, which is itself essential to good governance. The Rio+20 Outcome Document *Future We Want*<sup>5</sup> stated that we need institutions at all levels that are effective, transparent, accountable and democratic, and underscored that broad public participation and access to information and judicial and administrative proceedings are essential to the promotion of sustainable development.<sup>6</sup> States there resolved to strengthen the institutional framework for sustainable development, which will enhance the participation and effective engagement of civil society and other relevant stakeholders in the relevant international fora and in this regard promote transparency and broad public participation and partnerships to implement sustainable development.<sup>7</sup> Effective engagement includes the need to build in robust transparent procedural mechanisms. The Aarhus Convention<sup>8</sup> not only provides international best practice in transparency<sup>9</sup> but is incorporated in the Clarion Clipperton Zone Environmental Management Plan (“CCZ EMP”),<sup>10</sup> and as such its provisions provide strong guidance for procedures to implement transparency. The Aarhus Convention has three ‘pillars’:<sup>11</sup> access to information, public participation and access to justice.

Participation in the meetings of international forums such as the Authority, including their subsidiary bodies, should be allowed at all relevant stages of the decision-making process, unless there is a reasonable basis to exclude such participation according to transparent and clearly stated standards that are made available, if possible, in advance.<sup>12</sup>

In the context of the ISA, this would imply access by accredited observers to meetings of all governing bodies, including the Assembly, the Council and the Legal and Technical Commission, and any subsidiary bodies, which should be open unless specifically closed for defined purposes unless there is a reasonable basis to exclude such participation (such as when matters of commercial confidence are being discussed) according to transparent and clearly stated standards that are made available in advance. It would also imply other bodies such as working groups (including the recently formed Liability working group) be open to States and observers, as is the practice in most multilateral environmental agreements (MEAs) and regional fishery management organizations (RFMOs).

## **An Environment Committee**

DSCC has for a number of years suggested that an Environment Committee be established. We welcome Recommendation 14 that the Legal and Technical Commission

should be encouraged to continue its practice of setting up working groups dealing with particular areas of expertise. In this context, the establishment of a working group dealing with environmental issues should be considered.

It should also be considered whether an Environment Committee should be established as a full subsidiary body to Council. Comparable bodies have scientific advisory bodies: the International Maritime Organization has GESAMP,<sup>13</sup> the CBD (Biodiversity Convention) has the SBSTTA,<sup>14</sup> to name a few, and regional fisheries management organizations have scientific bodies. Moreover, the Part XI Implementing Agreement<sup>15</sup> specifically recognized the Authority will need to evolve with its growing role: it provided that “The setting up and the functioning of the organs and subsidiary bodies of the Authority shall be based on an evolutionary approach, taking into account the functional needs of the organs and subsidiary bodies concerned in order that they may discharge effectively their respective responsibilities at various stages of the development of activities in the Area.”<sup>16</sup> It described the current arrangement of the Assembly, Council, Secretariat, LTC, and Finance Committee as “early functions of the Authority.”<sup>17</sup> Subsidiary organs were envisaged by the Convention: they can be established “as may be found necessary” under UNCLOS art. 158(3), the Council can establish subsidiary organs<sup>18</sup> and so can the Assembly.<sup>19</sup> While there is no such provision for the LTC, the LTC could also establish working groups to assist it. Any such subsidiary bodies or working groups need to be effective, accountable and transparent.<sup>20</sup> The subsidiary bodies need to be established carefully in light of the requirement that the principle organs - Assembly, Council and Secretariat<sup>21</sup> - must avoid taking any action which may derogate from or impede the exercise of specific powers and functions conferred upon another organ.<sup>22</sup>

It seems clear that the working methods of the Authority will need to adapt to meet the increasing demands on the ISA, including the development of exploitation regulations and procedures including regional environmental management plans and their implementation, assessment of applications including baselines, environmental impact assessments and statements, environmental management and monitoring plans, compliance and enforcement and liability functions.

Council has the function of approving plans of work, upon the recommendation of the LTC<sup>23</sup> or upon no recommendation.<sup>24</sup> It also has the function of compliance: it has the function of exercising such control over activities in the Area as is necessary for the purpose of securing compliance with the relevant provisions of Part XI and its Annexes, and the rules, regulations and procedures of the Authority, and the plans of work.<sup>25</sup> Council also has the power to issue emergency orders which may include orders for the suspension or adjustment of operations, to prevent serious harm to the marine environment arising out of activities in the Area,<sup>26</sup> the power to disapprove areas for exploitation by contractors or the Enterprise in cases where substantial evidence indicates the risk of serious harm to the marine environment<sup>27</sup> and to establish appropriate mechanisms for directing and supervising a staff of inspectors who shall inspect activities in the Area to determine whether Part XI, the rules, regulations and procedures of the Authority, and the terms and conditions of any contract with the Authority are being complied with.<sup>28</sup>

DSCC therefore suggest that consideration should be given to the establishment of a

standing Environment Committee as a subsidiary body to Council, as well as the proposed Working Group for the LTC, to assist it in its functions. Such a Committee should incorporate best modern environmental practice, which includes full transparency, the timely provision of documents and the ability of observers to participate. DSCC, while welcoming Recommendation 14 of the Article 154 working group, suggests that a subsidiary organ, being an Environment Committee, should be established by the Council, to address the scientific and environmental functions entrusted the Council before full consideration of matters by the Council as mandated by the Convention.<sup>29</sup> An examination of the scheme of UNCLOS shows that establishment of an Environment Commission as a subsidiary organ under the Council to exercise functions of supervision of the Area, plans of work, and an inspectorate is fully consistent with UNCLOS and the Part XI Implementing Agreement.

The Environmental Committee could be entrusted with implementing functions such as overseeing the development of regional environmental management plans, development of the environmental impact assessment and statement, environmental management and monitoring plans and overseeing compliance and enforcement and possibly the inspectorate, or aspects of it. Some of these functions will likely require a dedicated staff.

The LTC would then be free to deal with its functions such as reviewing (as opposed to developing) plans of work, making recommendations to Council,<sup>30</sup> preparing assessments of the environmental implications of activities in the Area,<sup>31</sup> making recommendations to the Council on the protection of the marine environment, taking into account the views of recognized experts in that field;<sup>32</sup> formulating and submitting to the Council the rules regulations and procedures<sup>33</sup> and making recommendations to the Council regarding the establishment of a monitoring programme, ensuring that existing regulations are adequate and are complied with and co-ordinating the implementation of the monitoring programme approved by the Council;<sup>34</sup> and keeping the rules, regulations and procedures under review and recommend to the Council from time to time such amendments.<sup>35</sup>

The function of an Environmental Committee could be advisory, dedicated primarily to advising on specific issues given to it by the Council, freeing the LTC for the high level recommendatory functions granted to it by UNCLOS.

## **Development of Exploitation Regulations**

The attached **Annex A** represent DSCC observations on the January 2017 [ISA Discussion Paper](#) on the development and drafting of Regulations on Exploitation for Mineral Resources in the Area (Environmental Matters). Detailed comments will be made on forthcoming draft regulations.

Highlighted areas are transparency, effective protection, procedural mechanisms, threshold questions: serious harm and significant adverse changes, strategic environmental assessment and regional environmental assessment management plans, environmental baseline data, scoping reports and environmental impact assessments and environmental management plans and plans of work.

A summary of DSCC recommendations appears below.

## Liability

Liability is an area which is ripe for discussion and development. A briefing on liability is attached as **Annex B**.

The liability of the sponsored contractor arises from its failure to comply with its obligations under its contract.<sup>36</sup> The liability of the sponsoring State depends upon the damage resulting from activities or omissions of the sponsored contractor,<sup>37</sup> and arises from its own failure to comply with its responsibilities under the Convention. The main liability for a wrongful act committed in the exercise of the Authority's powers and functions rests with the contractor and the Authority.<sup>38</sup>

There are at least two potential gaps in liability arising under UNCLOS. The International Tribunal for the Law of the Sea (ITLOS) Seabed Disputes Chamber<sup>39</sup> pointed out that a gap in liability may occur if, notwithstanding the fact that the sponsoring State has taken all necessary and appropriate measures, the sponsored contractor has caused damage and is unable to meet its liability in full.<sup>40</sup> Secondly, ITLOS pointed out that a gap in liability may also occur if the sponsoring State failed to meet its obligations but that failure is not causally linked to the damage.<sup>41</sup> Therefore, situations may arise where a contractor does not meet its liability in full while the sponsoring State is not liable under article 139.2, of the Convention. ITLOS therefore suggested that the Authority may wish to consider the establishment of a trust fund to compensate for the damage not covered. Article 235.3 of UNCLOS refers to such possibility.<sup>42</sup>

Bonds and insurance are two ways of ensuring that funds are available to satisfy liability which arises. Bonds may be posted by contractors, but suffer from the potential shortcoming that they would be for specified and limited amounts, and would be subject to the terms specified in the bond. Insurance policies are subject to the provisions specified in the insurance policy, including terms and conditions, to the events specified in the policy, are limited to specified amounts and are commonly subject to conditions such as *force majeure*.

A liability regime needs to be established. Article 304 of UNCLOS refers to the development of further rules and opens the liability regime for deep seabed mining to new developments in international law.<sup>43</sup>

Development of rules on responsibility and liability need to be established. These include:

- rules around responsibility and liability for the Authority, sponsoring States and contractors;
- the standard of care for the Authority, for Sponsoring States and for Contractors – absolute liability, strict liability, of fault based and the standard of liability for breach by sponsoring States of direct obligations;
- the meaning of 'wrongful' acts by contractors: whether that term encompasses breaches of regulations, breach of contract, negligence, or liability for all damage, whether caused by negligence or however caused;
- the form reparation may take: restitution, compensation, satisfaction or a combination of the three;
- the role, form and substance of bonds and insurance; and
- the development of a Fund.

A first step could be a working group on liability.

## **Regional Environmental Management Plans**

In 2015, the LTC reported<sup>44</sup> that the Commission was informed of a scoping workshop (Horta, Azores, 1-3 June 2015) held to initiate a scientific and technical process towards the development of a strategic environmental management plan for deep seabed mineral exploration and exploitation in the Atlantic basin in areas beyond national jurisdiction, and that the LTC welcomed inputs from external initiatives by the scientific community. Importantly the LTC reported that that Commission supported the rationale for an environmental management plan for the Mid-Atlantic Ridge, noted that a robust scientific case would be developed by the workshop participants over the coming years and it was expected that a report would be submitted for consideration and development by the Commission in 2017. Last year Council<sup>45</sup> encouraged the LTC to make progress on the development of environmental management plans in other international seabed area zones (other than the Clarion Clipperton Zone), in particular where there are currently exploration contracts,<sup>46</sup> as it did in the two previous years.<sup>47</sup>

Already two exploration contracts have been granted for the mid-Atlantic Ridge<sup>48</sup> while another is pending.<sup>49</sup> It is therefore critical that a strategic environmental management plan (SEMP) is developed for the Mid-Atlantic Ridge as a matter of urgency.

## **DSCC Recommendations**

### **Transparency**

Accredited observers should have access to meetings of all governing bodies, including the Assembly, the Council and the Legal and Technical Commission, and any subsidiary bodies and associated meetings, which should be open unless specifically closed for defined purposes unless there is a reasonable basis to exclude such participation (such as when matters of commercial confidence are being discussed) according to transparent and clearly stated standards that are made available in advance.

### **Environment Committee**

DSCC welcomes Recommendation 14 of the Article 154 working group. Consideration should be given to the establishment of a standing Environment Committee as a subsidiary body to Council, as well as the proposed Working Group for the LTC, to assist it in its functions.

An Environment Committee should incorporate best modern environmental practice, which includes full transparency, the timely provision of documents and the ability of observers to participate.

### **An Atlantic Basin SEMP**

Further progress in the drafting of a science-based proposal for an Atlantic Basin SEMP outside of areas of national jurisdiction for future consideration by the ISA should be encouraged.

LTC could recommend that the Council requests States to reconsider or postpone any applications until after an strategic environmental management plan (SEMP) is adopted for the Mid-Atlantic Ridge.

## **Substantive Content of Exploitation Regulations on Environmental Protection**

1. Establishment of an environmental baseline:
  - 1.a Is an essential and fundamental part of an EIA and an Environment Management Plan (EMP) as well as a Strategic Environmental Assessment (SEA) and Management Plan (SEMP).
  - 1.b Establishes sufficient good quality/comparable data/information to describe the existing environment, and will enable the ISA to both properly assess the potential and actual environmental impacts and put into place management strategies to protect the marine environment.
  - 1.c Identifies vulnerable marine ecosystems (VMEs) and ecologically and biologically significant areas (EBSAs) and other similar ecological features, as well as relevant bioregional processes (e.g. species connectivity, source and sink populations, migratory routes of pelagic species potentially affected by mining operations).
  - 1.d Contractors should be required to share environmental baseline information to contribute to the information base needed to effectively conduct regional SEAs and develop SEMPs. In addition, other environmental information gained from marine scientific research should be shared.

2. EIAs and Environment Management Plans (EMPs):
  - 2.a Once an environmental baseline is established, the EIA must take into account all potential effects of the proposed mining activities and include, *inter alia*, an assessment of direct, indirect, acute, chronic and cumulative impacts e.g. mortality, displacement, plume, sediment, toxicity, food-web impacts, noise etc., identify potential adverse impacts on other activities (e.g. fisheries), and identify other impacts such as those arising from climate change (e.g. ocean acidification and its impacts on deep-sea ecosystems).
  - 2.b EMPs must be developed in an open and transparent process, must be based on adequate EIAs, and be designed to prevent significant adverse impacts on vulnerable marine ecosystems as well as ecologically or biologically significant areas, other serious harm to the marine environment, and implement other conservation objectives identified in the SEMP.
3. Strategic Environmental Assessments (SEAs) and Strategic Environmental Management Plans (SEMPs):
  - 3.a SEAs and SEMP must be implemented for identifying and establishing networks of protected areas on a regional basis prior to allowing commercial mining in individual claims within a region.
  - 3.b Must take into consideration the potential impacts of mining on biodiversity, habitats and ecosystems on a regional scale.
  - 3.c Must be designed to protect representative habitats and source populations, ensure species connectivity remains intact, prevent extinctions, and ensure the effective functioning of a range of additional ecosystem processes relevant to the particular biogeographic region concerned.
  - 3.d SEMP should include provisions for periodic SEAs as a key tool to address cumulative effects of multiple exploration and exploitation activities in a region, as well as to take into consideration cumulative impacts from other activities affecting the region as well. SEAs should be conducted periodically (e.g. every 3-5 years), particularly as new information is generated from contractor's accumulation of baseline data, EIAs and EMPs as well as independent research and surveys, and the SEMP revised accordingly.
  - 3.e Develop appropriate management responses, including establishing protected areas, strategies to prevent significant adverse impacts (SAIs) to EBSAs and VMEs, and avoiding serious harm to the marine environment
4. Protected Areas
  - 4.a A programme must be developed for identifying and establishing networks of protected and representative areas, including marine reserves, VMEs, and EBSAs, under both SEMP and under site specific EMPs.
  - 4.b Habitat protection needs to be robust and representative both in quantity and quality of habitat and species composition, especially in areas where mining activities may result in the complete removal or significant alteration of the habitat or underlying substrate.
5. An effective management response:
  - 5.a A well-resourced continual pre- and post- activity monitoring programme should be established and an early warning system implemented in case of accidents, incidents or unforeseen effects.

- 5.b An environment bond should be required from the contractor to ensure that contractors comply with regulations and best environmental practice.
- 5.c A Sustainability Fund should be established, for instance, to carry out environmental research where it is not otherwise being carried out.
- 5.d Sharing of research data and facilities and cooperative research efforts should be facilitated and encouraged by the Authority.
- 5.e Best known environmental practices must be adopted by applicants. These should be reviewed regularly and updated as necessary.
- 5.f Cooperation between contractors should be encouraged, in order to share and promote best environmental practices, including through reviews and through incentives, as well as sharing baseline environmental data as indicated above.
- 5.g Environmental baselines for the conservation of species, populations and ecosystems and prevention of significant adverse impacts on the environment should be set using the best available science to allow, on a precautionary basis, for viability, recovery, growth and ecosystem processes and species and habitat connectivity. These should be precautionary based and include buffer margins depending on the credibility and quality of data and information.
- 5.h Areas containing VMEs and EBSAs should be protected.

### **Procedural Aspects of Regulations**

Establishment of an Environmental Committee as a subsidiary organ under Council.

Establishment of procedures which:

1. establish a clear and transparent framework with timelines and chains of responsibility for the State/contractor obligations from the start of the process until its completion and any continued obligations following mining (e.g. long-term monitoring of impacts after the closure of a site);
2. provide for transparent, comprehensive and fair evaluation of applications;
3. provide for independent scientific review of EIAs and EMPs, including requirements to improve an EIA or EMP if need be (e.g. provide more baseline information, better assessments of risk and/or development of mitigation measures) and further scientific review as a condition for approval of EMPs;
4. provide for ongoing review and adaption of regulatory and management procedures including EMPs, SEMP, monitoring and control procedures, compliance and enforcement and long term monitoring at regular intervals;
5. provide for development, implementation and adaptation of EMPs, environmental best practices and industry best practices;
6. provide a fair and equitable contractor-pays cost structure consistent with the Common Heritage of Mankind;
7. establish clear timelines for applications; and
8. establish effective procedures for access to information, public participation and review opportunities for stakeholders.

### **Information and transparency principles applicable**

1. The Aarhus Principles of access to information, public participation and access to review processes should be adopted and implemented.
2. Best available science should be used.

3. The precautionary approach must be adopted to address scientific uncertainty.
4. The ISA should favour caution and environmental protection.
5. Applications should undertake a transparent, comprehensive and fair evaluation.
6. EIAs should include independent scientific review, public comment.

### **Forms of Applications**

1. Applications should include: EIA, EMP, financial plan, plan of work, closure plan, training plan, emergency response and procedure plan, health safety and maritime security plan, and a social impact assessment. EIAs and EMPs must be independently reviewed and approved or disapproved and amended as necessary as part of a public review process.

### **Sustainability Fund**

1. A fundamental challenge to ensuring that mining activities can be regulated to protect the marine environment is a lack of knowledge about the marine environment. This could be addressed through the development of a Sustainability Fund that would enable the ISA to direct further research in relation to marine ecosystems in the Area and develop institutional capacity.
2. ISA currently has no budget for large-scale research activities. The Sustainability Fund could be financed by a levy, e.g. USD x per ton of ore recovered and could also be used to provide for independent monitoring and scientific review.
3. In recognition of the lack of scientific knowledge of the deep sea, the environmental impacts and the need for a precautionary approach, a Sustainability Fund is needed to fund activities supporting effective protection of the marine environment from harmful effects,<sup>50</sup> the protection and preservation of the marine environment<sup>51</sup> and the protection and preservation of rare or fragile ecosystems and the habitat of depleted, threatened or endangered species and other forms of marine life.<sup>52</sup>

### **Central Data Repository and Environmental Information**

1. The ISA Secretariat needs the continued mandate and adequate resources to establish and maintain the Central Data Repository.
2. Environmental information must be standardised and disclosed and not be kept confidential, and sharing of environmental information should be required. Reports from contractors and sponsoring States should also be disclosed and not be confidential. The ISA should draft and agree on comprehensive procedures and criteria for the release and withholding of information.

### **Mitigation, Adaptive Management and Remediation**

1. EMP will need to focus on prevention, mitigation and/or avoidance
2. Adaptive management must be rigorously defined
3. NZ Supreme Court in the case of *Sustain Our Sounds v King Salmon*, SC 84-2013, [2014] NZSC 40 paras. 129, 130 has said that the question of whether the precautionary approach requires an activity to be prohibited until further

information is available, rather than an adaptive management approach, will depend on:

- 3.a The extent of the environmental risk (including the gravity of the consequences);
- 3.b the importance of the activity;
- 3.c the degree of uncertainty; and
- 3.d the extent to which an adaptive management approach will sufficiently diminish the risk and the uncertainty.

## **Liability Fund**

1. An international framework is needed to ensure prevention of and response measures for addressing unexpected negative consequences of mining exploration or exploitation activities and to recover the costs, or to claim compensation or other relief on behalf of the international community.
2. A Liability Fund should be established to address the gaps identified by ITLOS in the Seabed Mining Advisory Opinion, such as when a contractor is insolvent or otherwise unable to meet its obligations.
3. The Liability Fund needs to be funded independently of royalties.

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<sup>1</sup> UNCLOS article 145, 192, 194.5.

<sup>2</sup> UNCLOS article 136.

<sup>3</sup> ISBA/23/A/3, 8 February 2017.

<sup>4</sup> ISBA/23/A/3

<sup>5</sup> The Future We Want. 2012. A/RES/66/288. At <https://sustainabledevelopment.un.org/futurewewant.html>. Para 10.

<sup>6</sup> The Future We Want para 43.

<sup>7</sup> The Future We Want para 76(h).

<sup>8</sup> Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters. Aarhus, Denmark, 25 June 1998. At <https://www.unece.org/env/pp/treatytext.html>.

<sup>9</sup> See Kravchenko, S (2007). "The Aarhus convention and innovations in compliance with multilateral environmental law and Policy". Colorado Journal of International Environmental Law and Policy. 18 (1): 1–50, and Dellinger, M (2011). "Ten Years of the Aarhus Convention: How Procedural Democracy Is Paving the Way for Substantive Change in National and International Environmental Law". Colorado Journal of International Environmental Law and Policy. 23(2) 309-366.

<sup>10</sup> "The Authority shall enable public participation in environmental decision-making procedures in accordance with the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, 1998, and its own rules and procedures." Environmental Management Plan for the Clarion-Clipperton Zone. ISBA /17/LTC/7. C.13 (f). At <https://www.isa.org.jm/environmental-management-plan-clarion-clipperton-zone>.

<sup>11</sup> Access to information is provided for in articles 4, 5 of the Aarhus Convention; Public participation in articles 6,7,8 and access to justice in Aarhus Convention articles 9. See generally guidance provided in the Aarhus Convention Implementation Guide (2<sup>nd</sup> edition 2014) .E.13.II.E.3. At [https://www.unece.org/env/pp/implementation\\_guide.html](https://www.unece.org/env/pp/implementation_guide.html)

<sup>12</sup> Almaty Guidelines para. 29.

<sup>13</sup> Joint Group of Experts on the Scientific Aspects of Marine Environmental Protection

<sup>14</sup> Subsidiary Body on Scientific, Technical and Technological Advice

<sup>15</sup> Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982.

<sup>16</sup> Annex, Section 1, paragraph 3.

<sup>17</sup> Annex, Section 1, paragraph 4.

<sup>18</sup> UNCLOS art 162(2)(d)

<sup>19</sup> UNCLOS art 160(2)(d)

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<sup>20</sup> For instance, in the composition of subsidiary organs of the Council, emphasis shall be placed on the need for members qualified and competent in relevant technical matters dealt with by those organs provided that due account shall be taken of the principle of equitable geographical distribution and of special interests. UNCLOS art.162(2)(d). And for the Assembly, in the composition of these subsidiary organs due account shall be taken of the principle of equitable geographical distribution and of special interests and the need for members qualified and competent in the relevant technical questions dealt with by such organs. UNCLOS art. 160(2)(d).

<sup>21</sup> UNCLOS art. 158.1

<sup>22</sup> UNCLOS art. 158.4. It also seems clear from the Convention that subsidiary bodies may be established by the Assembly and Council only under art. 158, so it would seem that a subsidiary body of the Assembly or Council is different than a working group under the LTC.. UNCLOS art 158.1 defines the principal organs as an Assembly, a Council and a Secretariat. The Enterprise, when established, is an organ. Article 158.2 then describes “such subsidiary organs as may be found necessary may be established in accordance with this Part.” Certainly the Assembly and Council can establish subsidiary organs (art. 160(2)(d) and 162(2)(d). It is an open question whether the Enterprise can establish a subsidiary organ.

<sup>23</sup> UNCLOS art. 162.2(j)

<sup>24</sup> UNCLOS art. 162.2(j)(ii)

<sup>25</sup> UNCLOS art. 153.3 and art. 162.2(l).

<sup>26</sup> UNCLOS art. 162.2(w)

<sup>27</sup> UNCLOS art. 162.2(x)

<sup>28</sup> UNCLOS art. 162.2(z)

<sup>29</sup> A brief discussion of functions of the principal organs may assist delegates. The Assembly is the sole organ of the Authority consisting of all the members, and is the supreme organ of the Authority to which the other principal organs shall be accountable as specifically provided for in the Convention. The Assembly shall have the power to establish general policies in conformity with the relevant provisions of the Convention on any question or matter within the competence of the Authority. UNCLOS art. 160.1. It has the power to discuss any question or matter within the competence of the Authority and to decide as to which organ of the Authority shall deal with any such question or matter not specifically entrusted to a particular organ, consistent with the distribution of powers and functions among the organs of the Authority. UNCLOS art. 160.2(n).

The Council is the executive organ of the Authority. The Council shall have the power to establish the specific policies to be pursued by the Authority on any question or matter within the competence of the Authority: UNCLOS art. 162.1. Council has the power to supervise and co-ordinate the implementation of the provisions of Part XI on all questions and matters within the competence of the Authority and invite the attention of the Assembly to cases of non-compliance. UNCLOS art. 162.2(a)

<sup>30</sup> UNCLOS art. 165.2.(b)

<sup>31</sup> UNCLOS art. 165.2.(d)

<sup>32</sup> UNCLOS art. 165.2.(e)

<sup>33</sup> UNCLOS art. 165.2.(f)

<sup>34</sup> UNCLOS art. 165.2.(h)

<sup>35</sup> UNCLOS art. 165.2.(m)

<sup>36</sup> AO para. 204.

<sup>37</sup> AO para. 201 and see paragraph 181.

<sup>38</sup> AO para. 200. This conclusion rests on Annex III, article 22 of UNCLOS:

The contractor shall have responsibility or liability for any damage arising out of wrongful acts in the conduct of its operations, account being taken of contributory acts or omissions by the Authority. Similarly, the Authority shall have responsibility or liability for any damage arising out of wrongful acts in the exercise of its powers and functions, including violations under article 168, paragraph 2, account being taken of contributory acts or omissions by the contractor. Liability in every case shall be for the actual amount of damage.

<sup>39</sup> Case 17: Responsibilities and Obligations of States sponsoring persons and entities with respect to activities in the Area. At <https://www.itlos.org/en/cases/list-of-cases/case-no-17/>. Hereafter “AO”.

<sup>40</sup> AO para. 203.

<sup>41</sup> AO para. 203.

<sup>42</sup> AO para. 205.

<sup>43</sup> AO para. 211.

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- <sup>44</sup> Report of the Chair of the Legal and Technical Commission on the work of the Commission during the twenty-first session of the International Seabed Authority. ISBA/21/C/16 at <https://www.isa.org.jm/document/isba21c16> . Paras 24-25.
- <sup>45</sup> Decision of the Council of the International Seabed Authority relating to the summary report of the Chair of the Legal and Technical Commission (19 July 2016). ISBA/22/C/28. At <https://www.isa.org.jm/document/isba22c28>. Para. 11.
- <sup>46</sup> Recalling paragraph 60 of United Nations General Assembly resolution 70/235 (2015), where the UNGA noted with appreciation “that the Council encouraged the Legal and Technical Commission and the secretariat of the Authority to make progress on the development of environmental management plans in other international seabed area zones, in particular where there are currently contracts for exploration. At [http://www.un.org/depts/los/general\\_assembly/general\\_assembly\\_resolutions.htm](http://www.un.org/depts/los/general_assembly/general_assembly_resolutions.htm).
- <sup>47</sup> Decision of the Council of the International Seabed Authority relating to the summary report of the Chair of the Legal and Technical Commission. (21 July 2015). ISBA/21/C/20. At <https://www.isa.org.jm/document/isba21c20>. In line with the suggestion made by the United Nations General Assembly in paragraph 51 of its resolution 69/245. And Decision of the Council of the International Seabed Authority relating to the summary report of the Chair of the Legal and Technical Commission (23 July 2014) ISBA/20/C/31 at <https://www.isa.org.jm/document/isba20c31> para 9 in line with the suggestion by the United Nations General Assembly in paragraph 51 of its resolution 68/70.
- <sup>48</sup> Russia - October 29, 2012 and France - November 18, 2014. See [http://www.savethehighseas.org/wp-content/uploads/2017/03/Table\\_Exploration-contracts-granted-by-the-ISA\\_May-2017-1-1.pdf](http://www.savethehighseas.org/wp-content/uploads/2017/03/Table_Exploration-contracts-granted-by-the-ISA_May-2017-1-1.pdf)
- <sup>49</sup> Application for approval of a plan of work for exploration for polymetallic massive sulphides by the Government of Poland. At <https://www.isa.org.jm/document/isba23ltc3>.
- <sup>50</sup> Required under UNCLOS article 145.
- <sup>51</sup> Required under UNCLOS article 192.
- <sup>52</sup> Required under UNCLOS article 194.5