DSCC Briefing 26th ISA February Council Meeting

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Introduction

These are recommendations of the Deep Sea Conservation Coalition for the February 2020 Council meeting. It focuses on matters that will or may arise during the meeting, and other matters which we suggest need to be kept in mind by delegates.

Establish a Clear Obligation to Prevent Biodiversity Loss

Biodiversity considerations must be mainstreamed in the draft Regulations. Scientists have expressed concern over the loss of biodiversity[1] likely to occur as a result of deep-sea mining based the technology currently available or in development and the scale of the mining necessary to be 'economically viable'. The 2019 report of the Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services (IPBES), in its Summary for Policymakers, warned that "a million species already face extinction, many within decades, unless action is taken to reduce the intensity of drivers of biodiversity loss." SDG Target 14.2 commits States to 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.

Opening the Area, the common heritage of humankind, to seabed mining risks compounding and significantly exacerbating the threat of biodiversity loss; causing significant adverse impacts to, and the degradation of, marine ecosystems, in some cases to such an extent that restoration will not be possible on human timescales, if at all; and weakening the resilience of deep-sea ecosystems to withstand the impacts of climate chance and other human stressors.

We recommend that States Parties establish clear provisions in the regulations stipulating that no mining should be authorized to proceed unless it can be managed to prevent the loss of biodiversity, prevent the degradation of deep-sea ecosystems, and ensure that the resilience of deep-sea ecosystems is maintained and not compromised by mining activities.

Recommendations for Development of the Regulations

The Briefing Note from the President of the Council, H.E. Lumka Yengeni, suggests open-ended working groups of the Council, open to all stakeholders, focusing on the protection and preservation of the marine environment (Part IV), and Part XI on the inspection mechanism, compliance and enforcement. We welcome this proposal, and particularly the focus on the environment, but also observe that there are many other topics that need to be addressed, many of which are outlined in these recommendations, including liability, institutional structure and functioning, effective control and other cross-cutting matters.

DSCC supports an open procedure for the development of regulations, as well as associated documents including the standards and guidelines, involving modern communications technology such as webinars and similar collaborative platforms. The Area is the common heritage of mankind and the world at large has a great interest in the development of the regulations. Workshops should not be closed, invitations should be open, speakers, agendas and reports should be transparently developed and working groups should be relayed over the

[1] Van Dover et al., (2017). Biodiversity loss from deep-sea mining. Nature Geoscience volume 10, pages 464–465(2017). At https://www.scopus.com/record/display.uri?eid=2-s2.0-85021827333&origin=inward&txGid=b833e38b76529a85792a635e293b2561. See also Niner et al. Deep-Sea Mining With No Net Loss of Biodiversity—An Impossible Aim. Niner et al. Front. Mar. Sci. 2018.

internet. Concurrent working groups should be avoided, so as not to disadvantage small delegations, and closed meetings should be avoided.

We were surprised that the collation document does not include the written submissions (aroudn 20) made in the last consultation by non-Council member States and others. The recommendations of all member States and observers and other stakeholders should all be taken into account.

Structure of the ISA

We continue to believe that the LTC cannot meet the environmental responsibilities set out under Article 165 of UNCLOS imposed upon the ISA by UNCLOS. The Council should exercise its powers set out in UNCLOS Article 162 to establish a stand-alone Environmental Committee. The proposed expert committee can be seen as a step towards that goal.

The LTC should open its meetings. It is past time. The Assembly in 2017 – the "supreme organ"[2] - in ISBA/23/A/13 specifically encouraged "the LTC to hold more open meetings in order to allow for greater transparency in its work." It was therefore surprising to note the LTC Chair report in ISBA/24/C/9 that "[c]onsidering the Commission's agenda and expected workload for part II of the session, together with the schedule of meetings for the Commission and the Council, as well as the joint meeting with the Finance Committee, the Commission concluded that it would not be feasible to host an open meeting in July." The issue was not a single "open meeting". All meetings of the LTC should be, by default, open meetings, making provision for confidential information if need be, as is the practice in multilateral environmental agreements and regional fisheries management organizations worldwide.

Need for a measured, thorough approach

The world is increasingly recognizing the seriousness of the loss of biodiversity and the threat this poses to the planet and to our future survival.

There are growing calls for a moratorium on deep seabed mining to give science the opportunity to be carried out away from the pressure to mine. These include the European Parliament, the Long Distance (Fishing) Advisory Council of the European Union, and a growing number of NGOs amongst others.

The DSCC holds that there should be a moratorium on: deep seabed mining; the adoption of seabed mining regulations for exploitation and the issuing of exploitation and new exploration contracts, unless and until:

[2] UNCLOS Art. 160(1).

1. The environmental, social and economic risks are comprehensively understood;
2. It can be clearly demonstrated that deep seabed mining can be managed in such a way that ensures the effective protection of the marine environment and prevents loss of biodiversity;
3. Where relevant, there is a framework in place to respect the free, prior, informed consent of Indigenous peoples and to ensure consent from potentially affected communities;
4. Alternative sources for the responsible production and use of the metals also found in the deep sea have been fully explored and applied, such as reduction of demand for primary metals, a transformation to a resource efficient, closed-loop materials circular economy, and responsible terrestrial mining practices;
5. Public consultation mechanisms have been established and there is broad and informed public support for deep seabed mining, and that any deep seabed mining permitted by the International Seabed Authority fulfils the obligation to 'benefit (hu)mankind as a whole' and respects the Common Heritage of Mankind; and
6. Member States reform the structure and functioning of the International Seabed Authority to ensure a transparent, accountable, inclusive and environmentally responsible decision-making and regulatory process to achieve the above.

The Development of Regulations, Standards and Guidelines, Liability and other documents.

It is clear, and was clear from the Council discussion in ISA 25, that the 2020 deadline is no longer viable. Continuing to work towards that deadline risks significantly harming the nature of the procedures followed, and the quality of the output, as the ISA tries to develop its REMPs, Standards and Guidelines and Regulations. The process must not be rushed. An appropriate, transparent, and effective process needs to be established for all these documents without artificial and unrealistic deadlines distorting the process.

We believe that the LTC has already started work on the "priority list" of 9 Standards and Guidelines identified in the LTC Chair's Report. But this is being done without transparency or due process, and, we believe, is still working towards a July 2020 deadline. This is not feasible. The Council should discuss this and formulate a transparent and effective way forward.

Standards and Guidelines

An appropriate process for formulation of Standards and Guidelines which follows due process, which is transparent, accountable, inclusive and expert level needs to be established. The process should not be rushed, and critical standards and guidelines must be developed before any draft exploitation regulations are adopted. The former 2020 deadline is clearly no longer viable and

should be formally abandoned. Key and complex instruments, including the REMPs, will take time to develop.

Open-Ended Informal Working Group on Financial Terms

The Fund

DSCC noted at ISA-25 Council that it has concerns about the fund. These are principally that:

1. The liability fund needs to be separate from the sustainability fund. Current draft provisions (Draft Regulation 55) combine liability purposes with e.g. research, education and training.
2. The ISA will need to develop details regulations concerning the administration and purposes of the Fund.
3. The fund needs to be fully funded if and when commercial mining begins. Current proposals are for it to be funded by ongoing contributions during the 30 year (initial) term of a mining contract, and moreover there will be a gap in time when mining activities begin once a contract is issued before full commercial production occurs, leaving the Fund with minimal, if any, funds according to current proposals.
4. There needs to be a quantitative determination of (1) the value of the seabed, affected water column and associated ecosystems, species and ecosystem services and (2) the value of damage which may be caused by deep-sea mining. This full assessment of externalities and environmental cost is also a necessary pre-condition to determine whether a proposed Plan of Work delivers an overall net benefit.
5. The proposed fund is just the final component of the liability regime. The quantum (amount) of the fund can only be determined once all the other components such as insurance, bonds and the liability regime are fully clarified.
6. The current 1% figure assumed by MIT is, as far as can be determined, arbitrary. No reasoning has been given although we have asked for it.
7. There should be no cap on liability, since there is no cap on damages that can be caused by mining.

Financial Terms

The approach that is finally agreed must provide for adequate funds to support a robust monitoring and compliance system, appropriate incentives for environmental protection, as well as compensation for environmental damage.

It is critical that environmental matters should not be factored into the calculations in a way which simply follow from commercial considerations. These matters, including assessments, reporting, compliance, enforcement, redress and compensation must not in any way be disincentivised or disadvantaged.

The regime must meet all UNCLOS requirements, including avoiding subsidising or giving seabed mining in the Area an unfair competitive advantage over terrestrial mining,[3] and setting rates of payment within the range of those prevailing in respect of land-based miners. The crucial question is what constitutes an acceptable compensation to humankind for the loss of its common heritage, including environmental matters, rather than what rate of return contractors require or desire.

It is necessary to determine all the components of the necessary regulatory, financial, inspectoral and monitoring oversight of contractors and projects because only once those are in place can the ISA discuss and determine what additional work etc would be required in order to deliver each one of the several payment formats under discussion.

The financial model must reflect UNCLOS – this means it should cover the mining or 'collector' aspect and not shipping, processing etc that are regulated and taxed elsewhere. This will not deliver a contractor internal rate of return (IRR) but will rather show the correct "capital at risk" and allow for adequate project accounting for various finance mechanisms such as upfront payments, royalties, profits and hybrid approaches.

Finally, the financial mechanism must deliver an assessment of what the minimum and absolute amounts and the amounts relative to the overall sums delivered will be delivered to the ISA for the common heritage of mankind under the proposed approaches as well as under other potential approaches. This final point is crucially relevant for any decision as the whether the payment regime delivers adequate outcomes for CHM.

Liability

Liability has not been discussed in Council. There was a Legal Working Group, but there has been no discussion of its papers in Council to date. There was a session in the LTC, but it was held in closed session. The African Group raised it in the 25th Session but there was no following discussion. This is a crucial issue that must be addressed and a regime developed.

A liability regime needs to be established before the exploitation regulations are adopted. This must 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;

[3] E.g. see Annex III Article 13.

- the role, form and substance of bonds and insurance; and
- the definition of effective control.

Regional Environmental Management Plans (REMPs)

Regional Environmental Management Plans (REMPs) are essential management tools for the ISA and should be prioritised. No exploration or exploitation contracts should be granted until REMPs are in place for that region.

Two basic elements of the REMPs should be established:

One, that the REMP should catalogue all species within a region and establish an adequate baseline.

Two: require and ensure that any mining in the region ne managed to prevent loss of biodiversity.

The ISA should develop and agree overarching environmental goals and objectives for all REMPs as well as clear and measurable region-specific goals.

The REMP process and content should be standardised and agreed by Council. DSCC supports the German, Costa Rica and Dutch submission and associated template to Council in that regard.

Draft Regulations

Recommendations for the Draft Regulations submitted in October 2019 are attached.

Key Issues to be Addressed

1. Fundamental Principles

This section – DR 2 - has been weakened: it now includes fundamental "Policies" as well as Principles.

This is a crucial section: e.g. common heritage ONLY appears in DR2 and DR12(4) as "realizing benefits for mankind as a whole". The precautionary principle (approach) is only in DR 2 and DR 44. The elevation of Article 150 policies to "fundamental policies" is misconceived. In doing so it now includes a 'need' for mining, which is subjective, arguable and far from unanimously held, so that "(v) increased availability of the minerals derived from the Area as needed in conjunction with minerals derived from other sources, to ensure supplies to consumers of such minerals", for instance, is now on the same level as the common heritage of mankind. The policies need to be taken out of the Fundamental Principles Article so that the fundamental principles are fundamental, and are not policies to be weighed against other policies.

Additionally, the Fundamental Principles are not integrated and mainstreamed into regulations. For example, DR 2(e)(i) "…effective protection of the Marine Environment, including biological diversity and ecological integrity" should be operationalized in subsequent regulations. In doing so, it should require that a full inventory of biodiversity in a claim area be obtained and included

in an EIA and that the loss of biodiversity be prevented as a condition for the approval of a Plan of Work for Exploitation.

2. No General Discretion

There is no general discretion to refuse a contract. If stated criteria are satisfied, the Commission "shall" recommend approval in DR 15.

4. Duration of Contracts

Contracts are for an initial 30 years (Regulation 20) and thereafter can be repeatedly and almost automatically extended, so are in effect indefinite.

4. Environmental Impact Assessments

Section 1 bis on environmental impact assessments (EIAs) is merely a shell. It needs to be extensively developed, and needs to include independent scientific assessments and an open hearings process. In doing so it should take into account criteria such as that contained in paragraph 47 of the International Guidelines for the Management of Deep-Sea Fisheries in the High Seas repeatedly endorsed by the UN General Assembly, including in UNGA resolution 71/123 (paragraph 180(b)), adopted in 2016.

5. Contractor Amends its Own Plans

Rather than the ISA making necessary changes to the contractor's documents such as the Environmental Management and Monitoring Plan, it merely 'requests' changes.

Effective Control and Sponsoring State Roles and Responsibilities

Effective control is another issue which needs extensive discussion. This goes to the heart of the sponsoring State and administrative system. "Effective control" relates to how, and even whether, a sponsoring State controls its contractor. For example, if shares are held overseas, is there effective control? If all or the majority of directors are based overseas, is there effective control? What is the test for effective control: is it regulatory (depending on the sponsoring State's laws or the ISA's regulations) or economic (as a function of who controls the company)? The paper by Andrés Sebastián Rojas and Freedom-Kai Phillips. "Effective Control and Deep Seabed Mining: Toward a Definition"[4] is an excellent contribution and sets out the important issues, but there has been no discussion of this in Council.

There is also an enormous gap in ISA studies and regulation to date concerning the jurisdictional and regulatory interface between the ISA, sponsoring States and flag States. This must be addressed.

[4] Andrés Sebastián Rojas and Freedom-Kai Phillips. "Effective Control and Deep Seabed Mining: Toward a Definition. At https://www.researchgate.net/publication/333610242_Liability_Issues_for_Deep_Seabed_Mining_Series_Paper_Effective_Control_and_Deep_Seabed_Mining_Toward_a_Definition

8. Other Matters

- Accessible and effective dispute resolution mechanisms should be established.
- Plans of work should be flexible, capable of modification in accordance with a described process, and not of excessive duration.
- All documents comprising the Plan of Work should be subject to public comments, which should be taken into account.
- There should be independent scientific analysis at all stages.
- The LTC should have discretion in recommending approval, conditional approval with amendments, or disapproval of Plans of Work.
- The common heritage of mankind needs to be operationalized in the regulations. For instance, the LTC should be required to consider whether the Plan of Work benefits mankind as a whole, by measuring the application against the Fundamental Principles in DR 2, where the common heritage of mankind should be properly expressed, consistent with Article 150(j), to read "maintenance of the principle of the common heritage of mankind".
- Preservation reference zones (PRZs), impact reference zones (IRZs), and protected areas, not limited to areas of particular environmental interest (APEIs), need to be defined and mainstreamed into the REMPs, EIAs and EMMPs.
- The regulations need to make clear the procedure whereby the LTC considers and responds to public comments on proposed Plans of Work, including the environmental plans, including ensuring that a detailed record and rationale is provided by the LTC for any recommendations regarding approval or otherwise of a Plan of Work.
- Any renewal applications must take into account all the Fundamental Principles, including environmental considerations, should be subject to public review, and should enable the ISA to take into account any new information or circumstance in deciding whether or not to grant a contract extension.
- The Draft Regulation 58 review should be carried out as an independent assessment, with public comment.

The regulatory system as developed must:

- be responsive to independent scientific advice;
- offer stakeholders a meaningful opportunity for participation;
- enable rejection of mining proposals where the impacts are deemed too great or too uncertain;
- ensure effective protection of the ocean;
- ensure there is no loss of biodiversity.

Contacts: Matthew Gianni matthewgianni@gmail.com +31 646168 899

Duncan Currie duncanc@globelaw.com +6421632335