Deep-sea mining: is the International Seabed Authority fit for purpose?

The International Seabed Authority (ISA) is the international body through which countries regulate mining activities in the “Area” – the half of the world’s ocean that lies beyond national jurisdictions.

Responsible for ensuring the “effective protection” of the marine environment, the ISA must guarantee that any mining activities in the Area are carried out for the “benefit of (hu)mankind”. Commercial-scale mining in the Area, if it ever becomes a reality, can only be carried out with the ISA’s authorization.

Meanwhile, countries and contractors have been actively exploring the deep ocean for target mine sites. The ISA has granted a deep-sea mining exploration contract for every application it has received, amounting to 30 contracts, covering some 1.3 million square kilometers of seabed. The ISA is now working to complete a set of exploitation-phase regulations so that commercial operations can begin.

Leading scientists continue to raise concerns over the potential environmental impacts of deep-sea mining. Yet the ISA’s institutional structure and decision-making processes remain inadequate to the tasks of an effective regulator. Key reforms must be considered to ensure that ISA member States and all of humankind can have full confidence in ISA decisions, while alternative, non-extractive methods for meeting the world’s energy, communications and mobility needs are prioritized.

A case for institutional reform

Opaque processes and governance

Virtually all decision-making at the ISA must be guided by findings and recommendations of its Legal and Technical Commission (LTC), an advisory body whose 30 members are elected to serve in their personal capacities for five-year terms. Twelve of these members are from sponsoring States. If the LTC issues a recommendation, the Council (the executive and decision-making arm of the ISA) must adopt it, unless disapproved by a supermajority of the Council’s membership.

Under existing rules, contracts approved by the LTC remain confidential. Contractors submit annual reports on their activities to the LTC and ISA Secretariat, but these are not shared with the ISA membership or the public. While the LTC issues short annual summaries, these provide little record of deliberations or the rationale behind recommendations. They have held all LTC meetings behind closed doors over the past four years, despite a 2017 call by ISA members for the LTC to hold more open meetings. As a global industry regulator charged with acting for the benefit of humankind as a whole, the ISA’s structure is nowhere near sufficiently transparent, nor are the pathways for soliciting and responding to stakeholder input.
Monitoring and compliance
The ISA lacks an infrastructure and institutional capabilities dedicated to ensuring compliance with environmental regulations. Questions remain as to whether and how it will confront the technical, financial, and governance challenges of monitoring vast deep-sea mining operations carried out thousands of kilometers from shore. The LTC has repeatedly reported that several contractors have violated the terms of their contracts under the exploration regulations, although the nature of the violations and the names of the contractors concerned are kept confidential. Yet the ISA has never taken punitive action, as reported by the Secretary General of the ISA in 2018, “To date, no enforcement action has been taken by the Council with respect to any contractor. No written warnings have been issued, and no monetary penalties have been imposed”.

Lack of a Scientific Committee
Although it is standard practice for scientific committees to advise international organizations, and despite the ISA’s mandated role as an environmental protection agency, it has no dedicated source of scientific or environmental advice to inform its decisions. Instead, environmental issues are the responsibility of the LTC, composed largely of geologists, lawyers and diplomats. ISA member States have expressed concern that the LTC lacks expertise to canvass the full range of issues on which it must advise. In 2017, for example, it granted a 15-year exploration contract to Poland in the Atlantic Ocean without commenting on the fact that portions of the contract area were recognized under the Convention on Biological Diversity as an Ecologically or Biologically Significant Marine Area (EBSA). The contract area includes the famous Lost City, “a treasure of the deep sea” and potential UNESCO World Heritage site.

Potential conflicts of interest
The ISA is responsible for ensuring the effective protection of the marine environment from the harmful effects of mining activities. However, the revenues from issuing mining contracts will fund it. In 2019, the UK Parliament’s House of Commons Environmental Audit Committee concluded that it therefore has a “clear conflict of interest”, a view echoed by the Vatican.

States that sponsor mining activities are disproportionately represented on the Council and their nationals comprise a significant portion of the LTC. At least eight countries that are themselves contractors (through government research agencies or state-owned companies) are members of the ISA’s Council, allowing them to effectively negotiate rules for themselves. Some LTC members also serve as members of their government’s delegations in the ISA Council. This means they act as both decision-maker and as advisor to the decision-maker. Contractors often attend ISA meetings on the delegations of their sponsoring States and have at times addressed the ISA Council on their sponsoring State’s behalf.

Finally, there have been recent examples where the ISA Secretariat has appeared to take a strong pro-mining position. For example, the Secretary-General of the ISA appeared in a promotional video for a mining company, DeepGreen, that is actively calling on the ISA to quickly adopt rules to allow commercial mining so that it can apply for a contract from the ISA to mine the nodules.
Incentives to mine

The ISA is designed to prioritize resource extraction, as exemplified in the ‘use it or lose it’ provisions of the 1994 Agreement. These require a contractor either to apply for a commercial mining permit at the end of a 15-year exploration contract or apply for an extension of the exploration contract for a maximum of five additional years. If they do neither they lose their claim altogether and the ISA can give it to someone else. A contractor can only obtain an extension to an exploration contract if it makes a case that events beyond its control prevented it from completing the exploration work within the 15-year period, or if “prevailing economic circumstances do not justify proceeding to the exploitation stage” – in other words, commercial deep-sea mining cannot yet be carried out profitably.  

In 2016, the first 15-year exploration contracts would have expired. However, the six contractors, and the countries that sponsored them, all asked for five-year extensions, claiming market conditions weren’t right to begin commercial mining. The ISA granted all extensions, with one of the conditions being that they state that “the Contractor will complete the necessary preparatory work for proceeding to the exploitation stage” at the end of the five years. These extensions will expire in 2021 and most of the remaining 24 exploration contracts granted are scheduled to expire before 2030. The use-it-or-lose-it clauses may compel some sponsoring States to apply for mining contracts, even if they are not interested in commercial exploitation. If the first contractors to obtain licenses demonstrate that deep-sea mining is profitable, it would become more difficult for others to justify asking for extensions to their exploration contracts by claiming that deep-sea mining is not commercially viable. They may be faced with either beginning to mine or losing their exploration claim areas, each of which in the Clarion-Clipperton Fracture Zone totals 75,000 square kilometers. Several countries – China, France, Germany, India, Japan, Korea, Poland and Russia – have obtained exploration contracts for their government research agencies or State-owned companies. These countries may decide to begin mining when their exploration contracts expire for geopolitical or strategic reasons (e.g. to stockpile metals they deem of strategic importance as a hedge against future disruptions in supply) even if mining is not commercially viable, to avoid the risk of losing their claim areas altogether. An additional concern is that if commercial mining begins, and the mining proves...
profitable, the economics of the industry are likely to drive its further development. If many sponsoring States and the contractors they sponsor decided to apply for commercial mining licenses, and the LTC recommendation is supportive, it seems likely that most would be granted contracts to mine, given the structure and the politics of decision making by the LTC and the Council as described above. So far, 20 ISA member countries have become sponsoring States for exploration contracts and another plans to apply this year (2020). Some States have sponsored multiple contracts.

Two-year trigger rule
A particularly problematic weakness of the ISA is that if a sponsoring State asks to apply for an exploitation contract on behalf of a contractor, the ISA must adopt relevant regulations within two years so that the application can go ahead. If the regulations are not ready within two years, the ISA must grant a provisional contract to the contractor to mine, based on any provisional rules in place at the time.19

Recommendation
The Deep Sea Conservation Coalition calls on ISA member States to establish a moratorium on deep-sea mining until the structural issues highlighted above are fully resolved.

Endnotes
1. UNCLUS Article 145.
2. UNCLUS Article 140.
8. Where a scientific or environmental committee would sit in the ISA structure has yet to be determined, but Article 162(2)(d)of the Convention empowers the Council to establish such subsidiary organs as it finds necessary for the exercise of its functions, and the 1994 Part XI Agreement provides in Paragraph 3 of the Annex for an evolutionary approach to subsidiary bodies.
18. The eight countries together have sponsored 19 state owned contractors combined which equates to almost 2/3s of the 30 exploration contracts issued by the ISA to date.

About the DSCC
The Deep Sea Conservation Coalition (DSCC) was founded in 2004 to address the need to prevent damage to deep-sea ecosystems and the depletion of deep-sea species on the high seas from bottom trawling and other forms of deep-sea fishing. The DSCC is made up of over 80 non-governmental organizations (NGOs), fishers organizations and law and policy institutes, all committed to protecting the deep sea.

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