DSCC Interventions Informal Working Group on the Environment  
Friday 25 March 2022

Draft Regulation 54 (Establishment of an Environmental Compensation Fund)

Firstly, we thank Pew for the citation to the African group submission in 2019. We believe that this Council needs to discuss the issues raised in that submission to inform this discussion.

Yesterday we discussed test mining. Test mining may of course give rise to significant damage and thus liability issues. We know that many mining companies are thinly capitalized and that the Metals Company, which owns Nauru’s contractor NORI, has lost some 80% of their value since flotation. This underlines that funds may well not be available to cover damage. So we believe that paragraph 2 needs to be amended to ensure that it is in place before any test mining. In this connection we support Costa Rica, New Zealand, France and others that the fund must be in place before exploitation, but also before test mining.

We agree with the special representative that this fund must be seen in the context of the Seabed Advisory Opinion, but it is not enough. I would quote paragraph 211 of the Advisory opinion:

211. Lastly, the Chamber would like to point out that article 304 of the Convention refers not only to existing international law rules on responsibility and liability, but also to the development of further rules. The regime of international law on responsibility and liability is not considered to be static. Article 304 of the Convention thus opens the liability regime for deep seabed mining to new developments in international law. Such rules may either be developed in the context of the deep seabed mining regime or in conventional or customary international law.

We are concerned that liability issues are not discussed in this working group or elsewhere. A liability regime must be established, and this is likely to take several years. The ISA has already lost years in not addressing this. We note that the Kuala Lumpur Nagoya protocol took some 5 years to negotiate. Some time ago the African Group asked this be discussed in Council. It was not. There has been a liability working group which produced some useful papers, but its findings have never been discussed by Council. It is past time that it is.

Regulation 55 (Purpose of the Environmental Compensation Fund)

It is appropriate to delete the reference to training activities etc so we support these deletions. The purpose of the fund is not to subsidise contractors.

This conversation has been rich, as the FSM observed, but we believe that this underlines the need to be informed by a full discussion of liability and responsibility matters, which as we said in our previous intervention has not taken place. We would agree with France for example that it is not the place of the fund to take action where the contractor should, but it is the place of the fund to take action where contractors do not have sufficient funds. And quite honestly, it is highly likely that they will not have sufficient funds.
This is why other counsel and I, as counsel to Greenpeace and WWF in those days, argued in an amicus brief for residual liability of State, and that victims of damage caused by hazardous activities conducted in the Area are entitled to prompt and adequate compensation.

We said then that to avoid becoming a safe-haven for high risk activities, and to ensure the risks of operations in the Area are properly internalized, a sponsoring State must put in place an effective regime of civil liability, and we noted that these requirements are based on the importance of internalizing the real cost of any economic activity, as reflected in the Polluter-Pays Principle - which was just noted by the Netherlands. This of course reminds us of the discussions we had on Tuesday about valuation of the environment.

As we all know, ITLOS responded in terms of direct obligations and due diligence, as we all know, and of course recommended this fund for exactly the reasons we and others argued and that we outlined in our previous intervention. It was helpful for the Netherlands to remind us that this discussion is about compensating for damage to the environment where it is not forthcoming for any reason. We will return to this shortly.

But this also brings up the relevance of another important issue that has not been addressed, and is not scheduled to be addressed, by Council, which is that of effective control. If the sponsoring State does not have effective control over the contractor, it is highly unlikely that it will be able to effectively enforce any judgments or exercise proper control over it. As one example, this may give rise to otherwise preventable calls on the fund.

Yet the issue of effective control has not been discussed in Council for many years, and must be resolved before any regulations are finalised. Not requiring a financial test for effective control means that there will not be effective control over relevant financial matters of the company, which will prejudice the ability to enforce liability and redress matters.

Turning to the text, in article 55, we are concerned at the focus on restoration and rehabilitation. Currently available science shows that remediation and restoration are not now, and are unlikely to be, feasible and that damage caused to the marine environment will be irreversible.

We listened carefully to France’s observations but we note that offsetting elsewhere where restoration is not possible on site would be environmentally meaningless in the context of deep-sea ecosystems and therefore unacceptable and ineffective at preventing damage to the deep sea.

We would support a general obligation of funding, as Costa Rica suggested, and redress, but also the inclusion of response measures.

As a general principle, we want to make it clear that consequent action should not be limited by economic or technical feasibility. And as a drafting matter, we believe that the article meant to refer to economic or technical feasibility, not “and”.

What is unclear in the current draft is whether economic loss, such as by fishing industries, would be covered by the fund. As recent studies have underlined, effects such as the plume on industries such as fishing could be significant. Fishing industries and States dependent on fishing should be able to call on the Fund for compensation.

We note that ISA’s Technical Study 27 on the Fund (“Study on an Environmental Compensation Fund for activities in the Area”), published last year, just referred to by the Legal Counsel, states that “Since it is impossible to obtain compensation from the contractor or the sponsoring State is the basis for the intervention of the ECF, any element of ambiguity in the notion of compensable damage should...
be avoided.”(page 38) That Technical Study goes on to say on page 52 that “It is however suggested that personal injury and economic loss be excluded to ensure the sustainability of the ECF.”

In other words, including compensation for industries such as fishing may exhaust the fund. This not only acknowledges that damage to fishing industries may be so extensive that it may exhaust the fund, but highlights that otherwise those damaged by fishing -which could include not only fishing industries and countries reliant on fish and fishing revenue but artisanal fisheries - would otherwise not be compensated.

We note in closing that it is important to put these discussions into context. The ISA’s mandate is to ensure effective protection of the marine environment from harmful effects that may arise from deep-seabed related activities. If biodiversity loss and harm to marine ecosystems cannot be prevented, then mining cannot go ahead.

**Regulation 56 (Funding of the Environmental Compensation Fund)**

The Funding as envisaged will not allow the Fund to be properly funded by the time mining starts.

We note that this still does not address the fundamental problem that the Fund, being funded by progressive contributions, will not be adequately funded by the time early mining activities are proposed to be undertaken. (See Regulation 56). Quite simply, there will be no money in the fund.

This is a major problem. Contractors should be required to feed into the fund at the outset.

**Draft Regulation 59 (Closure plan)**

Firstly, we agree with Costa Rica’s edits on paragraph (3). It is not only residual effects but all effects of mining need to be identified and quantified.

Secondly, we agree with New Zealand and Costa Rica’s observations that cost effectiveness is not what guides us.

Thirdly, relating to paragraphs 2 e + f that refer to remediation, rehabilitation and restoration, we reiterate that restoration, rehabilitation and remediation will not be possible, according to available science.

In para 2(b), the management and monitoring plan need to be in place not just for the period prescribed by a closure plan but in effect in perpetuity - for the foreseeable future. To those delegations that would question that, the damage and effects will, in effect, last in perpetuity, we would say that this is why contractors and sponsoring States need to know that this is required before they start any mining. This is also relevant to the financial bond, or emergency performance guarantee, under DR 26.

We also need to add public notification around the monitoring and closure activities.

Under 5, review should be undertaken not just when there is a material change in the plan of work but where there is a material or significant change in environmental effects or circumstances.
The Netherlands proposal on paragraph 5 is helpful, but immediately raises the question of monitoring in the period provided in the closure plan - as noted, this is in effect, in perpetuity. Also continuous review of the closure plan is important.

**Daft Regulation 60 and 61 (Closure plan)**

Public notification, as far as we can see, is limited to that in DR 11, which in essence requires the closure plan to be placed on the ISA website at the time of consideration of a Plan of work. This would be many decades - or lifetimes - before any closure. Public consultation needs to be ongoing.

On Draft Regulation 61, we have already made the relevant observation that the effects of deep-sea mining may continue over vast timescales and EarthWorks quantified this in terms of millions of years. Monitoring needs to be reported in real time or at least regularly, and made public.

**Annex (Environmental Impact Assessment) - general comments**

We refer to the BBNJ negotiations which include detailed provisions on EIAs. Moreover, the annex cannot be properly developed until the Regulations are completed.

Therefore we believe that this can only be seen as a placeholder.

We associate ourselves with DOSI’s comments.

Having said that, for example, in part 1 ‘possible’ rather than ‘likely’ effects should be assessed. And also in (b), no significance is too high a threshold - more consideration is given. More than minor or transitory is one

**Executive Summary**

We have a few suggestions on wording:

a. Should include the current baseline. Nowhere is there a description of the current environment; only of the development.

b. “Economic, financial and other benefits to be derived from the project;” should include economic, financial and other costs including costs to other users, the cost of environmental impacts and externalities.

c. Anticipated impacts should instead read possible effects instead of impacts as the United States suggested. ‘Anticipated’ is subjective. We agree with the United States that cumulative impacts should be included here. As Costa Rica said, it should not be a closed list.

d. Should be broader than mitigation measures - they should also include prevention of effects not just minimise.

e. Consultation with other parties should read ‘Stakeholders’, also as the US suggested.

3.7. The no-action alternative is absent

**Part 2**
Part 2.3 should be an open list. We also agree with the Special Representative that this also needs to be able to capture future agreements, and we would cite for example as BBNJ.

This could be achieved by saying quote “as well as future relevant agreements, institutes and obligations” endquote

The list needs to include customary international law, including direct and due diligence obligations, as well as international commitments such as the Rio+20 Future We Want and the Leaders Pledge for nature, as well as international guidance, such as the FAO Deep Sea Guidelines, to name a few.

We also support Costa Rica’s suggestion that the EIS states how the proposed activity will comply with international commitments.

Part 3
3.11 Project area Needs to include not only contract area but the affected area. This is a crucial point to ensure that the affected area is to be considered - even if this is thousands or tens of thousands of square km. We agree with Chile on this matter.

On a related matter,
3.3.1 project scale should include scale of environmental area to be impacted including by the plume

3.3.4 The term “This section should also cover any disposal of seawater/fines.” is unclear
Should use the term discharged sediment and include the composition of such processed discharge

3.7 We agree with the US about the need to include a no-action alternative. This is not only other ways of mine but whether the mining itself should be carried out. We discussed this earlier.

Part 4
Agree with CR wording in making this list open-ended

There is a need for independent scientific research in this section

4.7 The oxygen minimum zone is also relevant to the higher water column. We don’t understand why it is limited to the bottom 200 m. The oxygen minimum zone is variable according to local circumstances. Robinson et al., 2010; Childress and Seibel, 1998; Seibel et al., 2016)

Also a description of the influence of climate change and ocean acidification processes is needed.

4.11 “Provide a description of the level of gas and chemical emissions from both natural and anthropogenic activities in the Area, as well as those affecting sea floor and water-column chemistry”

This needs to be much broader. Include a description of carbon sequestration processes including carbon storage and carbon flux, and how these may be affected and what the consequences of this may be, including contribution to climate change.

Part 5
We agree with DOSI that these need a lot more work including independent scientific advice.
For example 5.4 needs specific requirements of marine mammals surveys, such as acoustic surveys, what species are present in what numbers, at what depths and when. This a critical requirement in order to be able to ensure that there are no adverse noise impacts on marine mammals, were susceptibility to different frequencies and sound levels vary by species. The recent NORI EIA for example only included opportunistic surveys.

Also in 5.4, fish surveys are required at different depths and times for similar reasons.

The proposed US addition of species uniqueness is helpful here.

**Part 6**

6.2.1 Fisheries are not only relevant if the project area occurs within an area used by fisheries. The analysis must be provided if any fisheries may be affected wherever located. Plumes may drift thousands of kilometres.

It should describe traditional and industrial fisheries and how they may be affected need to be identified, including specific sensitivity to plumes and toxic material released.

It should also include susceptibility of fish and other species to the proposed plume, toxicity to possible toxic metals and to the plume needs to be added as well as sensitivity to noise and light pollution.

6.2.1 and the use of the term ecologically or biologically significant areas could be clarified by stating including those designated as such by the Convention on Biological Diversity.

We suggest that the cultural significance of areas targeted for mining, (such as traditional navigation routes) should be considered as a higher priority and included in its own section, rather than listed under ‘other, but we yield to FSM on this issue.

We agree with Costa Rica and DOSI on the inclusion of a section on ecosystem service in its own section.

**Part 7**

7.0 needs to add the term prevented before avoid, remedy or mitigate such impacts. Worth noting as we raised earlier today than any remedial or restoration efforts aren’t scientifically feasible.

7.9 we need specific noise frequencies and sound levels at different depths. This is critical issue. Otherwise effects cannot be assessed. Actual readings rather modelling is needed.

impacts from operations of machinery etc., e.g. Carbon emission needs to be considered. Deep-sea mining operations would add to already critical atmospheric greenhouse gas and pollution levels as well as ocean acidification and photochemical ozone formation.

We associate ourselves with DOSI’s comments on cumulative impacts and impacts on ecosystem services.

**Part 8**

a. We believe the word disturbance is misplaced. We suggest activity and impact. It is not only the recovery of the biological environment but the environment in general.
8.2 To the term crushing of animals suggest add terms ‘smothering and crushing of animals and other species
8.7.2 activities not just ‘where known’. Up to the applicant to make its own inquiries.

Part 9
The DSCC supports FSM’s suggestions about assessment of impacts on sociocultural environment.

9.4 This requires a description of socioeconomic and sociocultural benefits or impacts, including any applicable social initiatives. It should also include costs as well as benefits, as well as impacts.