

The International Seabed Authority and Current Issues in the Governance of Seabed Mining

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INTRODUCTION

Early commercial interest in seabed minerals

- First discovery of polymetallic nodules in 1860s but no commercial interests for a century.
- Book by John Mero in 1965 contributed to a nervous atmosphere almost instantly.
 - Only developed states had the technology and financial strength to access: “might is right”.
 - Small and developing states could not accept this and wanted to resist “first come, first serve”.
- Ambassador Arvid Pardo (Malta) speech in 1967 –these resources are of “common interest”.
- A string of UN General Assembly Resolutions between then and 1970:
 - Declared mineral resources in areas beyond national jurisdiction as “common heritage of mankind”, to be administered by an international organization.
 - Decided to convene the third UN Conference on the Law of the Sea (1973-1982)

UN Convention on the Law of the Sea 1982

- After intense negotiations, the LOSC was finally adopted in 1982.

Preamble

Part I: Introduction

Part II: Territorial Sea and Contiguous Zone

Part III: Straits Used for International Navigation

Part IV: Archipelagic States

Part V: Exclusive Economic Zone

Part VI: Continental Shelf

Part VII: High Seas

Part VIII: Regime of Islands

Part IX: Enclosed or Semi-enclosed Seas

Part X: Right of Access of Land-locked States [...]

Part XI: The Area

Part XII: Protection and Preservation of the Marine Environment

Part XIII: Marine Scientific Research

Part XIV: Development and Transfer of Marine Technology

Part XV: Settlement of Disputes

Part XVI: General Provisions

Part XVII: Final Provisions

The aftermath of the LOSC

- Part XI of LOSC outlined the regulatory framework for DSM in the Area and established the International Seabed Authority (ISA).
- However, LOSC did not enter into force due to lack of support.
 - Many important States did not ratify.
 - Main disagreement was on Part XI.
 - Mid-1980s: developed states initiated their own regime for DSM in the Area.
 - Resulted in a tensed situation and necessitated further negotiations.
 - Negotiations commenced in 1990
 - Led to the 1994 Agreement on the Implementation of Part XI of the LOSC.
 - Modified key parts of Part XI – included some big concessions from developing countries (e.g. financial assistance, transfer of technology, decision-making processes, etc.).
 - Paved the way for LOSC to receive overwhelming support.

The Area

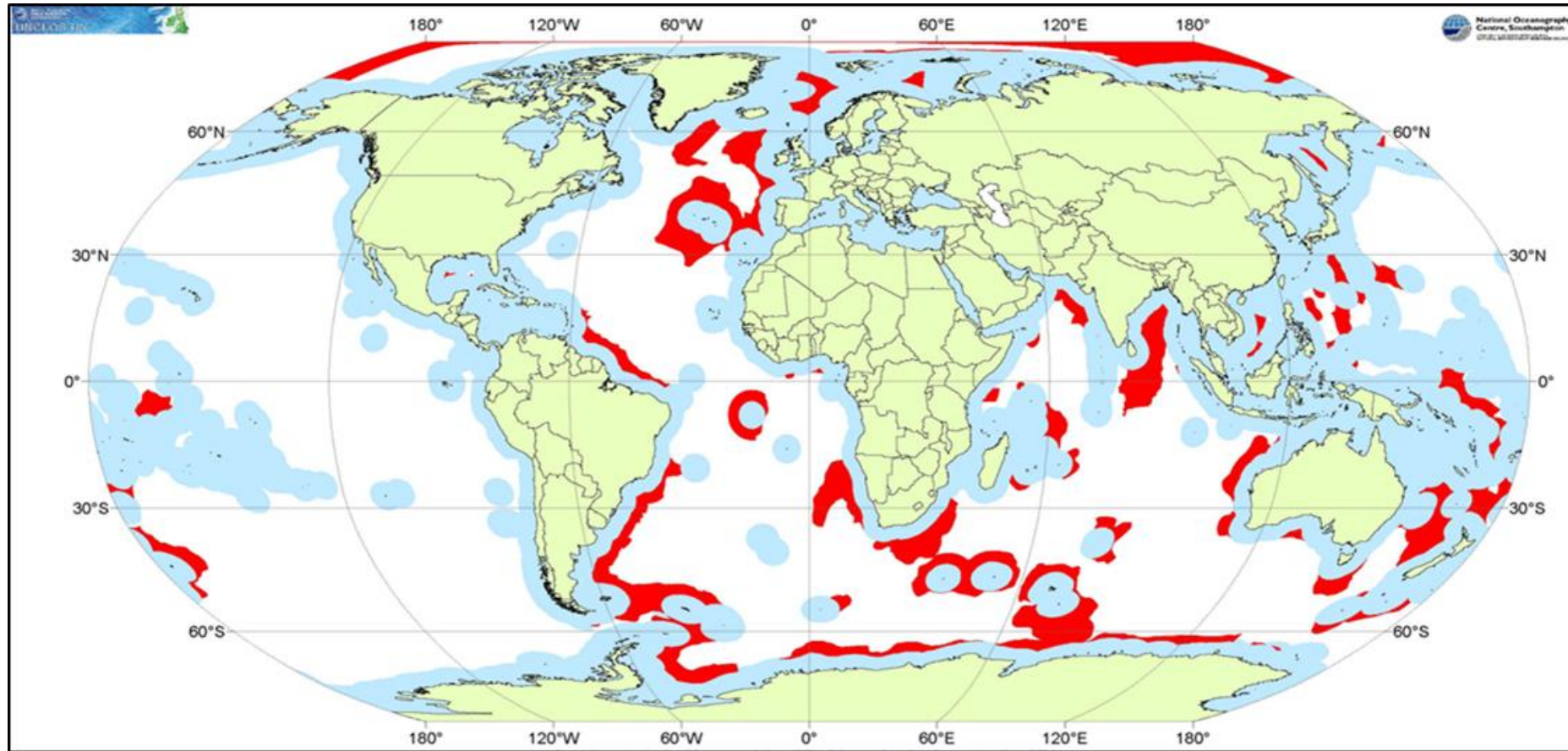


Chart showing the Area (spaces in white). Source: NOC/UNCLOS UK.

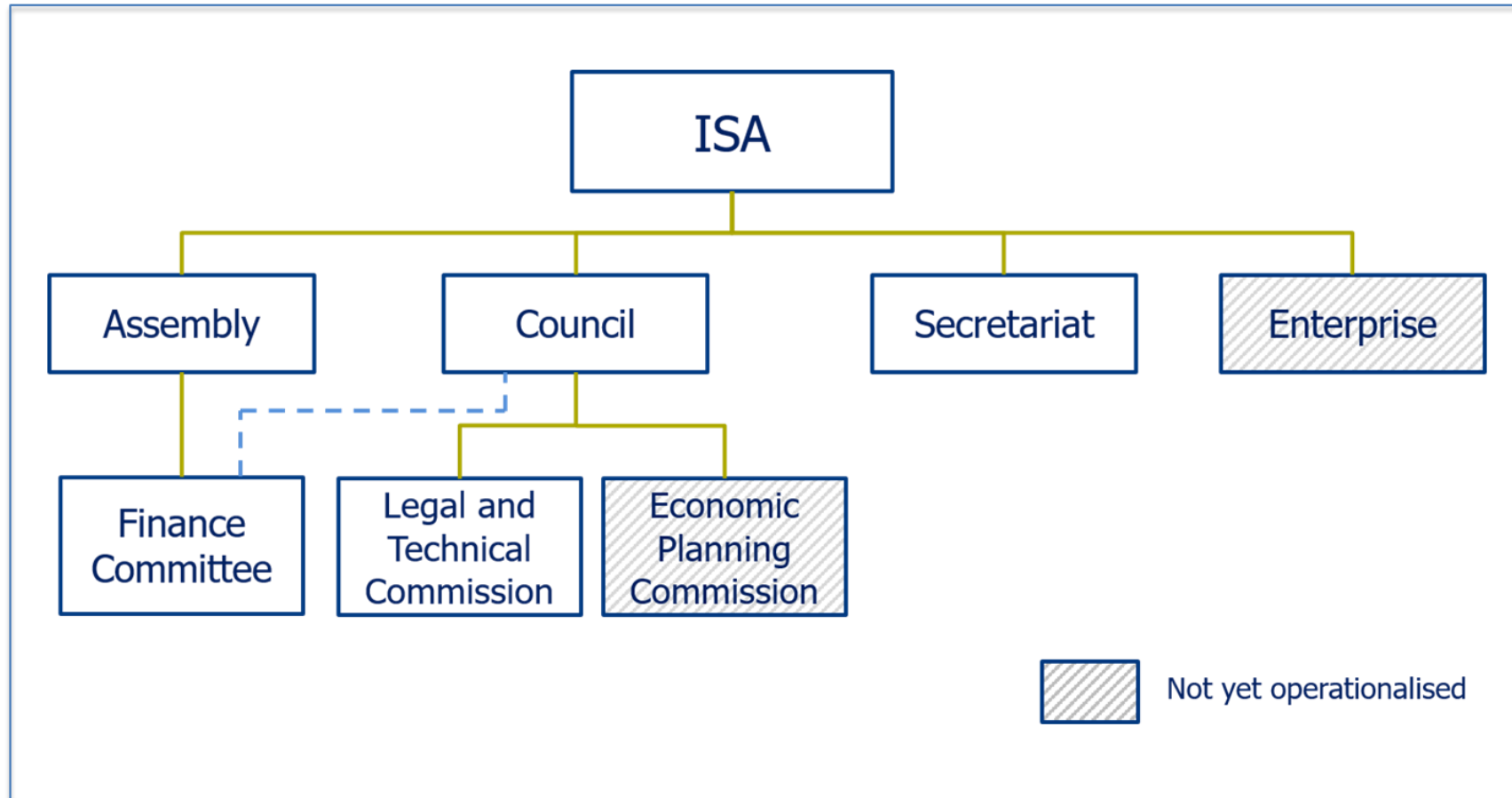
Salient principles governing the Area

UNCLOS Article	Provision
Art. 136	The Area and its mineral resources are the common heritage of mankind .
Art. 137	No claims or exercise of sovereignty or sovereign rights over the Area or its mineral resources. All rights in the mineral resources are vested in mankind as a whole, on whose behalf the ISA shall act in accordance with Part XI and the applicable RRP adopted by the ISA.
Art. 138	The conduct of States in relation to the Area shall be in accordance with Part XI.
Art. 139	States can be held responsible under international law for any damage caused by the failure to carry out its responsibilities under Part XI.
Art. 140	Activities in the Area shall be carried out for the benefit of mankind as a whole . Financial and other economic benefits derived from such activities shall be distributed equitably through an appropriate mechanism designed by the ISA.
Art. 141	The Area shall be used exclusively for peaceful purposes.
Art. 143	The conduct of marine scientific research in the Area shall be promoted.
Art. 145	Necessary measures shall be taken to ensure the effective protection of the marine environment from the harmful effects of activities in the Area.
Art. 147	Activities in the Area shall be carried out with reasonable regard for other activities in the marine environment and <i>vice versa</i> .
Art. 148	The effective participation of developing States in activities in the Area shall be promoted.

What is the International Seabed Authority?

- ISA is an autonomous international organization run by member States (i.e. all Parties to LOSC).
- Mandate over mineral resources of the Area, the rights of which are 'vested in mankind', with ISA acting 'on behalf of mankind as a whole'.
- Responsible for:
 - development of regulations for mineral exploration and exploitation;
 - considering and awarding mining contracts;
 - collecting payments from contractors
 - facilitate equitable sharing of financial and other economic benefits derived from mining in the Area;
 - compensating land-based mining developing countries for adverse economic impacts;
 - **whilst** ensuring the effective protection of the marine environment from harmful effects of mining;
 - exercising control over contractors; and
 - promoting marine scientific research.

Institutional structure of the ISA



The ISA

- Headquartered in Kingston, Jamaica.
- Primary organs:
 - Assembly
 - Supreme organ: 167 States + EU.
 - Approve regulations, ISA general policies (on Council's recommendations)
 - Council
 - Executive organ: 36 States only.
 - Decision-making organ: adopt and provisionally apply regulations, ISA specific policies, consider and approve mining applications.
 - Secretariat
 - Administrative organ: led by Secretary-General.
 - Permanent organ responsible for day-to-day running.



Subsidiary organ of the Council: LTC

- Members elected for 5 year terms by the Council from nominations by State Parties.
 - Current composition (until end of 2022) comprises 30 members.
- Significant responsibilities, especially environmental related.
 - Carrying out functions of the Economic Planning Commission in its absence.
- Key environmental responsibilities include to:
 - Formulate drafts of ISA rules, regulations and procedures, particularly on exploration and exploitation.
 - Review applications for plans of works for activities in the Area and submit recommendations to the Council.
 - Prepare assessments of the environmental implications of activities in the Area.
 - Make recommendations to the Council relating to emergency orders and the disapproval of exploitation areas.
- Major issues include: expertise, membership, transparency, outputs, workload.

CURRENT STATE-OF-AFFAIRS AT THE ISA

Who can apply to the ISA for a contract?

- The following may submit an application to the ISA:
 - Any Member States of UNCLOS;
 - The Enterprise (once operationalised); or
 - State-owned enterprises and private persons (mining companies), with the “sponsorship” of an eligible Member State or States.
 - States can sponsor their own nationals, as well as foreign nationals that are effectively controlled by them or their nationals (UNCLOS Art. 139, 153, and Annex III, Art. 4(3)).

Ongoing work of the ISA

- ISA 'turned' 25 in 2019.
- Exploration have been going on for two decades
 - Nodule exploration regulations: adopted 2000 (revised 2013).
 - Sulphides exploration regulations: adopted 2010.
 - Crusts exploration regulations: adopted 2012.
- A total of 31 exploration contracts awarded.
 - Nodules: 19
 - Sulphides: 7
 - Crusts: 5
- No exploitation activities as of yet.



IISD/RS



Current status of ISA Exploration contracts (as of September 2021). Source: ISA

The draft exploitation regulations

- Work commenced in 2014 at the LTC. In 2019, an advanced draft text presented to the Council.
- Text negotiations commenced at the Council in July 2019 and resumed in February 2020.
 - Three informal working groups established in February 2020:
 - Protection and preservation of the marine environment
 - Inspection, compliance and enforcement
 - Institutional matters
 - In addition to existing working group on the financial terms of exploitation contracts.
- Simultaneously, a phased-approach to Standards & Guidelines to give effect to regulations:
 - Phase 1: S&Gs necessary by the time of adoption of the draft regulations on exploitation.
 - Phase 2: S&Gs necessary prior to the receipt of an application of a plan of work for exploitation.
 - Phase 3: S&Gs necessary before commercial mining activities commence in the Area.
- The pandemic struck in March 2020. In June 2021, Nauru invoked the “two-year rule”.

What does the invocation mean?

- Section 1(15) of the 1994 Agreement Relating to the Implementation of Part XI of UNCLOS.
- Requires the ISA Council to accelerate the exploitation regulations, i.e. to complete elaboration and adoption within two years (which is by 9 July 2023), failing which, the Council would have to still have to consider and decide upon any pending application for exploitation despite the absence of regulations.
- Exploitation regulations must be adopted by consensus at Council.
 - The existence of one formal objection could result in a deadlock: Section 1(15) addresses that legal gap.
 - Primary intention to ensure that Council does not unnecessarily delay or to safeguard that a small number of States cannot “block” progress at the Council.
 - Not for situation where Council has been acting promptly and all States are genuinely negotiating the regulations.

Thoughts on the ‘two-year rule’

- Not an absolute deadline: Section 1(15)(c) concedes that the deadline can be missed.
- Arguable that the elaboration of the regulations is to be completed within the two years but the adoption or entry into force can come later.
- The two-year deadline is quite inconsequential if no application is submitted.
- Even if an application is submitted for consideration, there is no compulsion to approve it.
- Council can adopt provisional regulations to deal with the interim situation.

Singh P., ‘Legal Analysis of the Implications and Consequences of the Invocation of the ‘Two-year Rule at the International Seabed Authority, forthcoming (2022).

Options for the ISA/Council

- Forthcoming paper explores six options or pathways for the ISA as it moves forward in light of the invocation of the two-year rule:
 - Option 1: Proceed to meet the prescribed time
 - Option 2: Proceed notwithstanding the deadline by taking the time needed
 - Option 3: Adopt a provisional (temporary) set of regulations for the time being and continue to work on developing a system for exploitation
 - Option 4: Complete elaboration of the regulations within the prescribed time but not adopt them yet, or adopt them with conditions precedent in relation to their subsequent entry into force or application
 - Option 5: Adopt a 'precautionary pause' or moratorium on exploitation
 - Option 6: Consider avenues for judicial recourse

Singh, P. What Are the Next Steps for the International Seabed Authority after the Invocation of the 'Two-year Rule'? International Journal of Marine and Coastal Law 37 (2022).

What still needs to be resolved/agreed on?

Outstanding Matters Within the Exploitation Regulations

1. Necessary standards and guidelines that are to accompany the regulations.
2. Overarching environmental goals and objectives.
3. Threshold of environmental harm to apply when assessing applications.
4. Processes relating to the preparation and evaluation of Environmental Plans.
5. Status of regional environmental management plans (REMPs).
6. Compulsory test mining.
7. Aspects related to the progression of contractors into commercial production.
8. Financial terms of exploitation contracts.
9. The inspectorate.
10. ISA monitoring programmes.
11. Insurance and environmental performance guarantees.
12. Environmental compensation fund.
13. Adjacent coastal states and transboundary harm.

Outstanding Matters Intrinsically Related to Exploitation

1. Mechanism for the equitable sharing of benefits.
2. Compensation for developing States whose economies are dependent on terrestrial mining and suffer adverse consequences due to mining activities in the Area.
3. Constituting the Economic Planning Commission (EPC).
4. The operationalisation of the Enterprise.
5. Enhancing ISA environmental and scientific capacities.
6. Access to reserved areas and 'sponsorship of convenience'.
7. Broader reflections on the legitimacy of activities in the Area and ongoing negotiations of the 'BBNJ Instrument'.

Other Matters

1. Division of responsibilities (esp. sponsoring States).
2. The liability regime.

Update – Council’s December meeting

- Important agenda item for exploitation regulations: SG’s proposed roadmap for 2022-2023 to meet the deadline of 9 July 2023 at the Council.
- It was agreed to only have a schedule for 2022 for the time being:
 - February: Webinar/information session on environmental matters in the regulations.
 - 21.3-1.4: Commence/resume work through the four informal working groups; agree on intersessional work.
 - 19.7-29.7: Agenda to be developed based on progress.
 - 31.10-11.11: Agenda to be developed based on progress; review of progress and determining schedule for 2023; discussion on “what if” scenario.
- Confirms that:
 - Necessary for Council to accelerate work on the regulations but that “nothing is agreed until everything is agreed”.
- Primarily fixated on the exploitation regulations (and not on other intrinsically related matters).

ISA'S ENVIRONMENTAL RESPONSIBILITIES AND LEGAL DUTY TO ACT ON BEHALF OF HUMANKIND: A MORATORIUM?

Environmental responsibilities of the ISA

- Protection of the marine environment is a cornerstone of the regime for the Area.
 - LOSC and the 1994 Agreement entrusts the ISA to develop this responsibility further.

Article 145
Protection of the marine environment

Necessary measures shall be taken in accordance with this Convention with respect to activities in the Area to ensure effective protection for the marine environment from harmful effects which may arise from such activities. To this end the Authority shall adopt appropriate rules, regulations and procedures for *inter alia*:

- (a) the prevention, reduction and control of pollution and other hazards to the marine environment, including the coastline, and of interference with the ecological balance of the marine environment, particular attention being paid to the need for protection from harmful effects of such activities as drilling, dredging, excavation, disposal of waste, construction and operation or maintenance of installations, pipelines and other devices related to such activities;
- (b) the protection and conservation of the natural resources of the Area and the prevention of damage to the flora and fauna of the marine environment.

Ensuring effective protection ...

- LOSC: Effective protection is not just an aspiration but a legal duty.
- Significant scientific and knowledge gaps still exist.
 - Application of the precautionary approach. UN Ocean Decade presents a good opportunity.
- The other dimension of addressing climate change, i.e. halting the loss of marine biodiversity and enhancing the ability of the ocean to regulate climate, is being conveniently ignored.
 - Besides, seabed mining could exacerbate terrestrial mining and its problems.
- Environmental thresholds not determined; many ambiguities on environmental processes remain
 - E.g. environmental baseline data, EIA/EIS processes, criteria to assess applications.
- Institutional and governance framework requires much improvement:
 - The need for a dedicated scientific/environmental subsidiary body?
 - Transparency, accountability. Interaction with developments under BBNJ.

For the benefit of mankind as a whole

- Current financial models designed to attract investment.
- Does not adequately take into account environmental aspects, including loss of biodiversity and natural capital, and does not provide fair compensation to humankind.
 - Seems that only a handful will profit and not all of humankind.
- Geological data is kept strictly confidential
 - Despite being the common heritage of mankind, whereby all rights in the mineral resources are vested in mankind.
- Many questions on equity/fairness remain:
 - Benefit-sharing, the Enterprise, compensation to land-based mining developing countries, as well as on sponsorship, effective control and access to reserved areas.

Calls for a pause or moratorium

- Many external calls for a pause or moratorium have been addressed to the ISA, as well as internal processes in individual member states.
- No State has explicitly proposed a pause or moratorium at the ISA to date.
 - Recent ISA report (commissioned by the Secretariat) seems to try to dissuade this from happening at the ISA:
 - “From its inception, ISA has had a central role for civil society engagement in its processes [...]. NGOs have made valuable contributions to the framing of environmental regulations. Nevertheless, some are also simultaneously making a case outside ISA processes for a moratorium on deep-sea mining wherever it may occur. Many ISA Members who reach different conclusions on this issue, however, are currently shying away from engagement in the debate. [T]he failure of ISA’s Members to engage with critics may hinder progress [...].”
 - Invocation of the two-year rule might provide some impetus, although it will take a big shift in the current attitude displayed by most members of the Council.
- Options to pursue a pause or moratorium outside the ISA (e.g. UNGA, SPLOS, UN Ocean Decade, CBD, BBNJ) could also be considered, although viability and extent of influence remain unclear.
 - States cannot be allowed to take different/opposing/contradictory views in different fora.

Marine Expert Statement Calling for a Pause

Signed by 622 marine science & policy experts from over 44 countries

For the reasons outlined above, we strongly recommend that the transition to the exploitation of mineral resources be paused until sufficient and robust scientific information has been obtained to make informed decisions as to whether deep-sea mining can be authorized without significant damage to the marine environment and, if so, under what conditions. The United Nations Decade of Ocean Science for Sustainable Development (2021–2030) provides an opportune period in which to collect more information about the species and ecosystems that could be affected by deep-sea mining. As scientists, we deeply value evidence-based decision making, especially in instances as consequential as a global decision to open up an entirely new frontier of the ocean to large-scale industrial resource exploitation. The sheer importance of the ocean to our planet and people, and the risk of large-scale and permanent loss of biodiversity, ecosystems, and ecosystem functions, necessitates a pause of all efforts to begin mining of the deep sea, in line with the precautionary principle, and an acceleration of research so that we can gain a better understanding of what is at stake.

IUCN WCC Resolution 122 (September 2021)

069 - Protection of deep-ocean ecosystems and biodiversity through a moratorium on seabed mining

The IUCN World Conservation Congress, at its session in Marseille, France:

CALLS on all State Members, individually and through relevant international fora, to:

- a. support and implement a moratorium on deep seabed mining, issuing of new exploitation and new exploration contracts, and the adoption of seabed mining regulations for exploitation, including 'exploitation' regulations by the International Seabed Authority (ISA), unless and until:
 - i. rigorous and transparent impact assessments have been conducted, the environmental, social, cultural and economic risks of deep seabed mining are comprehensively understood, and the effective protection of the marine environment can be ensured;
 - ii. the precautionary principle, ecosystem approach, and the polluter pays principle have been implemented;
 - iii. policies to ensure the responsible production and use of metals, such as the reduction of demand for primary metals, a transformation to a resource-efficient circular economy, and responsible terrestrial mining practices, have been developed and implemented; and
 - iv. public consultation mechanisms have been incorporated into all decision-making processes related to deep-sea mining ensuring effective engagement allowing for independent review, and, where relevant, that the free, prior and informed consent of indigenous peoples is respected and consent from potentially affected communities is achieved; and
- b. promote the reform of the ISA to ensure transparent, accountable, inclusive, effective and environmentally responsible decision making and regulation.

Towards a moratorium?

- Can range from a pause, temporary suspension or permanent ban.
 - The nature of the call will influence its viability: e.g. a permanent ban might require an implementing agreement or amendment to LOSC.
 - Most calls to date are pertinent to exploitation and with “until and/or unless” conditions.
 - Exploration activities can continue and expected to continue collecting baseline data and close knowledge gaps.
- Environmental duty and the duty to represent mankind as a whole are essential obligations.
 - Exploitation activities cannot be allowed to commence if these cannot be ensured.
 - Should prevail over commercial interests of a small section of individuals or groups.
- LOSC allows mining under certain conditions – it does not require mining to happen at all costs.
 - State Parties determine what direction the ISA should take and are responsible for how they behave.
 - Environmental duty of the ISA and duty of ISA to represent and act in the best interest of humankind as a whole.

Concluding remarks/food for thought

- A moratorium is not “anti-international law”
 - The LOSC is a “living instrument”, and besides, all regimes must evolve
 - Moratoria have been introduced in other global regimes, e.g. Antarctic mineral resources, whaling, ocean fertilization.
- Contrary to being “anti-international law”, ensuring that mineral exploitation does not commence until the international community (through the ISA) is satisfied that preconditions under the LOSC are met is actually more in conformity with international law and the precautionary approach.
- UN Secretary-General, 2021: Ocean is now facing unprecedented levels of threat and degradation due to human activities – urgent action is required to restore ocean health.
- ISA Secretary-General, 2018:
 - *“Environmental protection is front and centre of the Authority’s responsibilities under the Convention. Seabed mineral exploitation cannot be permitted to proceed unless the Authority is satisfied that rigorous environmental safeguards are in place through globally applicable regulations that are binding upon member States.”*

THANK YOU

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