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The Development of the Deep Seabed Mining Regime by the International Seabed Authority: From Exploration to Exploitation.

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European University Institute

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Abstract

During the first period of functioning, between the entry into force of the United Nations Convention on the Law of the Sea (1994) and the approval of the first plan of work for exploitation, the International Seabed Authority has mainly carried out regulatory functions to allow the realization of activities of prospecting and exploration of deep-sea minerals resources of the Area. Currently, the Authority is moving to the regulation of exploitation of critical minerals in clean energy transition. The successes of its normative work will depend on how it understands and addresses four main challenges: transparency, (legal, technical, financial and scientific) uncertainty, (legal) integrity, and (social) accountability.

Keywords

Common Heritage of Mankind – Deep Seabed Mining – International Seabed Authority – Exploitation Regulations – Sustainable Development Goals – Marine Environment – BBNJ – Clean energy transition – Regional Environmental Management Plans.

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1. Introduction

Deep seabed mining (DSM) in the Area[1] are governed by Part XI of the Law of the Sea Convention (Convention[2]), the 1994 Implementing Agreement (1994 Agreement[3]) and the rules, regulations, and procedures (RRPs) adopted by the International Seabed Authority (Authority). The Authority is the organization through which States Parties to the Convention organize and control activities in the Area, particularly with a view to administering its resources[4]. The Area and its resources are the common heritage of mankind (CHM) and all rights in the resources of the Area are vested in mankind as a whole, on whose behalf the Authority shall act[5]. So, these resources[6] are not subject to alienation and the minerals recovered from the Area may only be alienated in accordance with the Convention, the 1994 Agreement and the RRPs of the Authority. In sum, the activities in the Area shall be carried out for the benefit of mankind as a whole and for peaceful purposes[7].

In the following sections we will address the main challenges the Authority faces in regulating such exploitation activities, in a controversial context over its environmental and social consequences. We will mainly deal with the law-making process of the draft exploitation

[1] Area means "the seabed ocean floor and subsoil thereof beyond the limits of national jurisdiction"; activities in the Area means "all activities of exploration for, and exploitation of, the resources of the Area", UNCLOS, arts. 1 (1) (3).

[2] United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982, in force 16 November 1994) 1833 *UNTS* 3 (UNCLOS).

[3] Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982 (New York, 28 July 1994, in force 28 July 1996) 1836 *UNTS* 3.

[4] UNCLOS, art. 157; 1994 Agreement, Annex, Section 1, paragraph 1.

[5] UNCLOS, art. 136 and 137 (2)

[6] For the purposes of the Part XI, "resources" means all solid, liquid or gaseous mineral resources in situ in the Area at or beneath the seabed, including polymetallic nodules, Article 133.

[7] UNCLOS, art. 140 (1) and art. 141.

regulations, currently under negotiation, from a technical-legal perspective, without being able to deal with the substantive aspects of the regulations in this paper.

2. The mandate of the Authority in a changing context

The mandate of the Authority was defined in 1970s in the context of the New International Economic Order (NIEO) and redefined in 1990s to adapt it to the political and economic changes, including market-oriented approaches affecting the implementation of Part XI[8]. More specifically, the 1994 Agreement stated that the "development of the resources of the Area shall take place in accordance with sound commercial principles"[9]. Nowadays, in the 2000s, the main challenge of the Authority is to interpret and fulfil its mandate in a new global context, mainly the 2030 Agenda for Sustainable Development[10]. Accordingly, the Strategic Plan of the Authority for 2019-2023 states that its mission is, *inter alia*, "to promote the orderly, safe and responsible management and development of the resources of the Area for the benefit of mankind as a whole, including through the effective protection of the marine environment and contributing to agreed international objectives and principles, including the Sustainable Development Goals[11]".

Therefore, the contribution of the Authority to the SDGs will be the result of the implementation (and balance) of its economic, environmental and social mandates including: (i) ensuring that activities in the Area are carried out for the benefit of mankind as a whole; (ii) ensuring effective protection for the marine environment and the safety of human life; (iii) promoting and encouraging the conduct of marine scientific research in the Area and the effective participation of developing States in activities in the Area; (iv) fostering healthy development of the world economy and balanced growth of international trade; (v) ensuring the development of the resources of the Area and the enhancement of opportunities for all States Parties[12].

3. Regulatory Functions of the Authority: The Evolutionary Approach

During the first period of functioning, between the entry into force of the Convention (1994) and the approval of the first plan of work for exploitation, the Authority has mainly carried out regulatory functions to allow the realization of activities of prospecting and exploration of polymetalic nodules, polymetallic sulphides and cobalt-rich crusts[13]. As provided for in the

[8] See 1994 Agreement, *Preamble*. In practice, the Annex of the Agreement constituted an amendment to Part XI of the Convention that removed all those elements contrary to free market principles in order to facilitate the signature and ratification by the industrialized states. The original regime was indeed very much in favour of developing countries, and included provisions on mandatory technology transfer, production limits and financing of the Enterprise's activities in the reserved areas. See D. H. Anderson, "Efforts to Ensure Universal Participation in the United Nations Convention on the Law of the Sea", *International and Comparative Law Quarterly,* vol. 42, part 3, July 1993, 886-893.

[9] 1994 Agreement, Annex, Section 6 (1) (a).

[10] A/RES/71/1, 3 October 2016, *Transforming our world: the 2030 Agenda for Sustainable Development*, including the SDG 14 "Conserve and sustainably use the oceans, seas and marine resources for sustainable development".

[11] ISBA/24/A/10, 27 July 2018, par. 7.

[12] UNCLOS, art.140 (1) and 150 (1); art.145; art.146; art.143; art.148; art.150 (b) and (g).

[13] Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area, adopted on 13 July 2000 which were later updated and adopted on 25 July 2013 (ISBA/19/C/17 and ISBA/19/A/9); Regulations on Prospecting and Exploration for Polymetallic Sulphides in the Area, adopted on 7 May 2010 (ISBA/16/A/12/Rev.1) and Regulations on Prospecting and Exploration for Cobalt-Rich Crusts, adopted on 27 July 2012 (ISBA/18/A/11). The complete set of these regulations form part of the "Mining Code" together with recommendations by the Legal and Technical Commission for the guidance of contractors, including those on the assessment of the

1994 Agreement, the Authority has concentrated on the adoption of RRPs necessary for the conduct of activities in the Area "as they progress"[14]. This "evolutionary approach" requires the organs of the Authority the continuous examination of factors that condition the progress of activities as the scientific knowledge available, the development of marine technology relating to the protection and preservation of the marine environment or aspects of the commercial DSM[15]. It is therefore foreseen that exploitation regulations, including those relating to the protection and preservation of the marine environment, will be developed in due course[16].

According to article 15 (a) of the Section 1 of the Annex, the Council may elaborate and adopt such regulations at the request of a State whose national intends to apply for approval of a plan of work for exploitation. Thus, in July 2011, the delegation of Fiji made a statement, supported by other delegations, requesting the Council to take up the formulation of the regulations governing the exploitation of deep-sea minerals in the Area[17]. The main factors determining a renewed interest in the potential for commercial exploitation of deep seabed minerals, that justified the transition to exploitation were: (a) a dramatic increase in the demand for metals due to the continued growth of the world's population and economy, as well as the technological transformation from fossil to renewable energy sources and the emergence of e-mobility; (b) an equally dramatic rise in metal prices; (c) the high profitability of mining sector companies; (d) a decline in the tonnage and grade of known land-based nickel, copper and cobalt sulphide deposits; (e) the intention of resource-poor countries to secure their supply of raw materials and reduce their dependence on quasi-monopolists of certain metals; and, (f) technological advances in DSM and processing[18]. Two other factors were decisive for the start the developing of exploitation regulations: the first DSM licence granted by Papua New Guinea to Nautilus Minerals Inc. under its jurisdiction[19], and the fact that the first contracts for polymetallic nodules exploration in the Area due to expire in 2016[20]. Consequently, the Authority is currently moving from the regulation of prospecting and exploration of deep-sea minerals resources of the Area to the regulation of exploitation for commercial purposes.

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environmental impacts (ISBA/25/LTC/6/Rev., ISBA/21/LTC/11, ISBA/21/LTC/15, ISBA/21/C/19, ISBA/19/LTC/14).

[14] 1994 Agreement, Annex, Section 1.5 (f). This "evolutionary approach" is also applied on an institutional level: "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", *ibid,* Section 1.3.

[15] 1994 Agreement, Annex, Section 1.5 (d) (i) (h).

[16] 1994 Agreement, Annex, Section 1 (5) (k).

[17] *Statement to the Council by the delegation of Fiji*, ISBA/17/C/22, 22 July 2011.

[18] *Towards the development of a regulatory framework for polymetallic nodule exploitation in the Area. Note by the Secretary,* ISBA/19/C/5, 25 March 2013, para. 1. See also the complete report published as *Technical Study: No. 11* (2013).

[19] In 1997 the Government of Papua Nueva Guinea granted the first of several exploration licences to Nautlius Minerals Ltd to. The licence to mine the most prospective collection of deposits, known as Solwara 1, was granted to the same company in June 2011, and production was expected to start in 2018. On the failure of the Solwara project see https://ejatlas.org/conflict/deep-sea-mining-project-solwara-1-in-the-bismarck-sea-papua-new-guinea (accessed 28 October 2021).

[20] ISBA/19/C/5, par. 4. The exploration contracts are approved for a period of 15 years. After this period, the contractor shall apply for a plan of work for exploitation unless the contractor has already done so or has obtained an extension for the plan of work for exploration. Such extensions shall be approved "if the contractor has made efforts in good faith to comply with the requirements of the plan of work but for reasons beyond the contractor's control has been unable to complete the necessary preparatory work for proceeding to the exploitation stage or if the prevailing economic circumstances do not justify proceeding to the exploitation stage", 1994 Agreement, Annex, Section 1 (9). See *Procedures and criteria for the extension of an approved plan of work for exploration pursuant to section 1, paragraph 9, of the annex to the Agreement relating to the implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982*, ISBA/21/LTC/WP.1, 14 January 2015.

4. Lawmaking process at the Authority

As other international organizations, the Authority has the capacity to develop and express a legal will of its own, independent of that of its Member States, individually or collectively considered. Likewise, its regulatory capacity must be deployed, on the one hand, within the limits of the competences expressly conferred upon it by the Convention or are implicitly deduced from it, and, on the other hand, with a view to achieving the common objectives set by the Member States[21].

The legal bases for its regulatory activity are expressly stated in Article 17 of the Annex III of the Convention, in relation to other articles of Part XI and considering the terms of the 1994 Agreement, the prolonged delay in commercial DSM and the likely pace of activities in the Area[22]. According to it, the Authority shall adopt RRPs for the exercise of its functions on the following matters: (a) administrative procedures relating to prospecting, exploration and exploitation in the Area[23]; (b) operations, included, prevention of interference with other activities in the marine environment and conservation of the resources and the protection of the marine environment[24]; (c) financial matters, included those concerning the financial terms of a contract between the Authority and the contractors and the equitable sharing of financial and other economic benefits derived from activities in the Area and the payments and contributions made pursuant to article 82[25]; (d) a system of compensation or other measures of economic adjustment assistance for developing States which suffer adverse effects caused by activities in the Area[26].

The 1994 Agreement adds that among the early functions of the Authority is to adopt RRPs incorporating applicable standards for the protection and preservation of the marine environment and timely elaboration of RRPs for exploitation, including those relating to the protection and preservation of the marine environment[27].

In the law-making process the two principal organs of the Authority (Council and Assembly) are involved, as well as the Legal and Technical Commission (LTC), a subsidiary organ of the Council[28], and the Finance Committee (FC), a subsidiary organ of the Assembly[29]. The LTC is in charge for formulating and submitting to the Council the RRPs considering all relevant factors including assessments of the environmental implications of activities in the Area[30]. The RRPs are later negotiated within the Council, the executive organ of the Authority[31], and

[21] UNCLOS, article 157; 1994 Agreement, Annex, Section 1 (1).

[22] 1994 Agreement, Annex, Section 1 (5) (f).

[23] UNCLOS, art. 160 (2) (f) (ii); art.162 (2) (o) (ii).

[24] UNCLOS, art. 145 (marine environment) and art. 146 (human life).

[25] UNCLOS, art. 160 (2) (f) (i); art. 162 (2) (o) (i).

[26] UNCLOS, art. 151 (10); art. 164 (2) (d).

[27] 1994 Agreement, Annex, Section 1(5) (f) (g).

[28] UNCLOS, art. 163 (1). The Convention provides for the setting up of a Economic Planning Commission, but according to the 1994 Agreement, its functions are performed by the LTC until such time as the Council decides otherwise or until the approval of the first plan of work for exploitation, Annex, Section 1 (4).

[29] The Finance Committee was established by the 1994 Agreement, Annex, Section 9.

[30] UNCLOS, art. 165 (2) (f).

[31] UNCLOS, art. 162. The Council is a restricted body, consists of 36 members of the Authority: 18 represents the regional groups, the other 18 represent various interest groups, 4 major consumers or importers of the commodities produced from the minerals to be derived from the Area, 4 largest investors in activities in the Area, 4 major producers or exporters of the categories of minerals to be derived from the Area, 6 developing states representing special interests. 1994 Agreement, Annex, Section 3, paragraph 15.

subsequently be adopted before they are submitted to the Assembly, the supreme organ[32] comprising 167 members and the European Union, to give its final approval. The Council will apply the RRPs provisionally, pending approval by the Assembly[33]. RRPs on the equitable sharing of financial and other economic benefits derived from activities in the Area require a recommendation of the FC[34].

As a general rule, decision-making in the organs of the Authority should be by consensus. If all efforts to reach a decision by consensus have been exhausted, decisions by voting in the Assembly on questions of substance shall be taken by a two-thirds majority of members present and voting and decisions by voting in the Council shall be taken by a two-thirds majority of members present and voting, provided that such decisions are not opposed by a majority in any one of the chambers[35]. This was one of the amendments introduced by the 1994 Agreement in the composition and decision-making of the Council[36]. However, paragraph 5 of Section 3 of the Annex maintains consensus as the final method of decision-making on all matters for whose decision the Convention requires consensus of the Council. According to Article 161 (8) (d), which applies, decisions on matters of substance arising under article 162 (2) (m) and (o) shall be taken by consensus. In other words, the adoption of RRPs is always decided by consensus of the Council, there will be not final vote. This method can paralyse the Council's normative work, delaying negotiations without reaching a consensus and creating a significant legal vacuum if a request for approval of a work plan for the exploitation were to be submitted, as we will see later.

5. Transparency and Stakeholder's participation

In the governance of natural resources, in general, transparency is found to be a necessary factor for improved accountability, as well enforceability, compliance and sustainability[37]. In the administering of the resources of the Area (CHM), transparency is an essential element of good governance and is therefore a guiding principle for the Authority in the conduct of its business as a publicly accountable international organization[38]. Therefore, the Authority is

[32] UNCLOS, Art. 160 (1). The supreme character of the Assembly is due solely to its plenary character, since "the general policies of the Authority shall be established by the Assembly in collaboration with the Council", 1994 Agreement, Annex, Section 3 (1).

[33] UNCLOS, art. 160 (2) (f); art. 162 (2) (o).

[34] 1994 Agreement, Annex, Section 3 (7) (f).

[35] 1994 Agreement, Annex, Section 3 (2) (3) and UNCLOS, article 159 (8). The Council consists of 36 member States distributed into five *groups of interests* (chambers): (a) Four members among major *consumers or importers* of the commodities produced from the categories of minerals to be derived from the Area ; (b) Four members from among the eight major *investors* in the conduct of activities in the Area; (c) Four members among major *producers* or *net exporters* of the categories of minerals to be derived from the Area ; (d) Six members from among developing States Parties, representing *special interests* ; (e) Eighteen members elected according to the principle of ensuring an equitable *geographical distribution* of seats in the Council as a whole, 1994 Agreement, Annex, Section 3 (15).

[36] Each group of States elected under paragraph 15 (a) to (c) shall be treated as a chamber for the purposes of voting in the Council. The developing States elected under paragraph 15 (d) and (e) shall be treated as a single chamber for the purposes of voting in the Council, 1994 Agreement, Annex, Section 3 (9) (a).

[37] J. A. Ardron (*et al*), "Incorporating transparency into the governance of deep-seabed mining in the Area beyond national jurisdiction", *Marine Policy,* 89 (2018) p. 58.

[38] ISBA/24/A/10, 27 July 2018, Annex, par. 25. Regarding the increase of transparency throughout the DSM process, it is agreed the value of applying the principles embodied in the Aarhus Convention: access to environmental information, public participation in environmental decision-making and access to justice. (UNECE, Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, Aarhus, 25 June 1998). See World Economic Forum, *Toward Transparency and Best*

committed to meaningful and informed engagement with all stakeholders in the work of its different organs and in the advancement of its mandate. This compromise is reflected in the Strategic Plan[39] and the High-Level Action Plan for 2019-2023[40], and developed in the Stakeholder Engagement Strategy published in 2020[41]. This strategy states that the Authority strives to ensure effective, broad and balanced participation of stakeholders as they play a central role in contributing to the decision-making process and in providing expertise and scientific knowledge in support of the work of the Authority. According to its "guiding principles" the Authority compromises *to inform* stakeholders on the work undertaken by its different organs; *to consult* stakeholders with a view of seeking their inputs and collecting feedbacks on analysis, alternatives or decisions at key steps of the work undertaken; *to involve* directly stakeholders to ensure that their concerns and perspectives are consistently considered and taken into account; *to collaborate* with stakeholders for the fulfilment of the mandate given to the Authority by the Convention and the 1994 Agreement and to empower stakeholders to be part of the decision-making processes and be accountable for the results of such decisions[42]. Among the four categories of stakeholders interacting with the Authority, two non-state actors with conflicting objectives are particularly relevant in the current law-making process: environmental non-governmental organizations and contractors[43]. Environmental NGOs may be granted observer status if they can demonstrate their interest in matters under consideration by the Assembly[44]. These NGOs may designate representatives to participate, without the right to vote, in the deliberations of the Council, upon invitation of the Council, on questions affecting them or within the scope of their activities[45]. The regime is different in relation to contractors, a new actor in the United Nations system. Their legal status is derived directly from the Convention which recognizes specific rights and obligations[46] to them by the fact that they

Practices for Deep Seabed Mining. An initial multistakeholder dialogue, Bellagio, Italy 7-9 October, January 2016, p. 5.

[39] Strategic Direction 9 (Commit to transparency) and specifically Strategic Direction 9.4, which call for the development of a "stakeholder communications and consultation strategy and platform, which facilitates open, meaningful and constructive dialogue, including on stakeholder expectations", *ibid*.

[40] ISBA/25/A/15, 24 July 2019.

[41] *Communications and Stakeholder Engagement Strategy (Zero Draft).* The Authority refers to the relevant provisions of the Rules of procedure of the different organs of the Authority as well as the principles and best practices followed by other UN organizations. The deadline to present comments was 29 January 2021, available at: https://isa.org.jm/node/19976 (accessed 28 October 2021).

[42] *Ibíd*., p. 9.

[43] "Stakeholders" include national governments, intergovernmental organizations, non-governmental organizations, the private sector, development partners, academia and the general public. Different rules apply to these different stakeholders depending on the context, *ibíd.* p. 10.

[44] Rules of Procedure of the Assembly, rule 82 (1) (e). See also *Guidelines for observer status of non-governmental organizations with the International Seabed Authority*, ISBA/25/A/16, 26 July 2019, Annex. As of June 2021, there were 92 observers including 30 observer states, 32 UN agencies and intergovernmental organizations as well as 30 non-governmental organizations with which the Secretary-General has entered into arrangements in accordance with UNCLOS or have been invited by the Assembly, UNCLOS, art.169 (1) (2).

[45] Rules of Procedure of the Council, rule 75.

[46] These rights and obligations are mainly found in Annex III of the Convention, in the Annex of the 1994 Agreement, in the exploration regulations and in the contracts, as well as, in the future exploitation regulations. For example, contractors have the right of access to the Seabed Dispute Chamber (art. 187, Convention), the right to enter into a joint arrangements with the Authority through the Enterprise (Annex III, article 11); the right not to be discriminated against in the approval of plans of work [1994 Agreement, Annex, Section 1 (6) (a)] or the right of confidentiality of data and information submitted to the Authority (Regulation 36). Contractors have also significant financial obligations (Regulation 19), the obligation to report annually in writing to the Secretary-General on their activities (Regulation 32) and to take measures to prevent, reduce and control pollution and other hazards to the marine environment arising from its activities in the Area as far as reasonably possible applying a precautionary approach and best environmental practices (Regulation 31).

enter directly into a contract with the Authority to carry out activities in the Area in accordance with the RRPs adopted by the Authority and the terms of the contract[47].

In any case, decision-making within the Authority remains the prerogative of members, as in other international organizations. However, during the sessions of the Assembly and the Council, qualified observers can, through their accredited representatives, contribute to the governance and participate on policymaking and decision- making processes[48]. The meetings of the Assembly and the Council are held in public unless otherwise decided[49]. On the contrary, as a general rule, meetings of subsidiary organs of the Assembly and the Council (such as the FC and the LTC) are held in private are therefore closed to observers[50]. The LTC could decide to hold open meetings, for instance when discussing "issues of general interest to members of the Authority, which do not involve the discussion of confidential information"[51]. In practice, however, the LTC rarely holds open meetings because of the confidentiality requirements[52]. Because all recommendations, documents and RRPs developed by the Commission are submitted to the Council, where they are publicly negotiated with the participation of all stakeholders prior to adoption, a certain degree of transparency is nevertheless ensured.

However, despite the Authority's commitment to transparency criticisms persist regarding access to information and public participation in decision-making process[53]. The Authority's capacity to regulate is also questioned. As a result, proposals have been made to improve the technical capacity of the LTC and the Secretariat, mainly on environmental issues[54].

6. Uncertainties and the triggering of the "two years-rule"

The development of the exploitation regulations by the Authority has been carried out from the outset in a context of great uncertainty, at least in four fields[55]: (i) *legal*: unlike the Convention which set out detailed and prescriptive policies for the conduct of commercial mining, the sections 6, 7 and 8 of the Annex to the 1994 Agreement sets out principles providing broad guidance on the policy framework within which detailed regulations are to be developed; (ii) *technical*: there is a high risk associated with the mining and processing systems, as none of the exploration contractors have undertaken (until 2021) the testing of collecting systems and

[47] As of June 2021, the Authority has entered into 31 exploration contracts with 22 entities. More information is available at https://www.isa.org.jm/exploration-contracts (accessed: 28 October 2021).

[48] *Stakeholder Engagement Strategy,* p. 10.

[49] Rules of Procedure of the Assembly, rule 43(1); Rules of Procedure of the Council, rule 39(1).

[50] Rules of Procedure of the Finance Committee, rule 31(1); Rules of Procedure of the Legal and Technical Commission, rule 6.

[51] Rules of Procedure of the Legal and Technical Commission, rule 6.

[52] Recommendation 33. Transparency in the LTC needs to be addressed with urgency, and consideration should be given to opening up the LTC meetings more often, *Periodic Review of the International Seabed Authority pursuant to UNCLOS Article 154. Final Report,* 30 December 2016 (ISBA/23/A/3, 8 February 2017, p. 55).

[53] In the Final Report the lack of transparency in the work of the Authority was mentioned repeatedly, although concerns about transparency were particularly focused on the LTC. The LTC is not open to observers and LTC members operate under strict rules of confidentiality and non-disclosure. Recommendations 31, 32, 33 and 34, *ibid*, pp. 54-55. See also P. Chaumette, *et all* (coord.), *Transforming the Ocean Law by Requirement of the Marine Environment Conservation,* Centre de Droit Maritime et Océanique, Université de Nantes, Marcial Pons, 2019, available at https://halshs.archives-ouvertes.fr/halshs-02395852/document (accessed 10 March 2022).

[54] See Suggestions for facilitating the work of the International Seabed Authority. Submitted by the delegation of Germany, ISBA/24/C/18, 27 June 2018. And the informal document submitted by Belgium Strengthening the environmental scientific capacity of the International Seabed Authority.

[55] This is evident from the *workplan for the formulation of regulations for the exploitation of polymetallic nodules in the Area* (ISBA/18/C/4, 25 April 2012).

equipment, processing facilities and transportation systems[56]; (iii) *economic*, the lack of a cost model of a mining venture conditions the financial aspects of the exploitation regulations; and, mainly (iv) *scientific*: the still insufficient knowledge about the environmental impact of the exploitation activities raises the fundamental question of how to interpret and apply the precautionary approach[57]. The knowledge on the diversity and abundances of species, the composition of ecosystems, and how the habitats within the deep-sea environment interrelate and interact with each other is still limited. Although it seems clear that, in the context of DSM, commercial-scale DSM operations will disturb, damage or remove structural elements of ecosystems, cause biodiversity loss and impact ecosystem services[58].

Therefore, it was also clear from the beginning that owing to the complexity of the issues involved in the development of the exploitation regulations "it [would] be necessary to provide the LTC with relevant technical advice and information prior to its consideration of detailed draft regulations"[59]. This technical advice has been provided through technical studies and discussion papers prepared by the Secretariat with the assistance of external consultants, workshops' reports, background studies, stakeholder surveys and concrete proposals submitted by States' members of the Council[60]. To move forward with its work, the LTC adopted the *building block approach* taken by the Secretariat but reiterating that "no single element or package of the regulatory code would be agreed upon until everything had been agreed upon"[61].

The informal negotiations on substance started in July 2016, when members of the Council and other stakeholders considered the First Working Draft[62] presented by the LTC and endorsed a list of priority deliverables and an action plan[63]. One year later, the LTC concluded the First Draft of the Exploitation Regulations (Draft Regulations[64]), a consolidated text incorporating environmental and inspection provisions. Member States and other stakeholders

[56] The major step forward the development of exploitation technology has been the recent test of the Patania II collector by the Belgium contractor GSR in April/May 2021. See https://www.offshore-energy.biz/deep-sea-mining-robot-gets-stuck-4500-metres-beneath-pacific-oceans-surface/ (accessed 28 October 2021).

[57] See A. L. Jaeckel, "The Implementation of the Precautionary Approach by the International Seabed Authority", *Discussion Paper No. 5,* March 2017.

[58] H. J. Niner (*et al*), "Deep-sea mining with no net loss of biodiversity—an impossible aim", *Frontiers in Marine Science,* 5, 53 (2018). See also D. J. Amon, and H. Lily, "Challenges to the sustainability of deep-seabed mining", *Nature Sustainability* 3, 784–794 (2020); L. A., Levin, (*et al*), "Defining "serious harm" to the marine environment in the context of deep-seabed mining", *Marine Policy* 74, 245–259 (2016); J. M. A. Van der Grient and J. C. Drazen, "Potential spatial intersection between high-seas fisheries and deep-sea mining in international waters", *Marine Policy* 129 (2021); C. L. Van Dover, (*et al*), "Biodiversity loss from deep-sea mining", *Nature Geoscience,* 10, 464–465 (2017).

[59] ISBA/18/C/4, par. 29. It was also pointed our that "[w]hile the secretariat provides technical advice to the Commission on matters within its competence, it should be noted that only limited resources are available within the existing work programme and budget to advance work on exploitation regulations. In particular, the secretariat currently has no staff positions for minerals economists, commercial lawyers or mining lawyers and it will therefore be necessary to have recourse to consultants and advisory meetings of experts to provide the necessary skills and knowledge for this purpose", par. 30.

60 All this information is available at https://isa.org.jm/mining-code/ongoing-development-regulations-exploitation-mineral-resources-area (accessed 28 October 2021).

[61] ISBA/22/C/17, 13 July 2016, par. 38.

[62] Developing a Regulatory Framework for Mineral Exploitation in the Area. Report to Members of the Authority and all Stakeholders, July 2016.

[63] ISBA/22/C/17, Annex II, Priority deliverables, high-level issues, action plan: update and suggested work programme discussion.

[64] *Draft Regulations on Exploitation of Mineral Resources in the Area*, ISBA/23/LTC/CRP.3, 8 August 2017. See also the note of the secretariat, ISBA/23/C/12, 10 August 2017.

were invited to make comments on the draft regulations, and in particular to address a number of general and specific questions[65].

The Council initiated substantive informal discussions on the draft regulations at its meetings in March and July 2018. During the first part of the session, the Council discussed six common themes arising from the responses to the draft regulations, which main objective was to provide action-oriented advice to the LTC to facilitate its forthcoming deliberations[66]. In the continuing development of the draft regulations, the Council highlighted the need for a transparent and inclusive approach to the drafting of their content[67]. During the second part, the Council provided general comments on the first eight parts of the revised draft regulations[68] and on areas on which the LTC had requested guidance from the Council (relating to the structure of the draft regulations, the balance of rights and obligations, the balance between certainty and predictability, as well as flexibility and adaptability, the roles of organs of the Authority and the balance of authority, confidentiality of information and annual fixed fee)[69]. The Draft Regulations was a complex but well-systematized text containing 105 regulations, distributed in thirteen parts, eight annexes and four appendices that reaffirms in its preamble the fundamental importance of the principle that the Area and its resources are the common heritage of mankind. It was commonly accepted that the CHM principle calls for the development of a robust, equitable and sustainable regime governing DSM[70].

At that time, other important issues were included in the agenda of the Council conditioning the future development of the draft regulations: (i) the informal discussions of an economic model/payment regime and other financial matters[71]; (ii) the proposal by the Government of Poland for a possible joint-venture operation with the Enterprise[72]; (iii) and the mechanism of election of members of the LTC[73]. These issues reopened the old dialectic between industrialised and developing countries on how to interpret and apply the CHM principle, which have become a brake in the negotiations. The LTC also started the development of Standards and Guidelines as part of the legal framework[74].

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[65] ISBA/23/C/12, 10 August 2017, par. 5. See Briefing note on the submissions to the draft regulations on exploitation of mineral resources in the Area, (ISBA/24/C/CRP.1, 22 February 2018).

[66] Issue note 1: understanding the pathway to exploitation and beyond. Issue note 2: payment mechanism. Issue note 3: the role of the sponsoring States. Issue note 4: role and legal status of standards, recommendations and guidelines. Issue note 5: broader environmental policy and the regulation. Issue note 6: roles of the Council, the Secretary-General and the Legal and Technical Commission in implementing the regulations, *ibid*.

[67] ISBA/24/C/8, 13 March 2018, par. 19.

[68] ISBA/24/LTC/WP.1/Rev.1, 9 July 2018.

[69] ISBA/24/C/20, 18 July 2018, par. 19-27.

[70] *Toward Transparency… loc. cit.*, p. 5.

[71] In 2019, the Council set up an Open-Ended Working Group in respect of the development and negotiation of the financial terms of a contract under article 13 (1) of the Annex III of the Convention and Section 8 of the Annex to the 1994 Agreement.

[72] ISBA/24/C/12, 25 May 2018. In 2019 the Council requested the Secretary-General to extend the contract and renew the terms of reference of the Special Representative for the Enterprise and to provide the requisite funds related o the work of the Special Representative, taking into consideration the need to finalize the joint venture with Poland, ISBA/25/C/16, 1 March 2019, par. 4. According to 1994 Agreement, Annex, Section 2 (1) the Council has to appoint from within the staff of the Authority an interim Director-General to oversee the performance of the functions of the Enterprise until it begins to operate independently.

[73] See ISBA/22/C/29, 26 July 2016, ISBA/23/C/2, 11 November 2016, ISBA/24/C/14, 31 May 2018, ISBA/25/C/22, 9 May 2019, ISBA/25/C/L.2, ISBA/26/C/L.2, 27, January 2020, ISBA/26/C/20, 16 July 2020.

[74] *Content and development of standards and guidelines for activities in the Area under the Authority's regulatory framework*, ISBA/25/C/3, 17 December 2018. In 2020 and 2021 there have been two public consultations on the draft standards and guidelines. All information is available at https://www.isa.org.jm/es (accessed 28 October 2021).

In July 2019, it was circulated the last version of the draft exploitation regulations[75], and a new version, prepared by the Secretariat including specific drafting suggestions by members of the Council, was circulated in December 2019[76]. The substantial informal discussion of the draft regulations was to be continued during the first part of the 26th session (February 2020), however, difficulties on the negotiations on a mechanism for the election of the members of the LTC did not allow progress to be made as expected. In addition to the above-mentioned open-ended working group on financial matters, the Council decided to establish three other informal working groups: (i) on the protection and preservation of the marine environment; (ii) on inspection, compliance and enforcement and (iii) on institutional matters (including the role and responsibilities of the various organs of the Authority, timelines, recourse to independent expertise, and stakeholder participation). The informal working groups will be open to observers and other stakeholders and shall be held in public unless otherwise decided[77]. The LTC as well as the Council agreed to a schedule that aims at concluding the negotiations of the regulations by 2020, however due to the covid-19 pandemic the 26th session of the Council planned for July 2020 was postponed until further notice.

During this uncertain and unpredictable situation of the pandemic, in June 2021, the Government of the Republic of Nauru, the first developing State, and the first small island developing State to sponsor a contract for exploration in a reserved area on the Clarion Clipperton Zone (CCZ), triggered the "two-year rule"[78]. According to this rule if a request is made by a State, the Council shall complete the adoption of such regulations on exploitation within two years of the request. In its letter, Nauru notified the President of the Council, that NORI (Nauru Ocean Resources Inc.) intends to apply for a plan of work for exploitation and requested the Council to complete the adoption of the regulations on exploitation in two years of the operative date of this request, which is 30th June 2021.

In response to the Nauru submission, the African Group adopted a common position according to which some critical questions must be substantially answered before regulations on exploitation can be finalized and commercial scale mining can be permitted even on provisional basis: (i) the mechanism for equitably sharing benefits derived from seabed mining; (ii) the impact of such activity on terrestrial mining economies; and (iii) the effects of mining on deep ocean ecosystems and coastal States. These issues add to other institutional issues as developing countries' continuing call for the need to operationalize the Enterprise, included a

[75] ISBA/25/C/WP.1, 22 March 2019.

[76] ISBA/26/C/CRP.1, 17 December 2019. See also the *Collation of specific draft suggestions by members of the Council,* ISBA/26/C/CRP.1, 17 December 2019.

[77] ISBA/26/C/11, 21 February 2020.

[78] 1994 Agreement, Annex, Section 1 (15) (c) (c) "[i]f the Council has not completed the elaboration of the rules, regulations and procedures relating to exploitation within the prescribed time and an application for approval of a plan of work for exploitation is pending, it shall none the less consider and provisionally approve such plan of work based on the provisions of the Convention and any rules, regulations and procedures that the Council may have adopted provisionally, or on the basis of the norms contained in the Convention and the terms and principles contained in this Annex as well as the principle of non-discrimination among contractors". About the possible legal consequences of the application of this rule see A. S. Pradeep, "The two-year deadline to complete the International Seabed Authority's Mining Code: Key outstanding matters that still need to be resolved", *Marine Policy,* Volume 134, December 2021 and K. Willaert "Under Pressure: The Impact of Invoking the Two Year Rule within the Context of Deep Sea Mining in the Area", *The International Journal of Marine of Coastal Law,* 36 (2021), 1-9.

Director-General and governing board[79], the establishment of the Economic Commission and a more equitable distribution of members of the LTC[80].

7. Challenges regarding integrity of the Convention and the legacy of the *package deal*

The Convention is considered to be the "Constitution of the Oceans[81]" and represents the result of an unprecedented, and so far, never replicated, effort at codification and progressive development of international law[82]. Although the Convention was eventually adopted by vote, it was negotiated following a "package deal" approach in order to obtain consensus. The most important procedural devices adopted in order to make progress towards a consensus were two: (i) the use of restricted negotiating groups to deal with specific issues (Committees), which were made necessary by the difficulty of negotiating in plenary bodies and the need to achieve progress between the most interested delegations and group representatives; (ii) the "Negotiating Texts" which contained a draft of the articles of the future convention prepared, in separate parts, under their responsibility, by the Chairmen of the main committees[83]. Nevertheless, the lack of consensus on Part XI forced the Convention to adopt the convention by voting. This short reminder of the negotiating process of the Convention serves us to show the delicate balance of interests existing between different parts of the Convention and the importance of keeping its unity and internal coherence in the development of the provisions of Part XI and 1994 Agreement by the Authority.

According to article 147 of the Convention, "activities in the Area shall be carried out with reasonable regard for other activities in the marine environment". This article guarantees the respect of other legitimate uses such as shipping, fishing, or laying submarine cables. This article is developed by draft regulation 31, which states that contractors shall carry out exploitation activities in accordance with article 147 of the Convention and the approved Environmental Management and Monitoring Plan and Closure Plan and applicable international rules and standards established by competent international organizations. In particular, each contractor shall exercise due diligence to ensure that it does not cause damage to submarine cables and pipelines in the contract area. At the same time, the Authority has the duty to take measures to ensure that other activities in the marine environment shall be conducted with reasonable regard for the activities of contractors in the Area. These measures are not yet concreted, but it has been understood that conflicts between mining and other legitimate uses can be better addressed at regional level, through specific Regional Environmental Management Plans (REMPs)[84].

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[79] According to Section 2 (1), Annex, 1994 Agreement, the Secretariat of the Authority shall perform the functions of the Enterprise until it begins to operate independently of the Secretariat. The Secretary-General of the Authority shall appoint from within the staff of the Authority an interim Director-General to oversee the performance of these functions by the Secretariat.

[80] The question of a mechanism for the election of the members of the LTC was one of the central topics of discussions among regional groups during the second part of the 26th session held in December 2021, in informal sessions under the guidance of the Russian facilitator, without being able to reach any agreement. Negotiations will continue during the first part of the 27th session in March 2022.

[81] *A Constitution of the Oceans*, Remarks by Tommy T. B. Koh, President of the Third United Nations Conference of the Law of the Sea, available at https://www.un.org/depts/los/convention_agreements/texts/koh_english.pdf (accessed 28 October 2021).

[82] See T. Treves, "United Nations Convention on the Law of the Sea", *United Nations Convention on the Law of the Sea. Introductory Note,* available at https://legal.un.org/avl/ha/uncls/uncls.html (accessed 28 October 2021).

[83] Ibíd.

[84] ISBA/26/C/7, par. 14. The REMPs include assessment, management and monitoring measures, aimed at

The Authority also needs to regulate the protection of the rights of coastal States in accordance with article 142 of the Convention, according to which activities in the Area shall be conducted with due regard to the rights and legitimate interests of any coastal State across whose jurisdiction the deposits of the Area lie. The article includes the obligation to consult the State concerned, including a system of prior notification, with a view to avoiding infringement of such rights and interests. Draft regulation 4 describes a mechanism to give effect that right of coastal States: any coastal state may notify the Secretary –General a "serious harm" or a "threat of serious harm" to its coastline or to the marine environment under its jurisdiction or sovereignty, who shall immediately inform the LTC, the contractor and its sponsoring State or States of such notification. The contractor and its sponsoring State or States shall be provided with a reasonable opportunity to examine the evidence, if any, and submit their observations thereon to the Secretary-General within a reasonable time. If the LTC determines that there are clear grounds for believing that serious harm to the marine environment is likely to occur, it shall recommend that the Council issue an emergency order pursuant to article 165 (2) (k) of the Convention. If the LTC determines that the serious harm or threat of serious harm to the marine environment is attributable to a breach of the exploitation contract, the Secretary-General shall issue a compliance notice or direct an inspection of the contractor's activities pursuant to article 165 (2) (m) of the Convention and Part XI of the regulations. This complex procedure is yet under consideration by the Council as well as Part XI relating to inspection, compliance and enforcement.

Moreover, the Authority has the mandate to protect the biological diversity of the Area according to article 145 of the Convention. Although some delegations have expressed the need to pay attention to the results of the parallel BBNJ process, and the Authority has an active role in it[85], no explicit reference has been included in the Draft Regulations. This is a sensitive topic that has been avoided until now and which encapsulates the controversial call by environmental groups for an international moratorium on DSM[86].

The Draft Regulations also include references to other applicable international rules and standards established by international organizations or general diplomatic conferences, *inter alia*: (i) concerning the safety of life at sea, the pollution of the marine environment by vessels, the prevention of collisions at sea and the treatment of crewmembers [DR 30 (2)]; (ii) concerning the Environmental Impact Statement (shipping regulations, maritime declarations, marine scientific research, climate change policies, Sustainable Development Goals), other applicable international agreements (SOLAS, MARPOL, London Convention) and applicable regional agreements, and other applicable standards, principles and guidelines [draft Annex IV].

Finally, attention should also be paid to the draft Annex X relating to the "standards clauses for exploitation contract". Section 17 (1) states that the contract is governed by the terms of [the] contract, the rules of the Authority and other rules of international law not incompatible with the Convention.

facilitating seabed mining activities as well as, *inter alia*, "identifying and mitigating conflicts in different uses by avoiding overlap between contract areas, reserved areas, areas of particular environmental interest, marine protected areas and areas designated for other legitimate uses (such as fisheries, submarine cables)".

[85] The Authority's statements are available at: https://www.isa.org.jm/es/node/18845

[86] See Deepsea Conservation Coalition available at http://www.savethehighseas.org/2019/08/19/calls-for-a-deep-seabed-mining-moratorium-grow/, IUCN Motion 069 available at: https://www.iucncongress2020.org/motion/069 (accessed 28 October 2021).

8. Accountability and the First Periodic Review (2015)

Accountability in international law is in essence an instrument to secure control of public power. This is a useful concept in the context of the exercises of the Authority's powers and functions as other international organizations (i. e. European Union, World Bank)[87]. In the management of the CHM some questions arise: Who is entitled to protect the benefit of the humanity (mankind)? How can the Authority's accountability to humanity (mankind) be made effective? The humanity is the holder of the common heritage, but it is not a subject of international law. The reference to it in the Convention has important consequences at the axiological and practical level. It must be understood as a frame of reference that symbolise the progressive awareness of common interests that go beyond national interests and which therefore places us before one of the most advanced expressions of the principle of international solidarity in its two dimensions: intra-generational and inter-generational[88].

The drafters of the Convention understood that only states acting together could achieve the highest degree of representation of humanity. For this reason, the Authority was conceived as an intergovernmental organisation with a universal vocation. Specifically, the Assembly composed of all Member States (and the European Union) would be the most representative organ[89]. The Convention also emphasises that the administration of the resources of the Area must reflect the interests not only of the peoples under the jurisdiction of the States that are members of the Authority, but also of the peoples of those States that have not ratified the Convention, those that have not yet become States[90]. This leads to the conclusion that the Authority acts on behalf of a collectivity greater than that represented by the sum of its Member States in the Assembly. Although the intergenerational dimension (future generations) is not explicitly mentioned, it is obvious that it is implicit in the expression "mankind as a whole[91]". In these 25 years it has highlighted the importance of international civil society, represented by non-governmental organisations concerned with the protection of the common heritage for the future generations. This is a specific feature of the Authority.

Regarding the second question, the mechanism established by the Convention to make accountable the Authority was the Conference of Review provided for in the article 154, where it expressly states that it will consider "whether the [legal regimen] which governs the system of exploration and exploitation of the resources of the Area have achieved their aims in all respects, including whether they have benefited mankind as a whole"[92]. The first periodic review took place in 2015, when the Assembly decided to undertake a general and systematic review of the manner in which the international regime of the Area had operated in practice[93]. Independent consultants appointed by a Review Committee conducted the review and all stakeholders, not only States, were consulted.

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[87] See D. Curtin and A. Noalkaemper, "Conceptualizing accountability in international and European law", *Netherlands Yearbook of International Law,* Volume XXXVI, (2005) 3-20.

[88] See M. E. Salamanca-Aguado, La Zona internacional de los fondos marinos. Patrimonio común de la humanidad, Dykinson, 2003.

[89] UNCLOS, Articles 159 (1) and 160 (1).

[90] UNCLOS, Articles 140, 160 (2) (f) (i) and 162 (2) (o) (i).

[91] UNCLOS, Articles 140, 143, 149, 150 (i), 153 (1).

[92] UNCLOS, Article 154 (1) (a) and 1994 Agreement, Annex, Section 4.

[93] ISBA/21/A/Rev.1, 24 July 2015. According to the Terms of Reference, the report includes a review of the manner in which the various organs and subsidiary organs of the Authority have operated in practice and of whether they have effectively performed the functions stipulated in paragraph 5 of section 1 of the annex to the 1994 Agreement.

The Assembly considered the Final Report at its twenty-third session, in 2017[94]. The Report concluded that the Authority is not yet fulfilling its obligations to ensure that activities in the Area are carried out for the benefit of mankind, but it has, however, made some efforts to involve developing States and had avoided discrimination. The main concerns relates to the capacity of the Authority to enforce conditions of exploration contracts and the lack of transparency of the governance processes. In particular the report affirms that there is a need for an independent regulatory body (autonomous inspectorate) to be set up that is capable of implementing or enforcing terms and conditions of contracts of exploration but above all future contracts of exploitation[95]. Most of the developments operated by the Authority over the last seven years are aimed at addressing these shortcomings, as we have seen in the preceding paragraphs.

9. Conclusion

The Authority is under enormous stress in the performance of its regulatory mandate[96]. The on-going process of developing the exploitation regulations of deep-seabed minerals of the Area is conditioned by internal and external factors that we have been recounting in this paper. From a law-making point of view, we have identified four main challenges that the Authority needs to address in order to successfully fulfil its current mandate to develop a robust and comprehensive set of exploitation regulations.

Stakeholder's participation in the decision-making process of the political organs of the Authority and in the work of its technical bodies is still an unresolved issue in the face of the environmental stakeholders' demands for greater transparency and the necessity to protect contractors' confidential information. In our view, it is relevant to underline the important contribution of the stakeholders to the law-making process of the Draft Regulations and the Standards and Guidelines that accompany them by providing expertise and scientific knowledge. This collaborative work with the Secretariat, the technical bodies and the Member States of the Council is desirable and should continue in the future. Although the trigger of the two-year rule is a temporary constraint for the Authority, it is desirable that it serves to improve working methods and that face-to-face sessions, where possible, be truly productive. It is everyone's responsibility to ensure that on-going work complies with the principle of cost-effectiveness provided for in the 1994 Agreement[97].

It is at the same time relevant that the Authority guarantees the unity and internal coherence of the Convention in the development of the provisions of Part XI and 1994 Agreement. This is particularly relevant in relation to the results of the parallel BBNJ process. But also in relation to the due respect for other legitimate uses of the sea such as shipping, fishing or the laying

[94] ISBA/23/A73, 8 February 2017, Annex.

[95] The *Final Report* includes 34 Recommendations concerning the control of seabed activities by Sponsoring States, a clear strategy and policy data management, the legal rights and responsibilities with respect to exploration and exploitation of deep-sea minerals, the review of annual reports and plans of work, the protection and preservation of the marine environment, the promotion and encouragement of marine scientific research in the Area, the development of marine technology, the confidentiality and transparency and other institutional matters as the adoption of a long-term plan defining the strategic direction and aims of the Authority. See note 58.

[96] As was evident from the discussions at the second part of the 26th session of the Council (6-10 December 2021) regarding the approval of the *Road Map for the 27th session, in 2022* (ISBA/26/C/CRP.2/REV.1, 10 December 2021).

[97] "In order to minimize costs to States Parties, all organs and subsidiary bodies to be established under the Convention and this Agreement shall be cost-effective. This principle shall also apply to the frequency, duration and scheduling of meetings", 1994 Agreement, Annex, Section 1 (2).

of submarine cables. To this end, it should be a priority for the Authority to make progress in the design and adoption of REMPs, and, where possible, the establishment of Areas of Particular Environmental Interest (or “Protected Areas”).

Finally, accountability is a relevant indicator for assessing the Authority’s work in the administering of the common heritage for the benefit of mankind as a whole. We cannot forget that the Authority performs its functions in the name of humanity and therefore its mandate goes beyond accommodating national or private interests and must protect the common good. This requires an assessment of whether the institutional structure of the Authority allows this objective to be achieved. A forthcoming Periodic Review will be able to assess these and other issues in the future.