

# Deep-Sea Minerals

Briefing, November 2017

## Latest Developments

### 1. The International Seabed Authority Consultation on Draft Exploitation Regulations

The Secretariat of the International Seabed Authority (ISA) released "Draft regulations on exploitation of mineral resources in the Area" on 8 August 2017 together with a list of consultation questions. Comment by stakeholders are requested by 20 December 2017 by email to [consultation@isa.org.jm](mailto:consultation@isa.org.jm).

A copy of the draft regulations under consultation can be found online here: <https://www.isa.org.jm/files/documents/EN/Regs/DraftExpl/ISBA23-LTC-CRP3-Rev.pdf>.

The accompanying note from the ISA Secretary-General, highlighting specific consultation questions can be found online here: <https://www.isa.org.jm/document/isba23c12>.

A lack of member state participation in previous consultations was highlighted in the last ISA Annual Session. The regulations under consultation are a crucial component of the regulatory regime for international waters, and will dictate what rules and standards will be applied to any future mining projects in 'the Area' (i.e. on the seabed beyond national jurisdiction), where the resources are designated the 'Common Heritage of Mankind'.

It is important that the ISA hears the views of as many member states as possible at this critical juncture.

Commonwealth member governments are therefore warmly encouraged to participate in this ISA consultation on the Exploitation Regulations. To support such efforts, and in response to requests received from member countries, Commonwealth Secretariat has developed an advisory note designed to assist member country preparation of responses to the consultation, which covers:

1. Process of Development of the Draft Regulations
2. Flow Chart of the Application Process
3. Regulatory Aspects
4. Environmental management Aspects
5. Financial Aspects

Member Governments are invited to contact Commonwealth Secretariat for a copy of this advisory note, by email to Hannah Lily [h.lily@commonwealth.int](mailto:h.lily@commonwealth.int)

For more information on any of the issues raised in this advisory note, or other deep-sea mineral matters, please contact Hannah Lily on [h.lily@commonwealth.int](mailto:h.lily@commonwealth.int)

This is Issue 3 in the Commonwealth Deep Sea Minerals Briefing series. Previous Issues can be found here: <http://thecommonwealth.org/oceans-and-natural-resources>

## ISA regulations: the key questions

Below we outline 9 key questions in relation to the latest draft ISA Exploitation Regulations. These are expanded further in a Commonwealth Secretariat Advisory Note, available upon request (see above).

1. Is the principle that exploitation in the Area must be carried out 'for the benefit of humankind as a whole' reflected and realised in the regime presented by the draft regulations?
2. Does the application system inadvertently establish an institutionalised bias towards exploitation contract approval?
3. Do the plans that comprise the contractual 'plan of work' provide sufficient information for exploitation contract decision-making and regulatory control, and hold contractors to expected levels of commercial production? Is it acceptable that plans of work and feasibility assessments can be amended by contractors during the life of the contract through fairly light-touch processes?
4. Is the inter-relation clearly delineated and coordinated between the regulatory roles of sponsoring States, the ISA, and flag states respectively?
5. Is it sufficiently clear how environmental permitting decisions will be taken, including what impacts are 'judged to be acceptable' by the ISA?
6. Are there aspects of the environmental management regime, covered in the January ISA 2017 discussion paper, which should not have been omitted from the draft regulations on the presumption that they will be covered instead in LTC 'Recommendations' documents?
7. Do the draft regulations successfully require 'best environmental practices' from contractors, and 'effective protection of the marine environment' from all parties?
8. Is it correct to presume a need to incentivise first movers to kick-start commercial exploitation (via a low burden of taxation)?
9. Do the advantages of the Payment Regime comprising only a royalty outweigh the costs?

## 2. Legal Working Group on Liability for Environmental Harm from Activities in the Area Beyond National Jurisdiction, London – September 2017

Concerns about potential environmental and economic impacts are often at the forefront of the deep-sea minerals debate. Less reported, but equally crucial, are some of the legal uncertainties. This was the issue at the heart of the meeting hosted by the Commonwealth Secretariat in London on 28-29 September 2017, in partnership with the ISA, and the Centre for International Governance Innovation (CIGI). The meeting brought together 14 expert ocean lawyers from around the world (including Commonwealth nationals from Canada, Malta, Singapore, South Africa, Trinidad and Tobago and UK), to launch a new working group to explore liability issues, trying



Group photo from London meeting of legal experts

to identify legal pitfalls that might arise in a future where exploitation is occurring in the Area, under ISA and sponsoring state regulation.

Lively debate took place over two days in Marlborough House, London, as these experts asked: "if something goes wrong, who is legally answerable?" A simple-sounding question, but with no easy answer. A mining operation run from ships in international waters will involve a multiplicity of actors, regulators, and legal regimes – giving rise

to grey areas about who is responsible for what, in certain circumstances. The Working Group identified six areas to research further, in order to assist the ISA and states develop the relevant legal regimes. The September meeting was a fruitful starting point. The working group will now work to delve further into these legal questions, in order to report back, at the next ISA meeting of States, in March 2018. A copy of a workshop report will also be published.

### The Legal Liability Working Group

Name	Affiliation
<b>Alfonso Ascencio-Herrera</b>	International Seabed Authority Secretariat
<b>Chris Brown</b>	International Seabed Authority Secretariat
<b>Eden Charles</b>	Former Ambassador (Trinidad and Tobago) and former chair of BBNJ PrepComm
<b>Aldo Chircop</b>	Dalhousie University (Schulich School of Law)
<b>Neil Craik</b>	Centre for International Governance Innovation
<b>Tara Davenport</b>	National University of Singapore (Centre for International Law)
<b>Hannah Lily</b>	Commonwealth Secretariat, Oceans and Natural Resources
<b>Ruth MacKenzie</b>	University of Westminster (Law School)
<b>Steven Roady</b>	Duke University School of Law and Nicholas Institute for Environmental Policy Solutions
<b>Andres Rojas</b>	Member of ISA Legal and Technical Commission (Argentina)
<b>Zoe Scanlon</b>	National University of Singapore (Centre for International Law)
<b>Dire Tladi</b>	University of Pretoria (Faculty of Law)
<b>Guifang (Julia) Xue</b>	Shanghai Jiao Tong University (Law of the Sea Institute)
<b>Elie Jarmache</b> [absent from the London meeting]	Member of ISA Legal and Technical Commission (France)

### 3. ISA Workshop on the Design of “Impact Reference Zones” and “Preservation Reference Zones” in Exploitation Contract Areas, Berlin – September 2017

Impact reference zones (IRZs) and preservation reference zones (PRZs) are required by existing ISA regulations, but are neither well elaborated nor are their purposes fully agreed-upon. In general, they are supposed to detect environmental change and harm occurring as a result of seabed mining. The ISA Workshop held in Berlin on 27–29 September highlighted that, the ‘devil is in the [scientific] details.’

To be confident that observed changes are not part of natural variability or other factors external to mining, proper experimental design requires both unaffected ‘control’ sites (the PRZs) and sites that are likely to be impacted (the IRZs). In order to detect changes over time, measurements will need to be taken both before and after mining begins. In scientific parlance, this is known as ‘before–after–control–impact’ (BACI) and is considered fundamental to good experimental design. However, there are several important decisions that need to be made beforehand to ensure that what one seeks to detect is indeed both detectable and detected. The process can be divided into three steps, all of which were discussed at the workshop:

1. Determining possible effects of mining (which differ for different mineral resource types).
2. Determining what should be measured to indicate these effects are occurring.
3. Designing a monitoring regime with sufficient statistical power to detect such effects.



Jeff Ardron, Commonwealth Secretariat Ocean Adviser, presenting at the ISA Berlin meeting

The largest contingent of the meeting attendees were ISA contractors. Also present were academic scientists, governments, non-governmental organisations, and the Commonwealth Secretariat.

The outcome of the workshop will be published prior to the next ISA Council meeting (in March 2018) as a Technical Study.



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Author: Oceans and Natural Resources Division, Commonwealth Secretariat, London, UK.

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For more information on these items, or any deep-sea mineral matters, please contact Hannah Lily, [h.lily@commonwealth.int](mailto:h.lily@commonwealth.int)

Commonwealth Secretariat  
Marlborough House, Pall Mall, London SW1Y 5HX, United Kingdom  
Tel: +44 (0)20 7747 6500  
[www.thecommonwealth.org](http://www.thecommonwealth.org)