

# Deep-Sea Minerals

Briefing, March 2018

## Latest Developments

### 1. Responses to the International Seabed Authority Consultation on Draft Exploitation Regulations

Fifty five countries submitted responses to the International Seabed Authority (ISA) Secretariat's consultation on their August 2017 "Draft regulations on exploitation of mineral resources in the Area" (ISBA/23/LTC/CRP.3\*). These submissions have been published on the ISA website, here: <https://www.isa.org.jm/files/documents/EN/Regs/2017/List-1.pdf>, along with a [briefing note](#) summarising responses.

The Commonwealth Secretariat wishes to congratulate the 26 Commonwealth countries who made their voices heard through their government submission, or as part of the regional African Group response.

The latter is worth highlighting. This is the first time a regional response has been provided to an ISA consultation, and represents a common position from forty-seven countries. It is significant that all of the forty-seven members of the African Group are developing states, which, according to the UN Convention on the Law of the Sea (UNCLOS), must have their specific needs and interests taken into account in relation to seabed mineral activities beyond national jurisdiction. It should also be noted that currently none of these countries



The ISA African Group chaired by Algeria and hosted by South Africa spent a December weekend discussing the draft ISA Exploitation Regulations, with support from the Commonwealth Secretariat and Pew Charitable Trusts

are contractors or sponsors of ISA contractors. Their submission, prepared with the assistance of a workshop supported by Commonwealth Secretariat, identified key UNCLOS principles, such as the Common Heritage of Mankind, compensation mechanisms for negative impacts on land-based mining economies, and the prioritisation of the interests of developing States. The African Group's response also contained detailed comments and some probing questions about the proposed royalty regime for exploitation, which was published for the first time in the draft Exploitation Regulations.

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

A review of the Commonwealth responses identifies some other common themes. Below are a top ten issues, listed in order of frequency (i.e. how many times the points were raised in different Commonwealth member countries' submissions.)

1	<p><b>Consultation</b> mechanisms need more work. For example:</p> <ul style="list-style-type: none"> <li>• 'Interested persons' should be interpreted widely to include all stakeholders (and reflect the Common Heritage of Mankind principle);</li> <li>• the definition of 'confidential information' should be improved and objective; and</li> <li>• the regulations should detail consultation processes better, including how responses will be taken into account, and what information will come back to consultees.</li> </ul>
2	<p>The absence of <b>environmental aspects</b> in the draft regulations raises concern and requires further discussion, including the following areas which were not addressed in the current version:</p> <ul style="list-style-type: none"> <li>• Overarching environmental objectives;</li> <li>• Strategic environmental assessment, regional environmental management plans, and 'areas of particular environmental interest';</li> <li>• environmental risk assessment;</li> <li>• Fragile ecosystems;</li> <li>• How to operationalise best environmental practice and a precautionary approach;</li> <li>• The definition of 'acceptable harm'.</li> </ul>
3	<p>A need to clarify which organ should be the <b>appropriate decision-maker</b> within the ISA for which decisions. For example, it may not be appropriate for the ISA Secretariat to take some decisions on behalf of the ISA Council.</p>
4	<p>A request for more detail about the interaction between ISA and a <b>sponsoring state</b>. For <b>example</b>, how the two regulatory entities will coordinate around information-sharing, monitoring and enforcement.</p>
5	<p>Concern about the way the draft regulations currently envisage contractors being able to use their <b>contract as security</b> to raise additional finance, via a mortgage or other such charge.</p>
6	<p>A need for a higher degree of scrutiny over applications for <b>renewal</b> of a contract.</p>
7	<p>Better inclusion of measures to ensure transparency and rationale in <b>decision-making</b>, including strengthened processes to enable applications for exploitation to be refused if key criteria are not met.</p>
8	<p>Further elaboration of how, by whom, when, under what conditions, and in accordance with what criteria, <b>modification of plans of work</b> can be effected.</p>
9	<p>A need for the regulations to include express requirements for the ISA to conduct regular <b>monitoring and review</b> (including of annual reports, environmental performance, and contract compliance) for each contract.</p>
10	<p>The ISA's <b>Legal and Technical Commission must be fit-for-purpose</b> in its composition and process to enable stringent review of exploitation applications, and should access external technical expertise to bolster its competence when required.</p>



Legal Liability Working Members at the February 2018 meeting in London. From left to right: Dire Tladi (South Africa), Steve Roady (US), Julia Xue (China), Neil Craik (Canada), Alison Swaddling (ComSec), Chris Brown (ISA), Elie Jarmarche (France), Hannah Lily (ComSec), Tara Davenport (Singapore), Eden Charles (Trinidad and Tobago), Andres Rojas (Argentina), Ruth Mackenzie (UK), Alfonso Ascensio-Herrera (ISA), Freedom-Kai Phillips (CIGI). Photo by Trevor Hunsberger, CIGI

## 2. Legal Working Group on Liability for Environmental Harm from Activities in the Area Beyond National Jurisdiction, London - February 2018

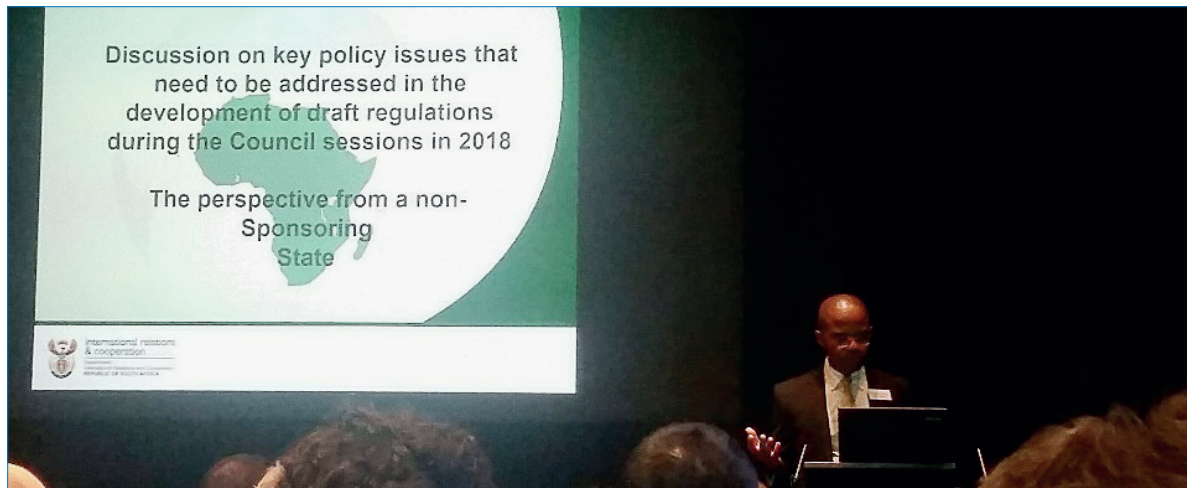
In our November 2017 [DSM Briefing issue 3](#), we reported back on an inaugural meeting of the Legal Working Group on Liability for Environmental Harm from Activities in the Area Beyond National Jurisdiction, co-chaired by the Commonwealth Secretariat, the ISA and the Centre for International Governance Innovation (CIGI). A copy of the report from that meeting is now available here: <https://www.cigionline.org/publications/legal-working-group-liability-environmental-harm-activities-area>.

In February 2018, this international team of lawyers met at the Commonwealth Secretariat's Marlborough House in London for a second time to continue the dialogue about legal gaps and environmental harm that may arise from seabed mining. The Working Group's aim is to provide useful and timely research and analysis on legal liability issues for relevant regulatory policy-makers, such as the ISA's Legal and Technical Commission, Council and Assembly. The group is focussing

efforts on the nine research topics set out below, and plans to launch its results at the July 2018 ISA Annual Session.

1. Purpose and scope of a liability regime for seabed mining beyond national jurisdiction
2. Responsible parties
3. Standards of liability
4. Damages
5. Claimants
6. Compensation funds
7. Dispute settlements forums
8. 'Effective control'
9. Sponsoring state legislation and liability

### 3. ISA Workshop on the draft regulations for the exploitation of mineral resources in the Area: policy, legal and institutional considerations, London – February 2018



South African representative Thembele Joyini addresses the February 2018 UK ISA workshop

The government of the United Kingdom convened a well-attended ISA workshop on 12-13 February 2018, hosted by the Royal Society in London. The aim of the workshop was to try to draw out the key policy considerations that need to be addressed by the ISA Council in its March 2018 Annual Session, which will focus on progressing the draft Exploitation Regulations to the next stage. The Commonwealth Secretariat was pleased to attend, and to see Commonwealth countries well-represented, including Canada, India, Jamaica, New Zealand, Singapore, South Africa and Trinidad and Tobago. Lively discussions were held over the two days. A report on the workshop will be produced and presented to the Council at its early March meeting in Kingston.

The workshop included a discussion about the financial regime proposed in the draft regulations. The extent of this debate suggested a lack of consensus on key aspects at this stage, including whether there should be a profit-share mechanism, which is not currently featured in the draft Regulations. It also considered whether an initial period of a lower royalty rate, currently featured in the draft regulations, was appropriate. Participants expressed a keen interest in future discussions and consultations on this aspect of the ISA regime, and the ISA Secretary General indicated that the ISA's

Finance Committee had been tasked to discuss in July 2018 the important matter of how equitable benefit-sharing of proceeds from mining in the Area may be arranged.

Meeting participants also raised questions about some of the steps envisaged in the Mining Code, from exploration through to post-mining. Topics that were particularly hotly-debated included:

- the role of test-mining,
- a need to re-visit the Exploration Regulations,
- how to manage revisions to Plans of Work or to applicable regulatory standards during contract periods,
- the respective roles of the ISA and sponsoring states, particularly in relation to monitoring and enforcement,
- how to incentivise optimal practices by contractors,
- the need for transparent and robust decision-making procedures within the ISA, including access to appropriate technical expertise.



## 4. Focus on Environmental Management

The ISA Secretary General has signalled his intention to prioritise the issue of regional environmental management plans over the next few months. A report from the Secretary-General (available online here: <https://www.isa.org.jm/document/isba24c3>) will be submitted to the ISA Council at their March session. It proposes a series of multi-stakeholder workshops to develop regional environmental management plans. This will include identifying 'areas of particular environmental interest', in areas currently subject to seabed mineral exploration activity. Speaking at the February 2018 UK ISA Workshop, Secretary-General Michael Lodge stated "I know that both the Council and the General Assembly of the United Nations have been calling for action on this matter for several years and that is why I have made this one of the priority issues to be addressed in 2018 and beyond. This is an area where the participation of the scientific community will be particularly important, and I look forward to the active engagement and commitment of all stakeholders in this activity."

Those involved in environmental aspects of seabed mining may also be interested in:

- The 'Scientific rationale and international obligations for protection of active hydrothermal vent ecosystems from deep-sea mining', an article recently published by a group of deep-sea academics. It is available at the following link: <https://doi.org/10.1016/j.marpol.2018.01.020>; and
- The 16 January 2018 European Parliament's resolution of on international ocean governance, which "calls on the [EU] Commission and [EU] member states to support an international moratorium on commercial deep-sea mining exploitation licences until such time as the effects of deep-sea mining on the marine environment, biodiversity and human activities at sea have been studied and researched sufficiently and all possible risks are understood": <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+TA+P8-TA-2018-0004+0+DOC+PDF+V0//EN>

## 5. March 2018 Annual Session #1

The ISA Council will meet in Kingston, Jamaica on 5-9 March 2018, for the first part of the 24th Annual Session, followed by the Legal and Technical Commission meeting on 12-23 March 2018. The ISA Council includes sixteen Commonwealth member countries: Australia, Bangladesh, Cameroon, Canada, Fiji, Ghana, India, Jamaica, Lesotho, Nigeria, Singapore, South Africa, Tonga, Trinidad and Tobago, Uganda, and the United Kingdom.

This is the first time the ISA will hold its Annual Session in two parts, reflecting the volume, complexity and urgency of the issues currently under consideration.

The March session will include particular focus on the draft ISA Exploitation Regulations. The Commonwealth Secretariat will attend the meeting in its capacity as an observer. An advisor will be on hand to support Commonwealth delegations.

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)



**The Commonwealth**

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