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Environmental impact assessment procedure for deep seabed mining in the area: Independent expert review and public participation

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ABSTRACT

With the fast rising sector of deep seabed mining, and the increasing number of exploration contracts in the international area of the deep seabed, the International Seabed Authority (ISA) is urged to adopt the exploitation regulations for its Mining Code, which will include processes and procedures for environmental impact assessment (EIA). While trying to put in place such a mechanism, the ISA will be confronted with key challenges due to its structure and decision-making process as an international organisation. This paper introduces the legal grounds and implementation issues of two elements that can be identified as good practice for EIA: the review by independent experts and the participation of the public.

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1. Introduction

In 1994, the International Seabed Authority (ISA) was inaugurated in Kingston, Jamaica. This international organisation was set up for the organisation and control of seabed mining activities occurring in the international area of the deep seabed (the Area), in accordance with article 157 of Part XI of the United Nations Convention on the Law of the Sea of 1982 [1] (LOSC), as interpreted and modified by the 1994 Agreement relating to the Implementation of Part XI of the Convention [2] (the 1994 Agreement).

States parties to the LOSC “have the obligation to protect and preserve the marine environment” (art. 192) as set out in Part XII of the LOSC which deals with environmental protection. Article 209(1) specifies that “international rules, regulations and procedures shall be established in accordance with Part XI” to protect the marine environment from pollution arising from mining activities in the Area (art. 209(1)). Since parties to the LOSC are *ipso facto* members of the ISA (art. 156(2)), the work achieved by States through the ISA should reflect an effort to comply with these provisions and achieve environmental protection. In fact, Part XI of the LOSC reiterates and reinforces the general obligation to protect the marine environment in the context of deep seabed mining.

Indeed, while the ISA is the organisation through which States “shall, in accordance with [Part XI], organise and control activities in the Area, particularly with a view to administering the resources of the Area” (art. 157(1)), Part XI emphasises the obligation of the ISA “to ensure effective protection for the marine environment” (art. 145) by providing that it “shall adopt appropriate rules, regulations and procedures” to this end.

In implementing these provisions, the ISA has developed over the years a set of instruments referred to as the Mining Code, which addresses prospecting for and exploration of marine minerals, namely polymetallic nodules, polymetallic sulphides and cobalt-rich ferromanganese crusts. The Mining Code includes regulations for polymetallic nodules (RPEN), polymetallic sulphides (RPES) and cobalt-rich ferromanganese crusts (RPEC), providing for the necessary steps to take to apply for the approval of a plan of work for exploration, the procedure for its consideration by the organs of the ISA, and the standard clauses that will be entrenched in the contract signed between the applicant and the ISA, may the plan of work be approved. In addition, the Mining Code is completed by recommendations issued from time to time by the Legal and Technical Commission (LTC) for the guidance of contractors, being private or public entities sponsored by a State party, and conducting mining activities agreed upon by the ISA in the form of a contract, in accordance with article 153 (3) LOSC.

The ISA is thus not only acting as a legislator in the development of the Mining Code, but is also an administration receiving, reviewing and deciding on applications received. The procedure

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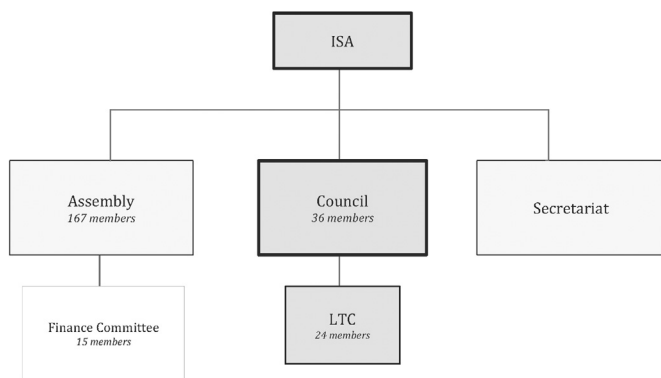


Fig. 1. Flowchart of the ISA main organs.

for the consideration of such application is set up in Part XI of the LOSC, the 1994 Agreement and the Regulations of the Mining Code.

1.1. International seabed authority decision-making process

The ISA is an international organisation. It is composed of three main organs (art. 157 LOSC): the Assembly, the Council and the Secretariat (Fig. 1). There are two subsidiary organs: the Finance Committee, which is subsidiary to the Assembly but also reports to the Council; and the LTC which reports to the Council. All States parties to the LOSC are members of the ISA and have a seat in the Assembly (to date, 167 parties). The Council is composed of 36 members, elected by the Assembly in accordance with specific rules ensuring equitable geographical and economical representation (1994 Agreement, Annex, Section 3, par. 9, 10, 15 and 16). The Secretariat prepares documents and reviews reports in order to assist the work of the Council and the Assembly, as entrusted by these organs (art. 166(3) LOSC). The Council and the Assembly meet periodically; each session consists of two weeks of meetings annually. The Secretariat is the only permanent organ and is based in Kingston.

Since the modifications brought by the 1994 Agreement [3], the Council is the organ withholding most of the legislative and executive powers of the ISA. The functions of the Council are listed in article 162(2) of the LOSC. However, these functions are as numerous as broad, and represent a workload too important for an organ that meets only two weeks a year.

This is where the LTC comes into play, the subsidiary organ of the Council set up by the LOSC (art. 163(1)(b)). While it has no decision-making power as such and can only issue recommendations to the Council or to contractors, the LTC is nevertheless essential for the implementation of both the legislative and the executive powers of the ISA. Its functions, also listed by the LOSC (art. 165(2)) range from the formulation of draft rules, regulations and procedures to the review of contractors' annual reports, and include the consideration of applications, the assessment of environmental impacts, the supervision of mining activities and many more. It is only on the basis of the LTC's recommendations that the Council will take its decisions (art. 162(2)(o)(ii) LOSC; 1994 Agreement, Annex, Section 1, par. 15 and Section 3, par. 11 and 12). While the LTC's mandate is found in article 165 of the LOSC, the Council also has the power to refer additional matters to the LTC.

The LTC is composed of 24 members [4] nominated by the ISA members and elected by the Council (art. 163(2) LOSC). The LTC members must have the necessary qualifications to fulfil their functions and must not have any interests in deep seabed mining activities to ensure their independence (art. 165(1) LOSC). Their qualifications range from a wide number of geologists to

international lawyers, and include marine biology and geo-engineering. Like the Council, the LTC is not a permanent organ. However, it meets more regularly since 2012 in order to address the increasing amount of items on its agenda at every annual session [5]: two weeks in the winter, and two weeks in the summer before the Council and the Assembly meetings.

One of the tasks of the LTC is to consider applications for the approval of a plan of work (art. 165(2)(b) LOSC). The procedure for this is provided by the Regulations of the Mining Code (the Regulations) [6]. The LTC will issue its recommendation to the Council on whether to approve (or not) the applicant's plan of work. In this process environmental considerations occupy an important place [7], in particular taking into account the foreseen environmental impacts and the proposed research programme in view of assessing the significance of those impacts, when the time comes for exploitation. In accordance with the LOSC framework, but also with general principles of international environmental law, the ISA has adopted environmental regulations to allow for a sustainable development of mineral resources in the Area. The framework includes a process for environmental impact assessment (EIA) that is meant to begin with exploration, and to be continued during exploitation.

1.2. Environmental impact assessment in the current framework

According to the LOSC, the LTC has the obligation to prepare assessments of the environmental implications of activities in the Area (art. 165(2)(d)) based on available environmental data and information, including the EIAs conducted by applicants and contractors, in order to assist the decision-making on the approval of a plan of work [7]. Indeed, these provisions have to be read in conjunction with the Annex, Section 1, paragraph 7 of the 1994 Agreement, which states that "an application for approval of a plan of work shall be accompanied by an assessment of the potential environmental impacts of the proposed activities and by a description of a programme for oceanographic and baseline environmental studies in accordance with the rules, regulations and procedures adopted by the [ISA]".

Over the years, the ISA has thus developed a set of regulations that build up an EIA process for mining activities in the Area. The Regulations on exploration of the three types of mineral deposits [6], combined with the Recommendations for the guidance of contractors on EIA [8] issued by the LTC as part of the Mining Code, set up a framework for EIA as an on-going process starting at the early stages of exploration and continued during the exploitation phase (Recommendations par. 19). So far, the ISA has focused its work on the exploration phase of mining activities, gathering scientific knowledge and developing an environmental framework for the assessment of the potential impacts of deep seabed mining. Contractors have to conduct the necessary research to perform an EIA during their exploration activities and to deliver their results and conclusions with the exploitation application logically following. This enables the LTC to prepare the assessment required in article 165(2)(d) LOSC.

One of the challenges of setting up an EIA framework is to design an adequate review procedure that guarantees well-informed decision-making. Although the LOSC does not refer explicitly to the precautionary approach, there is nevertheless a direct obligation for the ISA to apply it. Since 2000 [9], with the first Regulations on Polymetallic Nodules as amended in 2013 [6], the ISA has the obligation to "apply a precautionary approach, as reflected in principle 15 of the Rio Declaration, and best environmental practice" in order to ensure the effective protection required by article 145 (Reg. 31(2) RPEN; Reg. 33(2) RPEC & RPES). Performing an EIA is not only a requirement in the LOSC (art. 165(2)(d); art. 206), but is also an obligation in international

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