

**THE ROLE OF THE SPONSORING STATE IN DEEP SEABED MINING: DIVISION OF  
RESPONSIBILITIES**

**DRAFT BACKGROUND PAPER – DAY 1**

**I. INTRODUCTION**

The International Seabed Authority (“ISA”) is in the process of developing Regulations on the Exploitation of mineral resources in the Area (“Exploitation Regulations”) which is the ultimate regulatory phase in developing the mineral resources of the Area.<sup>1</sup> While the SDC Advisory Opinion clarified the obligations of the sponsoring State, and both the Exploration Regulations and Draft Exploitation Regulations (March 2019) have some provisions on the rights and obligations of the sponsoring States, the lack of a clear division of responsibilities between the sponsoring State and the ISA has come to the forefront in the course of developing the Draft Exploitation Regulations.<sup>2</sup>

Indeed, in 2015, the LTC addressed the matter as a ‘High Level Issue’ and observed “[i]t is not believed that the division of duties and responsibilities is clearly defined between a sponsoring State and the Authority. This relates to matters including enforcement and monitoring/inspection, offence and penalty systems, liability and responsibility of a contractor etc. From a contractor’s perspective, there is the potential for a duplicative regulatory and financial burden. This needs to be clarified and duties and responsibilities more clearly defined. Equally, this also points to effective co-operation between the Authority and a sponsoring State. Matrix setting out duties and responsibilities to be developed.”<sup>3</sup> the Council has asked the Legal and Technical Commission

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<sup>1</sup> See ISA Website available at <https://www.isa.org.jm/legal-instruments/ongoing-development-regulations-exploitation-mineral-resources-area>

<sup>2</sup> See in general, ISA, *Briefing Note to the Council on the Submissions to the Draft Regulations on Exploitation of Mineral Resources in the Area*, ISBA/24/C/CRP.1, 21 February 2018, 9 [Briefing Note (2018)], 7 – 8.

<sup>3</sup> See Draft framework, High level issues and Action plan, Version II, 15 July 2015. Also see Annex III of the Briefing Note, *id.*

(LTC) and the Secretariat to formulate a matrix of duties and responsibilities of the ISA and the sponsoring State.<sup>4</sup>

The Centre for International Law (CIL), in conjunction with the ISA, is undertaking a research project with the objective of developing a matrix of responsibilities of the ISA and the sponsoring State, accompanied with a Report. This **draft Background Paper** is for **discussion purposes** only for the Workshop on 12 – 13 April 2019, along with the Master Table of Sources (Excel Spreadsheet).

In general, CIL has approached this issue in the draft Background Paper by setting out (1) the general responsibilities of the ISA and sponsoring State which apply regardless of phase; (2) the specific responsibilities of the ISA and the sponsoring State in each phase of deep seabed mining, namely (a) Phase I: Prospecting; (b) Phase II: Application Process; (c) Phase III: Contract Phase; (d) Phase IV: Renewal of Contract; (e) Phase V: Termination of Contract. In each phase, CIL would like to propose a general framework for examining the issues. This involves asking the following general questions:

- (1) Are the responsibilities of the ISA and sponsoring State **complementary**? {this may suggest that nothing may need to be done}
- (2) Are the responsibilities of the ISA and sponsoring State **conflicting**?
- (3) Are the responsibilities of the ISA and sponsoring State avoidably **duplicative** so as to be burdensome for the Contractor?
- (4) Are there issues in which there are **gaps** in current distribution of responsibilities between the ISA and the sponsoring State and in which the sponsoring State can play a more effective role in ‘assisting’ the ISA?

These general questions may lead to specific questions being asked to generate discussion.

The primary sources that CIL has used consist of: (1) UNCLOS; (2) Annex III of UNCLOS; (4) the 1994 Implementation Agreement; (3) Consolidated Regulations and Recommendations on Prospecting and Exploration 2015, with a specific emphasis on the Cobalt-Crust Regulations for

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<sup>4</sup> See Statement by the President of the Council on the work of the Council during the first part of the twenty-fourth session, ISBA/24/C/8, 13 March 2018, 8 -9; Statement by the President of the Council on the work of the Council during the second part of the twenty-fourth session, Annex I, 5, 15 July 2018, ISBA/24/C/8/Add.1,

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ease of reference (the Final Report and Matrix will aim to address all sets of Exploration Regulations); (4) the 2011 Advisory Opinion on the Responsibilities of the Sponsoring State; and (5) Draft Regulations on Exploitation of Mineral Resources in the Area prepared by the Legal and Technical Commission dated 25 March 2019.

Again, it should be reiterated that this background paper is for discussion purposes only and CIL hopes for comments on our approach, including the framing of issues and methodology.

## **II. THE ROLE OF THE ISA AND THE ROLE OF THE SPONSORING STATE: LAYING THE GROUNDWORK**

### **A. The Mandate of the ISA**

The ISA is the intergovernmental organization that organizes, carries out and controls ‘activities in the Area’ (defined in UNCLOS as “all activities of exploration for, and exploitation of, the resources of the Area”)<sup>5</sup> on behalf of mankind as a whole.<sup>6</sup> It is the organization through which States Parties organize and control activities in the Area, particularly with a view to administering the resources of the Area.<sup>7</sup> The ISA has express powers conferred upon it by UNCLOS and “incidental powers, consistent with the Convention as are implicit in an necessary for the exercise of those powers and functions with respect to activities in the Area.”<sup>8</sup> The ISA’s main function is to regulate deep seabed mining<sup>9</sup> and pursuant to this, has the authority to adopt and uniformly apply rules, regulations and procedures of the ISA relating to the prospecting, exploration and exploitation in the Area.<sup>10</sup> It “shall exercise such control over activities in the Area as is necessary for the purpose of securing compliance with the relevant provisions of this Part and the Annexes relating thereto, and the rules, regulations and procedures of the Authority, and the plans of work approved in accordance with paragraph 3.”

The ISA has other responsibilities including but not limited to:

- Protection of the marine environment from harmful effects which may arise from activities in the Area;<sup>11</sup>
- Promoting and encouraging marine scientific research in the Area and on its resources and potentially carrying out such research;<sup>12</sup>

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<sup>5</sup> Article 1 (3), UNCLOS.

<sup>6</sup> Article 153 (1), UNCLOS.

<sup>7</sup> Article 157 (1), UNCLOS.

<sup>8</sup> Article 157 (2), UNCLOS.

<sup>9</sup> See generally Michael Lodge, *The Deep Seabed*, in OXFORD HANDBOOK ON THE LAW OF THE SEA, 226, 228 (Donald R Rothwell, Alex G. Oude Elferink, Karen N. Scott and Tim Stephens, eds., 2014).

<sup>10</sup> Article 160 (2) (f) (ii); Article 162 (2) (o) (ii); Annex III, Article 17 (1), UNCLOS.

<sup>11</sup> Article 145, UNCLOS.

<sup>12</sup> Article 143 (2) and (3), UNCLOS.

- Promoting and encouraging the transfer to developing countries of technology and scientific knowledge relating to activities in the Area;<sup>13</sup>
- Promoting international co-operation regarding activities in the Area;<sup>14</sup>
- Developing rules, regulations and procedures to provide for a payment mechanism and financial terms for mineral resources as well as providing for the equitable sharing and other economic benefits derived from the activities in the Area through any appropriate mechanism, on a non-discriminatory basis;<sup>15</sup>
- Distributing certain revenues from the continental shelf beyond 200 nm.<sup>16</sup>

## **B. The Mandate of the Sponsoring State**

The sponsoring State plays an instrumental role in the regime governing deep seabed mining. Activities in the Area can be carried out by non-State actors i.e. state enterprises or ‘natural or juridical persons which possess the nationality of States Parties or are effectively controlled by them or their nationals, when sponsored by such States.’<sup>17</sup> As put by the Seabed Disputes Chamber (SDC) in its 2011 Advisory Opinion:

The purpose of requiring the sponsorship of applicants for contracts for the exploration and exploitation of the resources of the Area is to achieve the result that the obligations set out in the Convention, a treaty under international law which binds only States Parties thereto, are complied with by entities that are subjects of domestic legal systems. This result is obtained through the provisions of the Authority’s Regulations that apply to such entities and through the implementation by the sponsoring States of their obligations under the Convention and related instruments.<sup>18</sup>

Thus, sponsoring States contribute to “the realization of the common interest of all States in the proper application of the principle of the common heritage of mankind which requires faithful compliance with the obligations set out in Part XI.”<sup>19</sup> Sponsoring States are not obliged to sponsor

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<sup>13</sup> Article 144 (1) and (2), UNCLOS.

<sup>14</sup> Article 160 (2), UNCLOS.

<sup>15</sup> See Article 13, Annex III, UNCLOS; Section 8, Annex 1994 Implementation Agreement; Article 140 (2), UNCLOS.

<sup>16</sup> Article 82 (4), UNCLOS.

<sup>17</sup> Article 153 (2) (b), UNCLOS.

<sup>18</sup> *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*, Advisory Opinion, Seabed Disputes Chamber of the International Tribunal for the Law of the Sea, Case No. 17, 1 February 2011, 50 ILM 458, para. 75 (SDC Advisory Opinion).

<sup>19</sup> *Ibid*, para. 76.

an entity that holds its nationality or is controlled by it or by its nationals. The SDC held that nationality or effective control are not sufficient to ensure that the Contractor conforms with the Convention and related instruments – the decision to sponsor is “a specific act emanating from the will of the State or States of nationality and of effective control.”<sup>20</sup>

The overarching role of the sponsoring State is set out in Articles 139 (1), Article 153 (4) and Article 4 (4) of Annex III.<sup>21</sup> First, under both Article 139 (1) and Article 4 (4) of Annex III, the sponsoring State has the responsibility to ensure that within their legal systems, that a sponsored contractor shall carry out activities in the Area in conformity with the terms of its contract and its obligations under the Convention. Second, and related to the first, Article 153 (4) provides that the sponsoring State shall “assist the Authority by taking all measures necessary to ensure such compliance in accordance with article 139.”

In order to fulfil its responsibility to ensure that activities in the Area are carried out in a manner consistent with UNCLOS, the SDC has held that the sponsoring State has a due diligence obligation to take necessary and appropriate measures within its legal system to ensure that the Contractor complies with its obligations.<sup>22</sup> It is not an obligation to achieve, in each and every case, the result that the sponsored Contractor complies with its obligations but rather an obligation to “deploy adequate means, to exercise best possible efforts, to do the utmost, to obtain this result.”<sup>23</sup> These necessary and appropriate measures consist of “laws and regulations, and...administrative measures which are, within the framework of its legal system, reasonably appropriate for securing compliance by persons under its jurisdiction.”<sup>24</sup> The scope and extent of the laws and regulations and administrative measures required depend upon the legal system of the sponsoring State.<sup>25</sup> However:

The sponsoring State does not have an absolute discretion with respect to the action it is required to take under Annex III, article 4, paragraph 4, of the Convention. In the sphere of the obligation to assist the Authority acting on behalf of mankind as a whole, while deciding what measures are reasonably appropriate, the sponsoring State must take into account, objectively, the relevant

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<sup>20</sup> *Ibid*, para. 78.

<sup>21</sup> SDC Advisory Opinion, para. 99.

<sup>22</sup> SDC Advisory Opinion, *supra* note 2, para. 117 – 120.

<sup>23</sup> SDC Advisory Opinion, *id*, para. 110.

<sup>24</sup> See Article 4 (4), Annex III, UNCLOS; SDC Advisory Opinion, *id.*, para. 216 – 217.

<sup>25</sup> SDC Advisory Opinion, para. 218.

options in a manner that is reasonable, relevant and conducive to the benefit of mankind as a whole. It must act in good faith, especially when its action is likely to affect prejudicially the interests of mankind as a whole. The need to act in good faith is also underline in articles 157, paragraph 4 and 300 of the Convention. Reasonableness and non-arbitrariness must remain the hallmarks of the action taken by the sponsoring State.<sup>26</sup>

In addition to the due diligence obligations of sponsoring States to ensure that the Contractors comply with their obligations, sponsoring States have certain direct obligations which they must comply with independently of their obligation to ensure a certain behaviour by the sponsored Contractor.<sup>27</sup> These include: the obligation to assist the Authority in the exercise of control over activities in the Area; the obligation to apply best environmental practices; the obligation to take measures to ensure the provision of guarantees in the event of an emergency order by the ISA for the protection of the marine environment; the obligation to ensure the availability of recourse for compensation in respect of damage caused by pollution; and the obligation to conduct environmental impact assessments.<sup>28</sup> The SDC observed that the said obligations are in most cases couched as obligations to ensure compliance with a specific rule and that the implementation of these direct obligations will be a factor that will be taken into consideration when assessing whether the sponsoring State has fulfilled its due diligence obligations.<sup>29</sup>

### **C. Relationship between ISA's Mandate and the Sponsoring State's Mandate?**

UNCLOS does not say much on the relationship between the ISA's mandate and the sponsoring State's mandate. The SDC observed that under Article 153 (4) of UNCLOS, the sponsoring State has the obligation to 'assist' the ISA and that this "*subordinate role* of the sponsoring State is reflected in Annex III, Article 22 of the Convention, in which the liability of the contractor and the Authority is mentioned while that of the sponsoring State is not [emphasis added]."<sup>30</sup> In this connection, the SDC went onto say that the "main liability for a wrongful act committed in the conduct of the contractor's operations or in the exercise of the Authority's powers and functions rests with the contractor and the Authority, respectively, rather than with the sponsoring State."

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<sup>26</sup> SDC Advisory Opinion, para. 230.

<sup>27</sup> SDC Advisory Opinion, *id.*, para. 121.

<sup>28</sup> SDC Advisory Opinion, *id.*, para. 122.

<sup>29</sup> SDC Advisory Opinion, *id.*, para. 122.

<sup>30</sup> SDC Advisory Opinion, para. 102.

This “reflects the distribution of responsibilities for deep seabed mining activities between the contractor, the Authority and the sponsoring State.”<sup>31</sup> This accounts for the finding of the SDC that the liability of the sponsoring State and the Contractor exists in parallel and that UNCLOS and related instruments leaves no room for residual liability.<sup>32</sup>

In addition to the above, the SDC also observed that the laws, regulations and administrative measures may also provide for the co-ordination between the various activities of the sponsoring State and the ISA, “with a view to eliminating avoidable duplication of work.”<sup>33</sup> This has been reflected in Regulation 3 (b) of the Draft Regulations on Exploitation of Mineral Resources in the Area prepared by the Legal and Technical Commission (‘Draft Exploitation Regulations’ [March 2019])<sup>34</sup> which provides that “the Authority, sponsoring States and flag States shall cooperate towards the avoidance of unnecessary duplication of administrative procedures and compliance requirements.”

#### **Possible Questions for Discussion**

1. Is the ISA the primary regulator and the sponsoring State the secondary regulator (based on its subordinate role)?
2. Is it necessary to even to make this clarification, or should it be decided on a case-by-case basis depending on the issue at hand and which actor has more control over the particular activity?
3. Is it necessary to elaborate on the role of State Contractors who are engaging in deep seabed mining? Is their role (and hence obligations) different than that of the sponsoring State?
4. What are the implications of the fact that the ISA is not a party to UNCLOS per se?

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<sup>31</sup> SDC Advisory Opinion, para. 200.

<sup>32</sup> SDC Advisory Opinion, para. 204.

<sup>33</sup> SDC Advisory Opinion, para. 218.

<sup>34</sup> Legal and Technical Commission, *Draft Regulations on Exploitation of Mineral Resources in the Area*, ISBA/25/C/WP.1, Unedited Advance Text, 25 March 2019.

### III. GENERAL RESPONSIBILITIES RELATED TO SECURING COMPLIANCE BY THE CONTRACTOR

#### A. Responsibility to Secure Compliance by Contractors of UNCLOS & Related Instruments

ISA	Sponsoring State
Article 153 (4), Part XI, UNCLOS	Article 139 (1), Part XI, UNCLOS
The Authority shall exercise such control over activities in the Area as is necessary for the purpose of securing compliance with the relevant provisions of this Part and the Annexes relating thereto, and the rules, regulations and procedures of the Authority, and the plans of work approved in accordance with paragraph 3.	States Parties shall have the responsibility to ensure that activities in the Area, whether carried out by States Parties, or state enterprises or natural or juridical persons which possess the nationality of States Parties or are effectively controlled by them or their nationals, shall be carried out in conformity with this Part. The same responsibility applies to international organizations for activities in the Area carried out by such organizations.
	Article 153 (4), Part XI, UNCLOS
	States Parties shall assist the Authority by taking all measures necessary to ensure such compliance in accordance with article 139.
	Article 4 (4), Part XI, UNCLOS
	The sponsoring State or States shall, pursuant to article 139, have the responsibility to ensure, within their legal systems, that a contractor so sponsored shall carry out activities in the Area in conformity with the terms of its contract and its obligations under this Convention.

#### B. Responsibility to Adopt Rules, Regulation, Procedures/Laws, Regulations and Administrative Measures

ISA	Sponsoring State
Article 160 (2) (f), Part XI, UNCLOS	Article 139 (2), UNCLOS
The Assembly shall consider and approve the rules, regulations and procedures of the Authority, and any amendments thereto,	A State Party shall not however be liable for damage caused by any failure to comply with this Part by a person whom it has sponsored

<p>provisionally adopted by the Council pursuant to article 162, paragraph 2 (o)(ii). These rules, regulations and procedures shall relate to prospecting, exploration and exploitation in the Area, the financial management and internal administration of the Authority, and, upon the recommendation of the Governing Board of the Enterprise, to the transfer of funds from the Enterprise to the Authority;</p>	<p>under article 153, paragraph 2(b), if <b>the State Party has taken all necessary and appropriate measures</b> to secure effective compliance under article 153, paragraph 4, and Annex III, article 4, paragraph 4.</p>
<p>Article 162 (o) (ii), Part XI, UNCLOS</p>	<p>Article 4 (4), Annex III, UNCLOS</p>
<p>The Council shall adopt and apply provisionally, pending approval by the Assembly, the rules, regulations and procedures of the Authority, and any amendments thereto, taking into account the recommendations of the Legal and Technical Commission or other subordinate organ concerned. These rules, regulations and procedures shall relate to prospecting, exploration and exploitation in the Area and the financial management and internal administration of the Authority.</p>	<p>The sponsoring State or States shall, pursuant to article 139, have the responsibility to ensure, within their legal systems, that a contractor so sponsored shall carry out activities in the Area in conformity with the terms of its contract and its obligations under this Convention. A sponsoring State shall not, however, be liable for damage caused by any failure of a contractor sponsored by it to comply with its obligations if that State Party <b>has adopted laws and regulations and taken administrative measures which are, within the framework of its legal system,</b> reasonably appropriate for securing compliance by persons under its jurisdiction</p>
<p>Article 165 (2) (f), Part XI, UNCLOS</p>	<p>Advisory Opinion, para. 218</p>
<p>The Legal and Technical Commission shall formulate and submit to the Council the rules, regulations and procedures referred to in article 162, paragraph 2(o), taking into account all relevant factors including assessments of the environmental implications of activities in the Area;</p>	<p>Annex III, article 4, paragraph 4, of the Convention requires the sponsoring State to adopt laws and regulations and to take administrative measures. Thus, there is here a stipulation <b>that the adoption of laws and regulations and the taking of administrative measures are necessary.</b> The scope and extent of the laws and regulations and administrative measures required depend upon the legal system of the sponsoring State. The adoption of laws and regulations is prescribed because not all the obligations of a contractor may be enforced through administrative measures or contractual arrangements alone, as specified in paragraphs 223 to 226. Support for the enforcement of contractor's obligations under the domestic law of the sponsoring</p>

	<p>State is an essential requirement in a number of national jurisdictions. But laws and regulations by themselves may not provide a complete answer in this regard. Administrative measures aimed at securing compliance with them may also be needed. Laws, regulations and administrative measures may include the establishment of enforcement mechanisms for active supervision of the activities of the sponsored contractor.</p>
<p>Article 17, Annex III, UNCLOS</p>	
<p>The Authority shall adopt and uniformly apply rules, regulations and procedures in accordance with article 160, paragraph 2(f)(ii), and article 162, paragraph 2(o)(ii), for the exercise of its functions as set forth in Part XI on, inter alia, the following matters</p>	

The ISA and the sponsoring State have the obligation to adopt rules, regulations, procedures and laws, regulations and administrative measures respectively in order to fulfill their obligation to secure compliance by the Contractor.<sup>35</sup>

**ISA:** With regard to the ISA’s rules, regulations and procedures, they become applicable on the Contractor via the contract between the ISA and the Contractor. Article 21 of Annex III of UNCLOS states that “the contract shall be governed by the terms of the contracts, the rules, regulations and procedures of the Authority, Part XI and other rules of international law not incompatible with this Convention.” This is reflected in the Standard Terms of the Exploration Contract and the Draft Exploitation Contract.<sup>36</sup>

**Sponsoring State:** With regard to the sponsoring State’s rules, regulations and procedures, as mentioned above, the scope and extent of the laws and regulations and administrative measures required depend upon the legal system of the sponsoring State.<sup>37</sup> The obligation is to act within its

<sup>35</sup> See SDC Advisory Opinion, para. 75.

<sup>36</sup> Section 27, Annex X, Cobalt-Crusts Regulations; Section 17.1, Annex X, Draft Exploitation Regulations.

<sup>37</sup> SDC Advisory Opinion, para. 218.

own legal system taking into account the particular characteristics of that system.<sup>38</sup> But as held by the SDC, the sponsoring State does not have an absolute discretion in adopting such laws, regulations and administrative measures. It has to decide what measures are reasonably appropriate, taking into account, , the relevant options in a manner that is reasonable, relevant and conducive to the benefit of mankind as a whole, and acting in good faith.<sup>39</sup> Generally, it cannot impose conditions on a contractor that is inconsistent with Part XI, except in relation to conditions imposed in relation to the marine environment which may be more stringent than the rules adopted by the ISA.<sup>40</sup>

The SDC gave some indication on the content of the laws, regulations and administrative measures, and said that it may include: financial viability and technical capacity of sponsored contractors; conditions for issuing a certificate of sponsorship; penalties for non-compliance by such contractors; the obligation to assist the ISA in the exercise of control over activities in the Area; the obligation to apply the precautionary approach, the obligation to apply best environmental practices; the obligation to apply best environmental practices; the obligation to take measures to ensure the provision of guarantees in the event of an emergency order by the ISA for protection of marine environment; the obligation to ensure availability of recourse for compensation in respect of pollution damage; obligation to conduct environmental impact assessments; laws and regulations relating to the enforceability of judgments of the SDC.<sup>41</sup>

### C. General Obligations to Preserve and Protect the Marine Environment

#### 1. General Obligation to Preserve and Protect the Marine Environment Through Adoption of Appropriate Rules, Regulations and Procedures

ISA	Sponsoring State
<b>Article 145, Part XI, UNCLOS</b>	<b>Article 192,</b>
Necessary measures shall be taken in accordance with this Convention with respect to activities in the Area to ensure effective protection for the marine environment from harmful effects which	States have the obligation to protect and preserve the marine environment

<sup>38</sup> SDC Advisory Opinion, para. 229.

<sup>39</sup> SDC Advisory Opinion, paras. 230, 240

<sup>40</sup> Article 21 (3), Annex III, UNCLOS, SDC Advisory Opinion, para. 231.

<sup>41</sup> SDC Advisory Opinion, paras. 234, 235, 236.

<p>may arise from such activities. To this end the Authority shall adopt appropriate rules, regulations and procedures for <i>inter alia</i>:</p> <p>(a) the prevention, reduction and control of pollution and other hazards to the marine environment, including the coastline, and of interference with the ecological balance of the marine environment, particular attention being paid to the need for protection from harmful effects of such activities as drilling, dredging, excavation, disposal of waste, construction and operation or maintenance of installations, pipelines and other devices related to such activities;</p> <p>(b) the protection and conservation of the natural resources of the Area and the prevention of damage to the flora and fauna of the marine environment.</p>	
<p><b>Article 17 (1) (b) (xii), Annex III</b></p>	<p><b>Article 194, Part XII</b></p>
<p>The Authority shall adopt and uniformly apply rules, regulations and procedures in accordance with article 160, paragraph 2(f)(ii), and article 162, paragraph 2(o)(ii), for the exercise of its functions as set forth in Part XI on, <i>inter alia</i>, the following matters:</p> <p>mining standards and practices, including those relating to operational safety, conservation of the resources and the protection of the marine environment;</p>	<p>1. States shall take, individually or jointly as appropriate, all measures consistent with this Convention that are necessary to prevent, reduce and control pollution of the marine environment from any source, using for this purpose the best practicable means at their disposal and in accordance with their capabilities, and they shall endeavour to harmonize their policies in this connection.</p> <p>2. States shall take all measures necessary to ensure that activities under their jurisdiction or control are so conducted as not to cause damage by pollution to other States and their environment, and that pollution arising from incidents or activities under their jurisdiction or control does not spread beyond the areas where they exercise sovereign rights in accordance with this Convention.</p> <p>3. The measures taken pursuant to this Part shall deal with all sources of pollution of the marine environment. These measures shall include, <i>inter alia</i>, those designed to minimize to the fullest possible extent:</p> <p>(a) the release of toxic, harmful or noxious substances, especially those which are persistent, from land-based</p>

	<p>sources, from or through the atmosphere or by dumping;</p> <p>(b) pollution from vessels, in particular measures for preventing accidents and dealing with emergencies, ensuring the safety of operations at sea, preventing intentional and unintentional discharges, and regulating the design, construction, equipment, operation and manning of vessels;</p> <p>(c) pollution from installations and devices used in exploration or exploitation of the natural resources of the seabed and subsoil, in particular measures for preventing accidents and dealing with emergencies, ensuring the safety of operations at sea, and regulating the design, construction, equipment, operation and manning of such installations or devices;</p> <p>(d) pollution from other installations and devices operating in the marine environment, in particular measures for preventing accidents and dealing with emergencies, ensuring the safety of operations at sea, and regulating the design, construction, equipment, operation and manning of such installations or devices.</p> <p>4. In taking measures to prevent, reduce or control pollution of the marine environment, States shall refrain from unjustifiable interference with activities carried out by other States in the exercise of their rights and in pursuance of their duties in conformity with this Convention.</p> <p>5. The measures taken in accordance with this Part shall include those necessary to protect and preserve rare or fragile ecosystems as well as the habitat of depleted, threatened or endangered species and other forms of marine life.</p>
<b>Article 17 (2) (f), Annex III</b>	

<p>Rules, regulations and procedures on the following items shall fully reflect the objective criteria set out below:</p> <p>Rules, regulations and procedures shall be drawn up in order to secure effective protection of the marine environment from harmful effects directly resulting from activities in the Area or from shipboard processing immediately above a mine site of minerals derived from that mine site, taking into account the extent to which such harmful effects may directly result from drilling, dredging, coring and excavation and from disposal, dumping and discharge into the marine environment of sediment, wastes or other effluents</p>	
<p><b>Article 209 (1), Part XII (Pollution)</b></p>	<p><b>Article 209 (2), Part XII (Pollution)</b></p>
<p>International rules, regulations and procedures shall be established in accordance with Part XI to prevent, reduce and control pollution of the marine environment from activities in the Area. Such rules, regulations and procedures shall be re-examined from time to time as necessary.</p>	<p>Subject to the relevant provisions of this section, States shall adopt laws and regulations to prevent, reduce and control pollution of the marine environment from activities in the Area undertaken by vessels, installations, structures and other devices flying their flag or of their registry or operating under their authority, as the case may be. The requirements of such laws and regulations shall be no less effective than the international rules, regulations and procedures referred to in paragraph 1.</p>
<p><b>Article 215, Part XII (Enforcement)</b></p>	<p><b>Article 21 (3), Annex III</b></p>
<p>Enforcement of international rules, regulations and procedures established in accordance with Part XI to prevent, reduce and control pollution of the marine environment from activities in the Area shall be governed by that Part.</p>	<p>No State Party may impose conditions on a contractor that are inconsistent with Part XI. However, the application by a State Party to contractors sponsored by it, or to ships flying its flag, of environmental or other laws and regulations more stringent than those in the rules, regulations and procedures of the Authority adopted pursuant to article 17, paragraph 2(f), of this Annex shall not be deemed inconsistent with Part XI.</p>

**ISA:** The ISA has a broad mandate under Article 145 of Part XI of UNCLOS. The ISA is obliged to adopt necessary measures with respect to deep seabed mining activities in the Area to “ensure effective protection for the marine environment from harmful effects which may arise from such activities.” To this end, the ISA has to adopt appropriate rules, regulations and procedures for (1) the prevention, reduction and control of pollution and other hazards to the marine environment, including the coastline, and interference with the ecological balance of the marine environment, particular attention being paid to the need for protection from harmful effects of such activities as drilling, dredging, excavation, disposal of waste, construction and operation or maintenance of installations, pipelines and other devices related to such activities; and (2) the protection and conservation of the natural resources of the Area and the prevention of damage to the flora and fauna of the marine environment.

Pursuant to this, Article 17 of Annex III of UNCLOS states that the ISA shall adopt and uniformly apply rules, regulations, and procedures on mining standards and practices relating to operational safety, conservation of the resources and the protection of the marine environment.<sup>42</sup> Such rules, regulations and procedures shall be drawn up in order to secure effective protection of the marine environment from harmful effects directly resulting from activities in the Area or from shipboard processing immediately above a mine site of minerals derived from that mine site, taking into account the extent to which such harmful effects may directly result from drilling, dredging, coring and excavation and from disposal, dumping and discharge into the marine environment of sediment, wastes or other effluents.<sup>43</sup> This is further reiterated in Article 209 (1) of Part XII of UNCLOS which states that “[i]nternational rules, regulations and procedures shall be established *in accordance with Part XI* to prevent, reduce and control pollution of the marine environment from activities in the Area [emphasis added].” Article 215 of Part XII states that “enforcement of international rules, regulations and procedures established in accordance with Part XI to prevent, reduce and control pollution of the marine environment from activities in the Area shall be governed by that Part.”

**Sponsoring State:** The sponsoring State, as a State Party to UNCLOS, is bound by the obligations relating to the marine environment in Part XII. Due to constraints of space, only the most salient

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<sup>42</sup> Article 17 (1) (b) (xii), Annex III, UNCLOS.

<sup>43</sup> Article 17 (2) (f), Annex III, UNCLOS.

ones will be highlighted here. The sponsoring State has a general obligation to protect and preserve the marine environment under Article 192 of Part XII of UNCLOS. This has been held in the *South China Sea Arbitral Award* to impose a duty on States Parties “the content of which is informed by the other provisions of Part XII and other applicable rules of international law.”<sup>44</sup> The general obligations extends “both to ‘protection’ of the marine environment from future damage and ‘preservation’ in the sense of maintaining or improving its present condition.”<sup>45</sup> The Tribunal goes on to state that “the corpus of international law relating to the environment, which informs the content of the general obligation in Article 192, requires that States ‘ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control.’”<sup>46</sup> The sponsoring State is also bound by the range of obligations in Article 194, including adopting necessary measures to protect and preserve rare or fragile ecosystems as well as the habitat of depleted, threatened or endangered species and other forms of marine life.<sup>47</sup> The obligation to preserve and protect the marine environment is a due diligence obligation (see discussion in Part II B).<sup>48</sup>

The sponsoring State has a specific obligation in relation to the protection of the marine environment from activities in the Area in Article 209 (2) of Part XII:

Subject to the relevant provisions of this section, States shall adopt laws and regulations to prevent, reduce and control pollution of the marine environment from activities in the Area undertaken by vessels, installations, structures and other devices flying their flag or of their registry or operating under their authority, as the case may be. The requirements of such laws and regulations shall be no less effective than the international rules, regulations and procedures referred to in paragraph 1.

Article 21 (3) of Annex III provides that while in general, no State party can impose conditions inconsistent with Part XI, there is a general exception in relation to the protection of the marine environment. It states that “the application by a State Party to contractors sponsored by it, or to ships flying its flag, of environmental or other laws and regulations more stringent than those in

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<sup>44</sup> SCS Arbitration, para. 941.

<sup>45</sup> SCS Arbitration, para. 941.

<sup>46</sup> SCS Arbitration, para. 941.

<sup>47</sup> Article 194 (5), UNCLOS.

<sup>48</sup> Also see discussion in Fisheries Advisory Opinion, para. 131; SCS Arbitration, para. 944.

the rules, regulations and procedures of the Authority adopted pursuant to article 17, paragraph 2(f), of this Annex shall not be deemed inconsistent with Part XI.”

2. *General Principles: Precautionary Approach, Best Environmental Practices etc*

<b>ISA</b>	<b>Sponsoring State</b>
<b>Reg. 33 (2), Cobalt-Crusts</b>	<b>Reg. 33 (2), Cobalt-Crusts</b>
In order to ensure effective protection for the marine environment from harmful effects which may arise from activities in the Area, the Authority and sponsoring States shall apply a precautionary approach, as reflected in principle 15 of the Rio Declaration, and best environmental practices.	In order to ensure effective protection for the marine environment from harmful effects which may arise from activities in the Area, the Authority and sponsoring States shall apply a precautionary approach, as reflected in principle 15 of the Rio Declaration, and best environmental practices.
<b>Reg 44, Draft Exploitation Regulations</b>	<b>Reg 44, Draft Exploitation Regulations</b>
The Authority, sponsoring States and Contractors shall each, as appropriate, plan, implement and modify measures necessary for ensuring the effective protection for the Marine Environment from harmful effects in accordance with the rules, regulations and procedures adopted by the Authority in respect of activities in the Area. To this end, they shall:	The Authority, sponsoring States and Contractors shall each, as appropriate, plan, implement and modify measures necessary for ensuring the effective protection for the Marine Environment from harmful effects in accordance with the rules, regulations and procedures adopted by the Authority in respect of activities in the Area. To this end, they shall:
(a) Apply the precautionary approach, as reflected in principle 15 of the Rio Declaration on Environment and Development, to the assessment and management of risk of harm to the Marine Environment from Exploitation in the Area;	(a) Apply the precautionary approach, as reflected in principle 15 of the Rio Declaration on Environment and Development, to the assessment and management of risk of harm to the Marine Environment from Exploitation in the Area;
(b) Apply the Best Available Techniques and Best Environmental Practices in carrying out such measures;	(b) Apply the Best Available Techniques and Best Environmental Practices in carrying out such measures;
(c) Integrate Best Available Scientific Evidence in environmental decision-making, including all risk assessments and management undertaken in connection with environmental assessments, and the	(c) Integrate Best Available Scientific Evidence in environmental decision-making, including all risk assessments and management undertaken in connection with environmental assessments, and the

management and response measures taken under or in accordance with Best Environmental Practices;	management and response measures taken under or in accordance with Best Environmental Practices;
(d) Promote accountability and transparency in the assessment, evaluation and management of Environmental Effects from Exploitation in the Area, including timely release of and access to relevant environmental data and information and opportunities for stakeholder participation.	(d) Promote accountability and transparency in the assessment, evaluation and management of Environmental Effects from Exploitation in the Area, including timely release of and access to relevant environmental data and information and opportunities for stakeholder participation.
	<b>SDC Advisory Opinion</b>
	Precautionary approach & Best Environmental Practices are direct obligations on sponsoring States

3. *Guarantees in the event of an Emergency Order*

<b>ISA</b>	<b>Sponsoring State</b>
	<b>Regulation 35 (7), Cobalt Crusts</b>
	If a contractor does not promptly comply with an emergency order to prevent, contain and minimize serious harm or the threat of serious harm to the marine environment arising out of its activities in the Area, the Council shall take by itself or through arrangements with others on its behalf, such practical measures as are necessary to prevent, contain and minimize any such serious harm or threat of serious harm to the marine environment.
	<b>SDC Advisory Opinion</b>
	Direct Obligation on Sponsoring State

4. *Availability of Recourse for Compensation for damage caused by pollution of the marine environment*

<b>ISA</b>	<b>Sponsoring State</b>
	<p data-bbox="795 359 954 390"><b>Article 235</b></p> <p data-bbox="795 396 1378 573">1. States are responsible for the fulfilment of their international obligations concerning the protection and preservation of the marine environment. They shall be liable in accordance with international law.</p> <p data-bbox="795 579 1378 829">2. States shall ensure that recourse is available in accordance with their legal systems for prompt and adequate compensation or other relief in respect of damage caused by pollution of the marine environment by natural or juridical persons under their jurisdiction.</p> <p data-bbox="795 835 1378 1339">3. With the objective of assuring prompt and adequate compensation in respect of all damage caused by pollution of the marine environment, States shall cooperate in the implementation of existing international law and the further development of international law relating to responsibility and liability for the assessment of and compensation for damage and the settlement of related disputes, as well as, where appropriate, development of criteria and procedures for payment of adequate compensation, such as compulsory insurance or compensation funds.</p>
	<p data-bbox="795 1388 1118 1419"><b>SDC Advisory Opinion</b></p> <p data-bbox="795 1425 1378 1787">By requiring the sponsoring State to establish procedures, and, if necessary, substantive rules governing claims for damages before its domestic courts, this provision serves the purpose of ensuring that the sponsored contractor meets its obligation under Annex III, article 22, of the Convention to provide reparation for damages caused by wrongful acts committed in the course of its activities in the Area. [140]</p>

**D. Obligations of Co-operation and Exchange of Information**

<b>ISA</b>	<b>Sponsoring State</b>
<b>Regulation 3 (a), Draft Exploitation Regs</b>	
Members of the Authority and Contractors shall use their best endeavours to cooperate with the Authority to provide such data and information as is reasonably necessary for the Authority to discharge its duties and responsibilities under the Convention	
<b>Regulation 3 (b), Draft Exploitation Regs</b>	
The Authority, sponsoring States and flag States shall cooperate towards the avoidance of unnecessary duplication of administrative procedures and compliance requirements;	
<b>Regulation 3 (d), Draft Exploitation Regs</b>	
The Authority shall consult and cooperate with sponsoring States, flag States, competent international organizations and other relevant bodies as appropriate, to develop measures to:  (i) Promote the health and safety of life and property at sea and the protection of the Marine Environment; and  (ii) Exchange information and data to facilitate compliance with and enforcement of applicable international rules and standards;	
<b>Regulation 3 (e), Draft Exploitation Regs</b>	
Contractors, sponsoring States and members of the Authority shall cooperate with the Authority in the establishment and implementation of programmes to observe, measure, evaluate and analyse the impacts of Exploitation on the Marine Environment, to share the findings and results of such programmes with the Authority for wider dissemination and to extend such cooperation and collaboration to the implementation and further development of Best Environmental Practices in connection with activities in the Area;	

Regulation 3 (f), Draft Exploitation Regs	
<p>Members of the Authority and Contractors shall use their best endeavours, in conjunction with the Authority, to cooperate with each other, as well as with other contractors and national and international scientific research and technology development agencies, with a view to:</p> <p>(i) Sharing, exchanging and assessing environmental data and information for the Area;</p> <p>(ii) Identifying gaps in scientific knowledge and developing targeted and focused research programmes to address such gaps;</p> <p>(iii) Collaborating with the scientific community to identify and develop best practices and improve existing standards and protocols with regard to the collection, sampling, standardization, assessment and management of data and information;</p> <p>(iv) Undertaking educational awareness programmes for Stakeholders relating to activities in the Area; and</p> <p>(v) Promoting the advancement of marine scientific research in the Area for the benefit of mankind as a whole;</p> <p>(vi) Developing incentive structures, including market-based instruments, to support and enhance the environmental performance of Contractors beyond the legal requirements, including through technology development and innovation; and</p>	

**E. Liability for damage arising out of activities in the Area**

UNCLOS sets out general provisions on the liability of the ISA and sponsoring States for damage arising out of activities in the Area, which have been interpreted by the SDC, and has been explored in detail by the CIGI Working Group on Deep Seabed Mining Liability.

**The ISA:** Generally, under Article 22 of Annex III, the Authority shall have responsibility or liability for any damage arising out of wrongful acts in the exercise of its powers and functions, including violations under article 168, paragraph 2, account being taken of contributory acts or

omissions by the contractor (Article 168 (2) refers to the obligation of the Secretary-General and Staff of the Secretariat to not disclose any industrial secret, proprietary data or confidential information which has been obtained in the course of the work for the ISA). The Exploration Regulations and Draft Exploitation Regulations expand on the responsibility and liability of the ISA.<sup>49</sup>

**Sponsoring State:** As discussed above, Article 139 (1) and Article 4 (4) of Annex III of UNCLOS sets out the responsibility and liability of the sponsoring State. As observed by the SDC in its Advisory Opinion, “the main liability for a wrongful act committed in the conduct of the contractor’s operations or in the exercise of the Authority’s powers and functions rests with the contractor and the Authority, respectively, rather than with the sponsoring State.”<sup>50</sup> It held that a sponsoring state will only be liable for damage arising out of the contractor’s activities in the Area if the sponsoring state has failed to fulfill its due diligence obligation to take necessary and appropriate measures to secure compliance by the contractor with the relevant framework for deep seabed mining, and that failure was causative of the damage. There is no residual liability of the sponsoring State. If there is more than one sponsoring state, the SDC observed that neither article 139(2) nor article 4(4) of Annex III indicate how sponsoring states are to share their liability, and do not differentiate between single and multiple sponsorship. Accordingly, the SDC opined that “in the event of multiple sponsorship, liability is joint and several unless otherwise provided in the Regulations issued by the Authority.”<sup>51</sup>

**Questions for Discussion:**

1. Do we need to discuss this in detail for the purposes of this report in view of the extensive discussion in the CIGI Working Group on DSM Liability?
2. If it is decided to include this discussion on liability, possible questions include:

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<sup>49</sup> See, for example, Section 16, Annex IV, Standard Terms, Cobalt Crust Regulations; Section 7, Annex X, Draft Exploitation Regulations.

<sup>50</sup> SDC of the International Tribunal for the Law of the Sea (ITLOS), *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area* (2011), Advisory Opinion, No 17 at para 200 [SDC Advisory Opinion 2011], online: <[www.itlos.org/fileadmin/itlos/documents/cases/case\\_no\\_17/adv\\_op\\_010211.pdf](http://www.itlos.org/fileadmin/itlos/documents/cases/case_no_17/adv_op_010211.pdf)>; Craik, *supra* note 6, elaborates on what is meant by “wrongful act.”

<sup>51</sup> SDC Advisory Opinion 2011, *supra* note 70 at paras 190–92.

- a. If the ISA and sponsoring State is both responsible and liable, how should division of liability be apportioned? Joint and several?
- b. In the event of multiple sponsoring states being liable, is the SDC's finding that liability is joint and several sufficient?

**IV. GENERAL RESPONSIBILITIES [UNRELATED TO THE SPONSORING STATE'S OBLIGATION TO SECURE COMPLIANCE?]**

**A. Rights and Legitimate Interests of Coastal States**

**B. Marine Scientific Research**

**C. Transfer of Technology**

**D. Protection of Human Life**

**E. Reasonable Regard Obligations for the Accommodation of Activities in the Area and in the Marine Environment**

**F. Archaeological and Historical Objects**

**V. VESSELS, INSTALLATIONS AND DEVICES**

**A. Adoption of Regulations and/or Laws**

ISA	Sponsoring State /Flag State (?)
Article 147, UNCLOS	Article 209 (2)
<p>2. Installations used for carrying out activities in the Area shall be subject to the following conditions:</p> <p>(a) <b>such installations shall be erected, emplaced and removed solely in accordance with this Part and subject to the rules, regulations and procedures of the Authority.</b> Due notice must be given of the erection, emplacement and removal of such installations, and permanent means for giving warning of their presence must be maintained;</p> <p>(b) such installations may not be established where interference may be caused to the use of recognized sea lanes essential to international navigation or in areas of intense fishing activity;</p> <p>(c) safety zones shall be established around such installations with appropriate markings to ensure the safety of both navigation and the installations. The configuration and location of such safety zones shall not be such as to form a belt impeding the lawful access of shipping to particular maritime zones or navigation along international sea lanes;</p> <p>(d) such installations shall be used exclusively for peaceful purposes;</p> <p>(e) such installations do not possess the status of islands. They have no territorial sea of their own, and their presence does not affect the delimitation of the territorial sea, the exclusive economic zone or the continental shelf.</p>	<p>Subject to the relevant provisions of this section, States shall adopt laws and regulations to prevent, reduce and control pollution of the marine environment from activities in the Area undertaken by vessels, installations, structures and other devices flying their flag or of their registry or operating under their authority, as the case may be. The requirements of such laws and regulations shall be no less effective than the international rules, regulations and procedures referred to in paragraph 1.</p>

	<b>Regulation 30 (3) (a), Draft Exploitation Regs</b>
<p>Necessary measures shall be taken in accordance with this Convention with respect to activities in the Area to ensure effective protection for the marine environment from harmful effects which may arise from such activities. To this end the Authority shall adopt appropriate rules, regulations and procedures for <i>inter alia</i>:</p> <p>(a) the prevention, reduction and control of pollution and other hazards to the marine environment, including the coastline, and of interference with the ecological balance of the marine environment, particular attention <b>being paid to the need for protection from harmful effects of such activities</b> as drilling, dredging, excavation, disposal of waste, <b>construction and operation or maintenance of installations, pipelines and other devices related to such activities</b>;</p> <p>(b) the protection and conservation of the natural resources of the Area and the prevention of damage to the flora and fauna of the marine environment.</p>	<p>In addition, Contractors shall:</p> <p>(a) Comply with the relevant national laws relating to vessel standards and crew safety of their flag State in the case of vessels, or their sponsoring State or States in the case of Installations; and</p>
<b>Article 209 (1), UNCLOS</b>	<b>Reg 30 (3) (b), Draft Exploitation Regs</b>
<p>“international rules, regulations and procedures shall be established in accordance with Part XI to prevent, reduce and control pollution of the marine environment from activities in the Area. Such rules, regulations and procedures shall be re-examined from time to time as necessary.”</p>	<p>Comply with the national laws of its sponsoring State or States in relation to any matters that fall outside of the jurisdiction of the flag State, such as worker rights for non-crew members and human health and safety that pertains to the mining process rather than to ship operation.</p>

**Questions for Discussion:**

1. Which actor should adopt international regulations on erection, emplacement & removal of installations used for activities in the Area?

2. Which actor should adopt international regulations on the protection of the marine environment from the construction, operation and maintenance of marine environment (and is this already part of the general regulations on protection of ME)?
3. Is there a requirement under UNCLOS and/or a need to adopt international regulations on vessels used in activities in the Area? Or are existing IMO regulations sufficient?
4. An installation used for activities in the Area – who has jurisdiction?

**ISA:** Under Article 147 of UNCLOS, installations used for carrying out activities in the Area “shall be erected, emplaced and removed solely in accordance with [Part XI] and subject to the rules, regulations and procedures of the Authority.”<sup>52</sup> Article 147 goes on to elaborate on the principles that should govern the erection, emplacement and removal of installations such as due notice requirements, non-interference with use of recognized sea lanes essential to international navigation or in areas of intense fishing activity and the establishment of safety zones.

In addition to this rules on erection, emplacement and removal, the ISA also has a responsibility under Article 145 to adopt appropriate rules, regulations and procedures “for the prevention, reduction and control of pollution and other hazards of the marine environment, and of ecological balance of the marine environment, particularly from harmful effects arising from... the *construction and operation or maintenance of installations, pipelines and other devices related to such activities.*”<sup>53</sup> This is reinforced by Article 209 (1) of Part XII of UNCLOS which states that “international rules, regulations and procedures shall be established in accordance with Part XI to prevent, reduce and control pollution of the marine environment from activities in the Area. Such rules, regulations and procedures shall be re-examined from time to time as necessary.”

**Sponsoring State:** Article 209 (2) states that sponsoring States are obliged to “adopt laws and regulations to prevent, reduce and control pollution of the marine environment from activities in the Area undertaken by vessels, *installations*, structures and other devices flying their flag or of their registry or operating under their authority, as the case may be. The requirements of such laws

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<sup>52</sup> Article 147 (2) (a), UNCLOS.

<sup>53</sup> Article 145 (a), UNCLOS.

and regulations shall be no less effective than the international rules, regulations and procedures referred to in paragraph 1.” They are able to apply more stringent laws and regulations vis-à-vis those adopted by the ISA relating to the protection of the marine environment.<sup>54</sup>

**Flag States:** With regard to vessels, under UNCLOS, they are subject to the exclusive jurisdiction of the flag State on the high seas.<sup>55</sup> Under Article 209, flag States are obliged to “adopt laws and regulations to prevent, reduce and control pollution of the marine environment from activities in the Area undertaken by *vessels*, installations, structures and other devices *flying their flag or of their registry* or operating under their authority, as the case may be. The requirements of such laws and regulations shall be no less effective than the international rules, regulations and procedures referred to in paragraph 1.” They are able to apply more stringent laws and regulations vis-à-vis those adopted by the ISA relating to the protection of the marine environment.<sup>56</sup>

## B. Inspection

ISA	Sponsoring State
<b>Article 153 (5), UNCLOS</b>	
The Authority shall have the right to take at any time any measures provided for under this Part to ensure compliance with its provisions and the exercise of the functions of control and regulation assigned to it thereunder or under any contract. <b>The Authority shall have the right to inspect all installations in the Area used in connection with activities in the Area.</b>	
<b>S. 14, Contract, Cobalt-Crusts</b>	
(1) The Contractor shall permit the ISA to send its inspectors on board vessels and installations used by the Contractor....  (7) The SG shall provide relevant information contained in the reports of inspectors to the Contractor and its sponsoring States or States here action is necessary.	

<sup>54</sup> Article 21 (3), UNCLOS.

<sup>55</sup> Article 92, 94, UNCLOS.

<sup>56</sup> Article 21 (3), UNCLOS.

<b>Reg. 96 (2), Draft Exploitation Regulations</b>	
<p>The Contractor shall permit the Authority to send its Inspectors aboard vessels and Installations, whether offshore or onshore, used by the Contractor to carry out Exploitation activities under an exploitation contract, as well as to enter its offices wherever situated. To that end, Members of the Authority, in particular the sponsoring State or States, shall assist the Council, the Secretary-General and Inspectors in discharging their functions under the Rules of the Authority.</p>	
<b>Reg. 99 (3), Draft Exploitation Regulations</b>	
<p>Any instruction issued under paragraph 1 above shall be in force for a specified period, not exceeding seven Days, after which it lapses. The Inspector shall report immediately to the Secretary-General and to the Contractor's sponsoring State or States that an instruction has been issued under paragraph 1, and the Secretary-General may thereafter exercise the powers conferred upon the Secretary-General under regulation 101.</p>	
<b>Reg. 100 (1), Draft Exploitation Regs</b>	
<p>At the end of an inspection, the Inspector shall prepare a report, setting out, inter alia, his or her general findings and any recommendations for improvements in procedures or practices by the Contractor. The Inspector shall send the report to the Secretary-General, and the Secretary-General shall send a copy of the report to the Contractor and to the sponsoring State or States and, if appropriate, the flag State. The Secretary-General shall report annually to the Council on the findings and recommendations following the inspections conducted in the prior Calendar Year, and shall make any recommendations to the Council on any regulatory action to be taken by the Council under these Regulations and an exploitation contract.</p>	
<b>Reg. 100 (3) Draft Exploitation Regs</b>	
<p>The Secretary-General shall report acts of violence, intimidation, abuse against or the wilful obstruction of an Inspector by any person or the</p>	

failure by a Contractor to comply with this regulation to the sponsoring State or States and the flag State of any vessel or Installation concerned for consideration of the institution of proceedings under national law.	
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**Questions for Discussion**

1. What is the role of the sponsoring State in inspection in the context of assisting the ISA in inspections?
2. Processes for co-operation?

## VI. PHASE I: PROSPECTING

**ISA:** Prospecting is not included in the UNCLOS definition of ‘activities in the Area.’ It has been defined in the Exploration Regulations as “the search for deposits of [cobalt crusts] in the Area, including estimation of the composition, sizes and distributions of deposits of [cobalt crusts] and their economic values without any exclusive rights.”<sup>57</sup> Article 2 of Annex III, UNCLOS does give the ISA certain responsibilities of regulation over prospecting, including the requirement that prospecting only takes place after the ISA has received a written undertaking that the proposed prospector will comply with UNCLOS & relevant rules, regulations and procedures of the ISA concerning training programmes and protection of marine environment.<sup>58</sup>

The Exploration Regulations elaborate on the ISA’s supervision of prospecting and impose a number of requirements.<sup>59</sup> This includes, *inter alia*, the obligation of the prospector to give notification which includes an undertaking to comply with the Convention and related instruments, co-operate in training programmes in connection with marine scientific research and transfer of technology, protection of marine environment, as well as provide the ISA with data on the protection of the marine environment.<sup>60</sup> The prospector also has to take necessary measures to prevent, reduce and control pollution and other hazards to the marine environment arising from prospecting as far as reasonably possible applying a precautionary approach and best environmental practices.<sup>61</sup> It also has to submit an annual report to the ISA on the status of prospecting.

**Sponsoring State:** Prospecting does not require sponsorship under the Convention. Therefore, the sponsoring State has no express responsibilities in relation to prospecting under UNCLOS, 1994 Implementation Agreement or the Exploration Regulations. The SDC observed that “considering that prospecting is often treated as the preliminary phase of exploration in mining practice and

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<sup>57</sup> See, for example, Regulation 1 (e) of the Cobalt Crusts Regulations.

<sup>58</sup> Article 2 (1), Annex III, UNCLOS.

<sup>59</sup> See Part II, Cobalt Crusts Regulations.

<sup>60</sup> Regulation 3, Cobalt Crusts Regulations.

<sup>61</sup> Regulation 5, Cobalt Crusts Regulations

legislation, the Chamber considers it appropriate that some aspects of the present Advisory Opinion also apply to prospecting.”<sup>62</sup>

According to the Comparative Study on National Legislation, some sponsoring States have provisions on prospecting in the Area and require prospectors to inform the competent authority, and provide certain information.<sup>63</sup> States such as China require those who conduct resources investigations to submit copies of data and samples to the Ministry in charge of oceanic administration.<sup>64</sup>

**Questions for Discussion:**

1. Is this a gap in the role of the sponsoring State?
2. Can the sponsoring State ‘assist’ the ISA in the regulation of prospectors?
3. Is there a legal basis under UNCLOS for imposing such a role?
4. Should discussion on this be part of the Final Report and Matrix considering we are focused on exploitation?

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<sup>62</sup> SDC Advisory Opinion, para. 98.

<sup>63</sup> See Comparative Study on National Legislation, 9 – 10.

<sup>64</sup> Ibid.

## VII. PHASE II: APPLICATION PROCESS

Under the Draft Exploitation Regulations, the application for a contract to exploit the deep seabed is done via a Plan of Work in the form reflected in Annex 1 of the Draft Exploitation Regulations.<sup>65</sup> The application shall be submitted by States Parties (by an authority designated for that purpose); the Enterprise (the competent authority); State enterprise or other entity (by a designated representative, or by the authority designated for that purpose by the sponsoring State).<sup>66</sup> Each Plan of Work must be accompanied by a Certificate of Sponsorship from the sponsoring State,<sup>67</sup> be accompanied by specific written undertakings by the Contractor, as well as accompanied by the following:<sup>68</sup>

- Data and information acquired during the Exploration Contract;
- A Mining Workplan prepared in accordance with Annex II;
- A Financing Plan prepared in accordance with Annex III;
- An Environmental Impact Statement prepared in accordance with Regulation 47;
- An Emergency Response and Contingency Plan prepared in accordance with Annex VI;
- A Training Plan in accordance with Article 15 of Annex III of UNCLOS;
- An Environmental Management and Monitoring Plan prepared in accordance with Regulation 48;
- A Closure Plan prepared in accordance with Regulation 59 and Annex VIII to these regulations;
- An Application Processing Fee.

Thereafter, the Secretary-General conducts a preliminary review of the application<sup>69</sup> and carries out a publication and review of the Environmental Impact Statement and Environmental Management and Monitoring Plan.<sup>70</sup> The LTC considers the application and determines whether

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<sup>65</sup> Article 153 (3), UNCLOS; Regulation 5, Draft Exploitation Regulations.

<sup>66</sup> Regulation 5 (2), Draft Exploitation Regulations.

<sup>67</sup> Regulation 6, Draft Exploitation Regulations.

<sup>68</sup> Regulation 7, Draft Exploitation Regulations.

<sup>69</sup> Regulation 10, Draft Exploitation Regulations.

<sup>70</sup> Regulation 11, Draft Exploitation Regulations

it meets the various requirements and makes a recommendation to approve or disprove the Plan of Work.<sup>71</sup>

The specific responsibilities of the sponsoring State during the application phase are not expressly set out in the Draft Exploitation Regulations, although they will of course be informed by the mandate of the sponsoring State to ensure that within their legal systems, that a sponsored contractor shall carry out activities in the Area in conformity with the terms of its contract and its obligations under the Convention; and to assist the Authority by taking all measures necessary to ensure this compliance. The sponsoring State's responsibilities in the Application Process will also be derived from its general obligations described in Part III. For purposes of discussion, we have highlighted four aspects of the application process where the sponsoring State may also have responsibilities (with the caveat that this is non-exhaustive).

#### **A. Certificate of Sponsorship**

As mentioned in Parts II and III, sponsorship is an essential pre-requisite before States enterprises and private entities can engage in activities in the Area. Under Article 153 (2) (b), such non-State actors must satisfy two requirements: (1) either to possess the nationality of a State Party or to be effectively controlled by it or its nationals; and (ii) to be sponsored by such States. Thus, this provision requires a twofold connection between the State Party and domestic law entity, namely that of nationality and effective control.<sup>72</sup> If the applicant has more than one nationality, all States concerned must sponsor the application. If the applicant is effectively controlled by another State or its nationals, the sponsorship of that State is also necessary.<sup>73</sup>

**ISA:** Article 4 (3) of Annex III states that “the criteria and procedures for implementation of the sponsorship requirements shall be set forth in the rules, regulations and procedures of the Authority.” Accordingly, the requirements for a certificate of sponsorship are set out in Regulation 6 of the Draft Exploitation Regulations. It requires applications to be accompanied by a ‘certificate of sponsorship’ issued by the State of which it is a national or by whose nationals it is effectively controlled. Where an applicant has the nationality of one State but is effectively controlled by

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<sup>71</sup> Regulations 12, 13 and 15, Draft Exploitation Regulations.

<sup>72</sup> SDC Advisory Opinion, para. 77.

<sup>73</sup> Article 4 (3), Annex III, UNCLOS.

another State or its nationals, each State shall issue a certificate of sponsorship. The Certificate of Sponsorship must contain certain information and undertakings, including a statement that the applicant is a national of the sponsoring State or is subject to its effective control and a declaration that the sponsoring State assumes responsibility in accordance with Article 139 and 153 (4), Article 4 (4), Annex III of the Convention.<sup>74</sup>

**The Sponsoring State:** In general, the ISA leaves it to the sponsoring State to decide whether it has effective control over the entity it is sponsoring.<sup>75</sup> In its view of the LTC, for example, the act of incorporation, or the conferring of nationality, combined with the undertakings given as a sponsoring State, would seem to be sufficient to establish “effective control” for the purposes of satisfying the sponsorship conditions.<sup>76</sup> The onus is thus up to the sponsoring State to impose additional requirements to satisfy itself that the objective of ‘effective control’ has been met.<sup>77</sup> According to the Comparative Study on National Legislation, “most countries have adopted the criteria of nationality or registration/residence within their jurisdiction as a necessary requirement to be entitled to apply for a license/certificate of sponsorship. Belgium and Germany add effective control as a criterion.”<sup>78</sup>

## **B. Financial and Technological Capabilities**

Apart from the sponsorship requirements, all applicants, apart from the Enterprise, must meet the qualification standards set forth in the rules, regulations and procedures of the Authority, which are related to the financial and technical capabilities of the applicant and his performance under any previous contracts with the Authority.<sup>79</sup> Both the Exploration Regulations<sup>80</sup> and Draft Exploitation Regulations<sup>81</sup> elaborate on the requirements to demonstrate financial and technical capabilities.

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<sup>74</sup> Regulation 6 of Draft Exploitation Regulations appears to be identical to Regulation 11 of Cobalt Crust Exploration Regulations.

<sup>75</sup> See generally, Andreas Rojas, Effective Control.

<sup>76</sup> ISA, Legal and Technical Commission, *Summary Report of the Chair of the Legal and Technical Commission on the Work of the Commission During the Twentieth Session of the International Seabed Authority*, SBA/20/C/20, 16 July 2014, para. 27.

<sup>77</sup> Gaddis, 258.

<sup>78</sup> Comparative Study, 10.

<sup>79</sup> Article 4 (1), (2), Annex III, UNCLOS.

<sup>80</sup> Regulation 13, Cobalt Crusts Regulations.

<sup>81</sup> Regulation 13 (2) and 13 (3), Draft Exploitation Regulations.

**ISA:** The LTC determines whether the applicant has demonstrated that it has the financial and technical capability to carry out the Plan of Work and to meet all its obligations under the Exploitation Contract.<sup>82</sup> With regard to financial capabilities, the LTC has to determine whether the applicant is capable of committing or raising sufficient financial resources to cover the estimated costs of the proposed Exploitation activities and other associated costs; the payment of applicable fees and other financial payments; estimated costs of implementing the Environmental Management and Monitoring Plan and closure plan; sufficient financial resources for prompt execution and implementation of the Emergency Response and Contingency Plan; and necessary access to insurance products that are appropriate to the financing of exposure to risk in accordance with Good Industry Practice.<sup>83</sup> The applicant also has to provide a Financing Plan with certain information set out in annex III.

With regard to the technical capability and operational capability of the applicant, the LTC must consider a range of requirements including whether it has the necessary technical and operational capability to carry out the proposed Plan of Work in accordance with Good Industry Practice using appropriately qualified and adequately supervised personnel; the technology and procedures necessary to comply with the terms of the Environmental Management and Monitoring Plan and Closure Plan; established the necessary risk assessment and risk management systems to effectively implement the proposed Plan of Work; the capability to respond effectively to Incidents.<sup>84</sup>

**Sponsoring State:** There is no express provision in UNCLOS and the 1994 Implementation Agreement which requires sponsoring States to verify the financial and technical capabilities of its sponsored contractor. The SDC Advisory Opinion suggested that one of the provisions that the sponsoring State may wish to include in its domestic laws is one concerning the financial and technical capacity of sponsored contractors.<sup>85</sup> According to the Comparative Study on National Legislation, some States make demonstration of the financial, technical and technological capabilities and reliability of the applicants as a condition of granting the certificate of sponsorship

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<sup>82</sup> Regulation 13 (1) (e), Draft Exploitation Regulations.

<sup>83</sup> Regulation 13 (2), Draft Exploitation Regulations.

<sup>84</sup> Regulation 13 (3), Draft Exploitation Regulations.

<sup>85</sup> SDC Advisory Opinion, para. 234.

(Belgium, China, Fiji, Germany, Japan, Kiribati, Nauru, Singapore, Tonga and Tuvalu).<sup>86</sup> The Exploration Regulations stipulate that an application for approval of a plan of work for exploration by a State or a State enterprise shall include a statement by the State or the *sponsoring State* certifying that the applicant has the necessary financial resources to meet the estimated costs of the proposed plan of work for exploration.<sup>87</sup> The Draft Exploitation Regulations do not impose a similar requirement on the sponsoring State in this context.

### **C. Environmental Plans**

**ISA:** As part of its obligation to take necessary measures to protect the environment from the harmful effects of deep seabed mining under Article 145 of UNCLOS, the ISA requires that “an application for approval of a plan of work shall be accompanied by an assessment of the potential 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.”<sup>88</sup>

Obligations of Co-operation: In the Exploration Regulations, this has manifested in the obligation for “Contractors, sponsoring States, and other interested States or entities [to] co-operate with the Authority in the establishment and implementation of programmes for monitoring and evaluating the impacts of deep seabed mining on the marine environment.”<sup>89</sup>

In the Draft Exploitation Regulations, “Contractors, sponsoring States and members of the Authority shall cooperate with the Authority in the establishment and implementation of programmes to observe, measure, evaluate and analyse the impacts of Exploitation on the Marine Environment, to share the findings and results of such programmes with the Authority for wider dissemination and to extend such cooperation and collaboration to the implementation and further development of Best Environmental Practices in connection with activities in the Area.”<sup>90</sup>

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<sup>86</sup> Comparative Study on National Legislation, 11.

<sup>87</sup> Regulation 13 (3), Cobalt Crust Regulations.

<sup>88</sup> Section 1(7), 1994 Implementation Agreement.

<sup>89</sup> Regulation 33 (6), Cobalt-Crusts Regulations.

<sup>90</sup> Regulation 3 (e), Draft Exploitation Regulations.

General Principles: As part of its obligation to ensure the effective protection of the marine environment, the ISA has to apply the precautionary approach; Best Available Techniques and Best Environmental Practices, integrate Best Available Scientific Evidence in environmental-decision-making, promote accountability and transparency in the assessment evaluation and management of Environmental Effects from Exploitation in the Area.<sup>91</sup>

Environmental Impact Statements, Environmental Management Plans, Closure Plans: As mentioned above, one of the requirements before approval of Plan of Work is given under the Draft Exploitation Regulations is that the applicant provides (1) an Environmental Impact Statement (EIS) prepared in accordance with Regulation 47 and in the format prescribed by Annex IV; (2) an Environmental Management and Monitoring Plan prepared in accordance with Regulation 48 and annex VII to these Regulations; and (3) a Closure Plan prepared in accordance with regulation 59 and annex VIII.<sup>92</sup> These three plans are collectively referred to as “Environmental Plans” in the Draft Exploitation Regulations.<sup>93</sup>

The purpose of the EIS is to document and report the results of the environmental impact assessment process (EIA) process.<sup>94</sup> The purpose of the Environmental Management and Monitoring Plan is to manage and confirm that Environmental Effects meet the environmental quality objectives and standards for the mining operation. The Plan sets out commitments and procedures on how the mitigation measures will be implemented, how the effectiveness of such measures will be monitored, what the management responses will be to the monitoring results and what reporting systems will be adopted and followed.<sup>95</sup> The Closure Plan sets out the responsibilities and actions of a Contractor for the decommissioning and closure of activities in a Mining Areas, including post-closure management and monitoring of residual and natural Environmental Effects. Closure also includes a temporary suspension of mining activities.<sup>96</sup>

As part of the application process, the Secretary-General of the ISA will place the Environmental Plans on the ISA website for a period of 60 days and invite members of the Authority and

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<sup>91</sup> Regulation 44, Draft Exploitation Regulations.

<sup>92</sup> Regulation 7 (3), Draft Exploitation Regulations.

<sup>93</sup> Schedule 1, Draft Exploitation Regulations.

<sup>94</sup> Regulation 47 (1), Draft Exploitation Regulations.

<sup>95</sup> Regulation 48 (1), Draft Exploitation Regulations.

<sup>96</sup> Regulation 59, Draft Exploitation Regulations.

Stakeholders (defined as a natural or juristic person or an association of persons with an interest of any kind in, or who may be affected by, the proposed or existing Exploitation activities under a Plan of Work in the Area or who has relevant information and expertise.)<sup>97</sup> The LTC is also required to provide its comments on the Environmental Plans, and prepare a report on the Environmental Plans, which includes a summary of the comments or responses made by Stakeholders, Members of the Authority and Secretary-General. The LTC's Report will also be placed on the Website and be part of the reports and recommendations of the LTC.<sup>98</sup>

### **Sponsoring State:**

General Obligation: Sponsoring States have obligations under UNCLOS and general international law to monitor and carry out environmental impact assessments. Article 204 of UNCLOS obliges States Parties as far as practicable, directly or through the competent international organization to observe, measure, evaluate and analyze the risks or effects of pollution of the marine environment. Article 205 requires reports of such effects. Article 206 stipulates that when States have reasonable grounds for believing that planned activities under the jurisdiction or control may cause substantial pollution of or significant and harmful changes to the marine environment, they shall, as far as practicable, assess the potential effects of such activities on the marine environment and communicate the results of such assessments.

SDC Advisory Opinion: The SDC Advisory Opinion also observed that EIAs were a general requirement under international law even in areas beyond national jurisdiction, although general international law did not specify the scope and content of an environmental impact assessment.<sup>99</sup> The sponsoring State is under a due diligence obligation to ensure that the Contractor complies with this obligation.<sup>100</sup> In addition, it is also a direct obligation which they have to comply independently of their obligation to ensure certain behavior of the sponsored contractor and is thus a relevant factor in determining whether the sponsoring State has met its due diligence obligation.<sup>101</sup>

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<sup>97</sup> Schedule 1, Draft Exploitation Regulations.

<sup>98</sup> See generally, Regulation 11, Draft Exploitation Regulations.

<sup>99</sup> SDC Advisory Opinion, paras. 147 – 149.

<sup>100</sup> SDC Advisory Opinion, para. 141.

<sup>101</sup> SDC Advisory Opinion, para. 142.

Obligations of co-operation under the Draft Exploitation Regulations: Under the Draft Exploitation Regulations, the sponsoring State has an obligation to co-operate with the Authority, Contractors and other States “in the establishment and implementation of programmes to observe, measure, evaluate and analyze the impacts of Exploitation on the Marine Environment, to share the findings and results of such programmes with the Authority for wider dissemination and to extend such cooperation and collaboration to the implementation and further development of Best Environmental Practices in connection with activities in the Area.”<sup>102</sup>

General Principles: Like the ISA, as part of its obligation to ensure the effective protection of the marine environment, the sponsoring State has to apply the precautionary approach; Best Available Techniques and Best Environmental Practices, integrate Best Available Scientific Evidence in environmental-decision-making, promote accountability and transparency in the assessment evaluation and management of Environmental Effects from Exploitation in the Area.<sup>103</sup>

Implementation: There are no express provisions in UNCLOS and related instruments on how the sponsoring State should implement this obligation, and as mentioned above, international law does not specify the content of EIAs.

#### **D. Obligations of Co-operation: Consultation and Exchange of Information**

Generally, under the Draft Exploitation Regulations, Members of the Authority (including sponsoring States) shall use their best endeavours to co-operate with the Authority to provide such data and information as is reasonably necessary for the ISA to discharge its duties and responsibilities under the Convention.<sup>104</sup> Further the ISA shall consult and co-operate with sponsoring States as appropriate to develop measures for the exchange of information and data to facilitate compliance with and enforcement of applicable international rules and standards.<sup>105</sup>

<b>Questions for Discussion:</b>
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<sup>102</sup> Regulation 3 (e), Draft Exploitation Regulations.

<sup>103</sup> Regulation 44, Draft Exploitation Regulations.

<sup>104</sup> Regulation 3 (a), Draft Exploitation Regulations.

<sup>105</sup> Regulation 3 (d), Draft Exploitation Regulations

1. Is the division of responsibilities between the ISA and the sponsoring State in the Application Phase clearly demarcated?
2. What role should the sponsoring State play in the Application Phase bearing in mind its obligations to secure compliance by the Contractor and its obligation to assist the ISA?
3. In the developing criteria governing sponsorship, should the definition of effective control be left to the sponsoring States? [or not necessary to discuss?]
4. Can and should the sponsoring State play a greater role in assisting the ISA in verifying the financial and technical capabilities of the sponsored Contractor?
5. With regard to EIAs, EIS, Environmental Management Plans, how can the sponsoring State fulfil its obligations but not impose duplicate requirements on the Contractor:
  - a. 2 separate procedures with different requirements or only one process but with the obligation to submit Plan of Work and related EIS, EMPs, Closure plans to the sponsoring State?
  - b. How can the sponsoring State fulfil the public consultation and transparency obligations? Should Contractor be subject to two separate public consultation processes?
  - c. What role should the sponsoring State play in reviewing the EIS, EMP and Closure Plans? Should its review be confined to the Public Consultation of the ISA Secretary-General?
  - d. What happens if the sponsoring State disagrees with the comments or decision of the LTC?
6. Given the general obligation to exchange information, should these duties be specified in the specific context of the Application Process?