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Makoto Seta

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CHAPTER 18

THE LEGITIMACY OF THE INTERNATIONAL SEABED AUTHORITY AND THE WAY IT ACCEPTS THE INVOLVEMENT OF NON-STATE ACTORS IN GOVERNING THE AREA

Makoto SETA

*Associate Professor of International Law
Yokohama City University, Japan*

RÉSUMÉ: *En 2019, un quart de siècle se sera écoulé depuis la création de l'Autorité internationale des fonds marins (AIFM-ISA). Compte tenu de son fort pouvoir sur les activités minières dans la Zone, il est nécessaire ou, du moins, hautement souhaitable que l'AIFM-ISA soit perçue comme légitime. En particulier, du fait que les activités de l'AIFM-ISA au cours des dix dernières années ont été très agressives, il semble important de revoir sa légitimité en examinant ses pratiques. En particulier, étant donné l'incertitude scientifique et le caractère éventuellement irréversible des environnements marins de la Zone après certaines activités, il semble important que l'AIFM-ISA décide de manière transparente, à la lumière de ces préoccupations, d'accepter la participation d'acteurs non-étatiques. En examinant les pratiques à l'œuvre au cours de la dernière décennie, il a été conclu que les acteurs non-étatiques (ANE) participant aux activités de l'AIFM-ISA avaient contribué à la prise de décisions et à l'élaboration de réglementations. Bien que des problèmes subsistent, l'AIFM-ISA semble aller dans une direction efficace. L'AIFM-ISA, comme toute organisation humaine, n'est pas parfaite, mais, 25 ans après sa création, et compte tenu de l'incertitude scientifique qui règne dans la Zone, son développement positif et graduel en ce qui concerne l'AIFM-ISA devrait être hautement valorisé.*

Mots-clés: *autorité internationale des fonds marins; acteurs non-étatiques; légitimité; droit de la mer; ressources minérales.*

ABSTRACT: *In 2019, one-quarter of a century has passed since the establishment of the International Seabed Authority (ISA). Given its strong power over mining activities in the Area, it is necessary or, at least, highly desirable that the ISA is perceived as legitimate. Especially, because the ISA's activities during the past ten years have been very aggressive, it seems important to review its legitimacy by examining its practices. In particular, given the scientific uncertainty and possibly irrecoverable nature of the Area's marine environments after the certain activities, it seems important that the ISA decides transparently in light of these concerns, to accept the involvement of non-state actors (NSAs). By examining the practices, it is concluded that NSAs involved with the ISA's activities and have contributed to decision-making and the development of regulations. Although challenges remain, the ISA seems to be moving in an effective direction. The ISA, like all human organization, is not perfect, but, after only 25 years since its inception, and considering the extent of scientific uncertainty of the Area, its gradual positive development of ISA should be highly evaluated.*

Keywords: *international seabed authority; non-state actors; legitimacy; law of the sea; mineral resources.*

1. INTRODUCTION

In 2019, one-quarter of a century has passed since the establishment of the International Seabed Authority (ISA). The ISA's mandate is to develop mineral resources in the seabed and ocean floors and subsoil thereof, beyond the limits of national jurisdiction (the Area), to foster economic development. Although the ISA initially was expected to focus on developing resources immediately after the United Nations Convention on the Law of the Sea (UNCLOS) went into effect, it has become clear that it will take some time before some of the resources can be exploited because of technological reasons. Despite the delay in exploitation, the ISA has established many regulations for future exploitative activities to date¹. Given its strong power over activities in the Area², it is necessary or, at least, highly desirable that the ISA is perceived as legitimate³. Rüdiger Wolfrum's interpretation of the relevant UNCLOS provisions perceives the ISA as an international administration, with legitimacy based on State Parties' consent and the elaborate dispute settlement procedure⁴.

¹ Pancraccio argued that the seabed mining will probably be one of the major phenomena in the twentieth century; PANCRACTIO, J. P. (2010), *Droit de la mer*, Dalloz, 371.

² Combacau regards the ISA's competence as similar to the territorial jurisdiction of States; COMBACAU, J. (1985), *Le droit international de la mer*, Que Sais-Je, 88.

³ Bodansky argued: «As international institutions gain greater authority, however, and their consensual underpinnings erode, questions about their legitimacy are beginning to be voiced». BODANSKY, D. (1999), «The legitimacy of International Governance, A Coming Challenge for International Environmental Law», *American Journal of International Law*, vol. 93, 597.

⁴ WOLFRUM, R. (2008), «Legitimacy of International Law and the Exercise of Administrative Functions: The Example of the International Seabed Authority, the International Maritime Organization (IMO) and International Fisheries Organizations», *German Law Journal*, vol. 9, 2054.

Perhaps the ISA is legitimate from the perspective of its structure provided in the constituent instrument. However, because the ISA's activities during the past ten years have been very aggressive, it seems important to review its legitimacy by examining its practices. In particular, given the scientific uncertainty and possibly irrecoverable nature of the Area's marine environments after the certain activities⁵, it seems important that the ISA decides transparently in light of these concerns, by accepting the involvement of non-state actors (NSAs).

Three kinds of NSAs are involved with the ISA's activities: (1) contractors, (2) environmental non-governmental organizations (ENGOS), and (3) researchers (or research institutions). Current contractors can be divided into three categories: (1) state government, (2) semi-public organization, and (3) private company⁶. Contractors and ENGOS often work with researchers. Generally, contractors tend to emphasize developing mineral resources and ENGOS perform environmental protection activities. Therefore, it is necessary that the ISA considers the balance and tension between their activities.

This study analyses the ISA's legitimacy by examining its recent activities, particularly its relationship to the NSAs with which it is involved. The following section describes the ISA's provisions under the UNCLOS system. The third section explains the ISA's recent activities. An elaboration of the ways that NSAs are involved in the ISA's activities is presented in the fourth section, and the paper closes with conclusions drawn from the analysis.

2. THE ISA UNDER THE UNCLOS SYSTEM

Part XI of UNCLOS provides most of the rules relevant to the Area, and Annex III covers the basic conditions for prospecting, exploration and exploitation in the Area. However, some of developed States' dissatisfaction with some Part XI provisions, such as compulsory transfers of technology (Article 5 of Annex III), led them to refuse to ratify it. Then, in 1994, the Implementing Agreement on Part XI (IA) was adopted, after which UNCLOS entered into force. Therefore, the current constituent instruments of the Area are both UNCLOS and IA.

Under Article 136 of UNCLOS, the Area and its resources are labeled as a «common heritage of mankind (CHM)», and a so-called «parallel system» is elaborated in Article 153 of UNCLOS. According to Article 153, both Enterprises subject to the ISA and Contractors supported by member States may develop mineral resources in the Area.

⁵ MILLER, K. A. *et al.* (2018), «An Overview of Seabed Mining Including the Current State of Development, Environmental Impacts, and Knowledge Gaps», *Frontiers in Marine Science*, vol. 4, Art. 418, 1-24.

⁶ Webpage of the ISA, available at <https://www.isa.org.jm/deep-seabed-minerals-contractors> (last visited 30th Oct. 2018).

2.1. The ISA's competence

The ISA is an organization as powerful as a sovereign State in some sense. Its competence is similar to a legislative and enforcement jurisdiction⁷. Regarding its legislative jurisdiction, Article 17 of Annex III provides the following:

«1. 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».

Those matters are things related to administrative procedures for prospection, exploration and exploitation in the Area. Moreover, the ISA is expected to adopt appropriate rules, regulations, and procedures to protect marine environment and human life⁸. This obligation is predicated on the ISA's competence to fulfill it.

Regarding enforcement, the ISA's most important power under UNCLOS is its decision-making power to grant exploration and future exploitation contracts after evaluating a plan of work submitted by the contractor candidates. According to Article 153(3) of UNCLOS, the ISA decides whether to authorize and any conditions for authorization of activities in the Area. The ISA is given the authority to sanction contractors that violate their authorized contracts under Article 18(1) of Annex III, which gives the ISA authority to suspend or terminate contracts seriously violated by contractors. Further, Article 18(2) authorizes the ISA to impose monetary penalties proportionate to the seriousness of a violation.

2.2. Structure and procedures of the ISA

Article 158(1) indicates three principal organs: Assembly, Council and Secretariat. The Assembly consists of all ISA member States and has the supreme power. The Council shall consist of 36 members elected by the Assembly in accordance with IA, Annex section 3(15) which takes into account various matters, such as the balance between developed and developing States, as well as geographical distribution. The Secretariat is led by the Secretary General.

Aside from these three main organs, Article 163 establishes two subsidiary organs of the Council: the Economic Planning Commission (EPC) and the Legal and Technical Commission (LTC). The EPC is mandated to handle the ISA's financial activities and the LTC controls legal and technical matters, including supervising the exploratory and mining activities. However, pursuant to IA, Annex section 1(4), the EPC's functions currently are being performed by the LTC. The LTC's function are provided for in Article 165, which grants it wide discre-

⁷ See TANAKA, Y. (2015), *The International Law of the Sea*, CUP, 2nd ed., 182-183.

⁸ UNCLOS, Art. 145 and 146.

tion. Therefore, the LTC's activities are important to prospecting, exploration and exploitation in the Area.

As described above, the ISA has the legislative jurisdiction over the Area to establish a mining code. In this process, the LTC, Council and Assembly work together to establish codes. First, the LTC is tasked with developing and drafting the relevant regulations. The LTC usually adopts its products by consensus, although a majority vote is acceptable⁹. Then, the Council scrutinizes the LTC's drafts, and, when accepted, the decisions are reached by consensus¹⁰. Last, the Assembly decides whether to approve the Council's drafts, and if not, returns them to the Council for review. The Assembly is expected to adopt mining codes by consensus, but, when that is not achieved, adoption may occur by a two-thirds vote¹¹. However, the drafts adopted by the Council are provisionally effective without the Assembly's approval, and there is no timeframe for the Council's reconsideration if they are rejected; therefore, the Council could indefinitely apply the provisional form of the regulations¹².

In this context, it must be noted that the composition of members of the LTC and the Council indicates that they may find more interest in developing mineral resources in the Area than protecting the marine environment. This is because most of the sponsoring States are members of the Council as of 2018¹³, and some members of the LTC concurrently work for sponsoring States or contractors¹⁴. Nevertheless, considering a limited number of experts in this field and scarce financial support for the LTC members, the additional post of an LTC member seems inevitable or even desirable from the practical perspective at the current stage.

2.3. Obligation of the ISA

As described above, the ISA is obliged to protect marine environments and human life from being harmed by the activities it approves. Regarding protection of the marine environment, it is particularly required to pay attention 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» as well as «the prevention

⁹ Rule 44 of Rules of Procedure of the Legal and Technical Commission.

¹⁰ IA, Annex sections 3(2) and 3(6).

¹¹ IA, Annex section 3(3).

¹² HARRISON, J. (2011), *Making the Law of the Sea: A Study in the Development of International Law*, CUP, 126.

¹³ Thirteen twentieths of sponsoring States, namely, Brazil, People's Republic of China (PRC), United Kingdom, Singapore, Tonga, Germany, India, France, Japan, Republic of Korea, Russian Federation, Czech Republic, and Poland are members of the Council in 2018; Webpage of the ISA, available at <https://www.isa.org.jm/files/documents/EN/Council/Council1996-2020.pdf> (last visited 30th Oct. 2018).

¹⁴ For example, Rena Lee is a staff of Singapore government and Nobuyuki Okamoto is a staff of Japan Oil, Gas and Metals National Corporation, one of Contractors sponsored by Japan; Webpage of the ISA, available at <https://www.isa.org.jm/la-autoridad/legal-and-technical-commission> (last visited 30th Oct. 2018).

of damage to the flora and fauna of the marine environment»¹⁵. In addition, Article 17(2)(f) of Annex III expands the scope of this obligation to include prevention of harmful effects from «shipboard processing immediately above a mine site of minerals derived from that mine site».

This obligation of the ISA to protect and conserve marine environments seemed strengthened in 2011 by the Advisory Opinion of the Seabed Disputes Chamber of the International Tribunal for the Law of the Sea (ITLOS). Unlike UNCLOS and IA, ITLOS's advisory opinions are not legally binding. However, because a function of the Seabed Dispute Chamber is in its jurisdiction over the dispute with respect to activities in the Area, its opinions are authoritative. Actually, ITLOS's opinions was required in order to confirm the scope of responsibilities and obligations of sponsoring State. Therefore, the implication for the ISA's obligations is limited. However, the ITLOS pointed out that ISA regulations take a precautionary approach, and, therefore, the ISA is expected either to repeat or further develop that approach in its future regulatory efforts¹⁶.

3. RECENT ISA ACTIVITIES

To date, the ISA has made many decisions, including three mining codes, namely, *Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area* (adopted in 2000 and amended in 2013) (RPEPN), *Regulations on Prospecting and Exploration for Polymetallic Sulphides in the Area* (2010) (RPEPS) and *Regulations on Prospecting and Exploration for Cobalt-rich Ferromanganese Crusts in the Area* (2012) (RPECFC).

These three regulations define the concepts of «exploitation», «exploration» and «prospecting», although these three terms are already employed in UNCLOS and Annex III. Regulation 1.3(a), (b) and (e) of RPEPN, Regulation 1.3(a), (b) and (e) of RPEPS and Regulation 1.3(b), (c) and (e) of RPECFC identically define the three concepts. «Exploitation» refers to recovery for commercial purposes of targeted mineral resources in the Area and the extraction of minerals therefrom, «exploration» means searching for deposits of targeted mineral resources in the Area and «prospecting» is defined as the search for deposits of targeted mineral resource in the Area without exclusive rights.

Mining activities can be examined based on the distinctions among the three activities. Based on the distinctions, the process of achieving the following two regulations are analysed, namely: (1) *Environmental Management Plan for the Clarion-Clipperton Zone (CCZ-EMP)* and (2) *Regulations on Exploitation of Mineral Resources in the Area*, because their influences are significant.

¹⁵ UNCLOS, Art. 145(1)(a) and (b).

¹⁶ ITLOS (2011), *Responsibilities and Obligations of States with Respect to Activities in the Area*, Advisory Opinion, 1 February 2011, ITLOS Reports, para. 130.

3.1. CCZ-EMP

The CCZ-EMP originated in a workshop at University of Hawaii, Manoa, in 2007. Supported by Pew Charitable Trust, the workshop was titled Design of Marine Protected Areas for Seamounts and the Abyssal Nodule Province in Pacific High Seas¹⁷. Its purpose was to design preservation reference areas (PRAs) where no test mining is allowed. It relied on the results of the ISA/Kaplan Project, which was jointly funded by the J. M. Kaplan Fund and the ISA. Led by Craig Smith, the project aimed to assess the biodiversity and geographical ranges of three key faunal groups in the abyssal Pacific nodule province¹⁸. Although the workshop and the ISA had no formal relationship, the workshop's outcomes were incorporated into the LTC document, *Rationale and Recommendations for the Establishment of Preservation Reference Areas for Nodule Mining in the CCZ* [ISBA/14/LTC/2]¹⁹.

Consequently, the workshop functioned to trigger the LTC's consideration and planning of environmental management in the CCZ. In 2008, the LTC decided not to proceed with the CCZ-EMP and required the Secretary General of the ISA to convene a workshop, involving many stakeholders, to further study CCZ-EMP proposal²⁰. The outcome of that workshop was the LTC's adoption of a CCZ-EMP in 2011²¹. The following year, the Council approved it to be implemented over an initial three-year period and also required the future review conducted by the LTC²². Because 16 of the contracts are about exploration for polymetallic nodules in the CCZ, the management plan in this zone might be a useful model for the future activities in the Area²³.

The concept of «Areas of Particular Environmental Interest» (APEIs) was introduced in the CCZ-EMP. Although similar in meaning to «PRAs», there are

¹⁷ *Proceedings of Pew Workshop on Design of Marine Protected Areas for Seamounts and the Abyssal Nodule Province in Pacific High Seas (Proceedings of Pew Workshop)*, available at www.soest.hawaii.edu/oceanography/faculty/csmith/MPA_webpage/documents/Proceedings_PEW_Workshop_MPAs_October_2007.pdf (last visited 30th Oct. 2018).

¹⁸ See the final report of this ISA/Kaplan Project; *Biodiversity, Species Ranges, and Gene Flow in the Abyssal Pacific Nodule Province: Predicting and Managing the Impacts of Deep Seabed Mining* (ISA Technical Study n° 3), available at <https://www.isa.org.jm/sites/default/files/files/documents/techstudy3.pdf> (last visited 30th Oct. 2018).

¹⁹ One of the organizers of the workshop, Smith argued that he has an intention to sell his method to design PRA to the LTC, and it is realized; *Proceedings of Pew Workshop*, *op. cit.*, 51.

²⁰ LODGE, M. (2011), «Some Legal and Policy Considerations Relating to the Establishment of a Representative Network of Protected Areas in the Clarion-Clipperton Zone», *The International Journal of Marine and Coastal Law*, vol. 26, 464;

²¹ ODUNTON, N. A. (2011), «Statement by H. E. Nii Allotey Odunton, Secretary-General, International Seabed Authority», 4, available at <https://www.isa.org.jm/sites/default/files/documents/EN/SG-Stats/sg-ad-hocwg.pdf> (last visited 30th Oct. 2018); *Environmental Management Plan for the Clarion-Clipperton Zone (Environmental Management Plan)* [ISBA/17/LTC/7].

²² *Decision of the Council relating to an Environmental Management Plan for the Clarion-Clipperton Zone* [ISBA/18/C/22], paras. 2, 4 and 6.

²³ JAMES, H. (2017), *Saving the Oceans through Law: The International Legal Framework for the Protection of the Marine Environment*, OUP, 239; See also *Report of the Chair of the Legal and Technical Commission on the work of the Commission during the twenty-first session of the International Seabed Authority* [ISBA/21/C/16], 5, para. 21.

several differences between APIEs and PRAs as defined by the Pew Workshop in 2007²⁴. APEIs are specifically established to avoid overlaps between current distributions of claimants and reserve areas²⁵. However, as for their dimensions (a 200 × 200 km core area surrounded by a 100 km buffer zone) and the ways of locating, PRAs determined at the workshop and the APEIs adopted by the ISA are identical.

Pursuant to the Council decision, the LTC must conduct a review within an appropriate time-frame. To facilitate the LTC, the Secretariat provided the *Review of Implementation of the Environmental Management Plan for the Clarion-Clipperton Zone*, submitted by Seascope Consultant Ltd., which stated there is no data demonstrated that the existing CCZ-EMP needed adjusted. It emphasized that no new data on the APEI's biology has been obtained since the establishment of the CCZ-EMP, and therefore, the Contractors and sponsoring States are asked to collect those data²⁶. The lack of APEI's biological data also was pointed out at a joint workshop hosted by the Japan Agency for Marine-Earth Science and Technology (JAMSTEC) and the ISA²⁷.

Finally, it must be noted that the ISA's authority to establish APEIs is not unobvious. Article 162 of UNCLOS obligates the ISA Council to «disapprove areas for exploitation by Contractors or by the Enterprises in cases where substantial evidence indicates the risk of serious harm to the marine environment». In other words, without providing evidence of risks, the Council is not obliged to disapprove areas²⁸. However, the CCZ-EMP was introduced without such evidence, which might be interpreted as an instance when the ISA abused its power. However, because the ISA has an obligation to protect marine environments in the Area and its approach is mostly precautionary, the Council's decision should be accepted.

3.2. Regulations on exploitation of mineral resources in the Area

To draft the Regulations on Exploitation of Mineral Resources in the Area, the ISA first conducted a Stakeholder Survey Questionnaire in February 2014. In the Questionnaire (in which submission of a comment is accepted by May 2014), the ISA tried to expand the scope of stakeholders as much as possible²⁹.

²⁴ *Rationale and Recommendations for the Establishment of Preservation Reference Areas for Nodule Mining in the CCZ* [ISBA/14/LTC/2] 5.

²⁵ Environmental Management Plan, *op. cit.*, 11, para. 39(c).

²⁶ SEASCAPE CONSULTANT LTD (2014), *Review of Implementation of the Environmental Management Plan for the Clarion-Clipperton Zone*, 18.

²⁷ EcoDEEP-SIP WORKSHOP (2015), *The Crafting of Seabed Mining Ecosystem-Based Management: Assessing Deep Sea Ecosystems in the Pacific Ocean*, 26.

²⁸ LODGE, M., *op. cit.*, 465-466; JAECKEL, A. L. (2017), *The International Seabed Authority and the Precautionary Principle: Balancing Deep Seabed Mineral Mining and Marine Environmental Protection*, Brill, 171.

²⁹ THE ISA (2014), *Developing a Regulatory Framework for Mineral Exploitation in the Area: Stakeholder Engagement*, 5, available at <https://www.isa.org.jm/sites/default/files/isa-ssurvey.pdf> (last visited 30th Oct. 2018).

Determining the appropriate stakeholders for the Area was difficult, compared to the maritime area within national jurisdictions, so the ISA's approach should be highly evaluated from the perspective of legitimate governance including the participation of numerous stakeholders. Since then, the ISA's approach to expand the scope of stakeholders and exchange views with them has consistently been applied.

Then, in March 2015, the ISA issued two consultative documents to members of the Authority and to all of the stakeholders: *Developing a Regulatory Framework for Mineral Exploitation in the Area: Report to Members of the Authority and All Stakeholders* and *Discussion Paper on the Development and Implementation of a Payment Mechanism in the Area*. The former document was a draft framework that included the draft action plan for further development of the regulations and reflected the comments from the 2014 Stakeholder Survey³⁰. The framework's action plan was quickly modified in July 2015, four months after the original version was issued. The other document dealt with the payment mechanism for exploitation activities in the Area³¹. In other words, this document focused on financial issues, one of the three issues for regulations on exploitation (other two issues are environmental and administrative). Both documents required all of the stakeholders to submit comments.

In February 2016, the ISA issued *First Working Draft of the Regulations and Standard Contract Terms on Exploitation for Mineral Resources in the Area*. Then, in January 2017, it issued a *Discussion Paper on the Development and Drafting of Regulations on Exploitation for Mineral Resources in the Area (Environmental Matters)*. These two documents concerned the rest of three issues, namely, administrative and environmental issues.

However, in August 2017, the ISA integrated the three issues into the one document, *Draft Regulations on Exploitation of Mineral Resources in the Area*. Because it integrated the three functional areas, the report simplified matters, and made it easier to modify regulations. As is the same manner as comments to other documents, many comments to this draft regulation³². Before the ISA analysed these comments, they were studied at a workshop jointly hosted by the Foreign and Commonwealth Office of the United Kingdom and The Royal Society in London on 12 and 13 February 2018. A result of the workshop was the ISA's issue of

³⁰ THE ISA (2015), *Developing a Regulatory Framework for Mineral Exploitation in the Area: Report to Members of the Authority and All Stakeholders*, 39 and 45, available at <https://www.isa.org.jm/files/documents/EN/Survey/Report-2015.pdf> (last visited 30th Oct. 2018).

³¹ THE ISA (2015), *Developing a Regulatory Framework for Mineral Exploitation in the Area: A Discussion Paper on the Development and Implementation of a Payment Mechanism in the Area for Consideration by Members of the Authority and All Stakeholders*, available at <https://www.isa.org.jm/files/documents/EN/WorkingPapers/DiscussionPaper-FinMech.pdf> (last visited 30th Oct. 2018).

³² *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] para. 4.

Briefing Note on the Submissions to the Draft Regulations on Exploitation of Mineral Resources in the Area [ISBA/24/C/CRP.1] on 21 February 2018.

After discussion in the LTC in March 2018, the Secretariat prepared two documents for the July session: (1) *Revised Draft Regulations on Exploitation of Mineral Resources in the Area* [ISBA/24/LTC/WP.1] and (2) *Draft Environmental Impact Statement Template* [ISBA/24/LTC/WP.1/Add.1]. By integrating these two documents and modifying several minor points of the former document, the LTC developed a revised text of the *Revised Draft Regulations on Exploitation of Mineral Resources in the Area* [ISBA/24/LTC/WP.1/Rev.1] at its July session. One significant difference from the previous version was the insertions of Regulations 46 bis. Environmental Impact Statement, 46 ter. Environmental Management and Monitoring Plan, and Annex IV which provides Template for Environmental Impact Statement. As of October 2018, this was the most recent information available about the Regulations on Exploitation of Mineral Resources in the Area.

4. INVOLVEMENT OF NON-STATE ACTORS WITH THE ISA

The previous section explained the ISA's efforts to protect marine environments and prepare for future exploitation of mineral resources in the Area. Achieving the balance between protection and development is expected of the ISA into the future. Although it is not an easy task, NSAs may have a key influence on the ISA's mission.

4.1. The ISA's need for NSAs

The ISA needs to involve NSAs in its activities because of the Area's scientific uncertainty and the ISA's lack of a scientific institution, such as the scientific committee in Regional Fisheries Management Organizations. It has been pointed out that some species in the deep seabed are fragile, and that the deep seabed's recovery time is excessively long, because sun-light does not penetrate to that depth³³. Furthermore, the precautionary approach has recently been emphasized not only by the ISA, but also generally regarding the oceans³⁴. Given this fact, the ISA and other actors are expected to refrain from any activity that might have adverse effects on the marine environment, even though such effects are scientifically not proven.

The ISA would be most effective and accurate regarding that if it had access to the best scientific data. The LTC might somewhat fill that role because some LTC

³³ WEDDING, L. M. *et al.* (2013), «From Principles to Practice: a Spatial Approach to Systematic Conservation Planning in the Deep Sea», *Proceedings of the Royal Society B (Biological)*, 5.

³⁴ For example, it was agreed in the preparatory committee for establishing the new implementing agreement on marine biological diversity of areas beyond national jurisdiction (BBNJ), that the precautionary approach should be applied: See *Report of the Preparatory Committee Established by General Assembly Resolution 69/292* [A/AC.287/2017/PC.4/2], 9.

staff member are experts in marine science³⁵. However, compared to the research capacities of the involved developed States, LTC's abilities are limited in both human and financial resources. The Secretariat's professional staff totals fewer than 20 people³⁶, and the proposed budget for 2019-2020 is about USD 18 million³⁷. In contrast, the Institut Français de Recherche pour l'Exploitation de la Mer (IFREMER) has an annual budget of EUR 210 million (not including internal operations) with 1,464 staff members that include 595 engineers and researchers³⁸. JAMSTEC's annual budget is JPY 980 million, and it has 987 staff members, including 227 engineers and 319 researchers³⁹. It is unlikely that all of IFREMER's and JAMSTEC's resources are used for research on the seabed; however, the ISA's resources simply do not allow it to work at the level of these national scientific institutions⁴⁰.

On this point, it must be noted that the national scientific institutions might tend to take a close position to sponsoring States and contractors, namely, the position to stress development, rather than protection of marine environments. This is because they share the interest in advancing exploration which leads to exploitation, and it seems difficult for national scientific institutions of sponsoring States to take the opposing position. Moreover, sometimes a national scientific institution becomes a contractor, and the institution itself has an advantage for development. For example, IFREMER is the contractor sponsored by the French government. Therefore, it is essential for the ISA to have collaborative work not only with the national research institutions but also more independent NSAs to take the balance between development and environmental protection.

4.2. The way to involve ISA activities

NSAs have contributed and will continue to contribute to the ISA's activities in two basic ways. First, they sponsor and participate in workshops and, second, they submit comments on relevant matters.

4.2.1. Workshop

Establishing the CCZ-EMP is a typical example of NSAs' workshop activities and the contributions they make to the ISA. One type of workshop is the indepen-

³⁵ The background on members of the LTC comprises two categories: legal and technological. Regarding members from 2017 to 2021, 10 members, such as Rena Lee and Elie Jarmache, seem to be law-oriented members, and the other 20 members, such as Nobuyuki Okamoto and Carlos Roberto Leite, are associated with technology.

³⁶ JOHNSON, D. *et al.* (2016), *Periodic Review of the International Seabed Authority pursuant to UNCLOS Article 154: Interim report*, 53.

³⁷ *Report of the Finance Committee* [ISBA/24/A/6-ISBA/24/C/19], para. 28.

³⁸ Webpage of IFREMER, available at <https://wwz.ifremer.fr/en/The-Institute> (last visited 30th Oct. 2018).

³⁹ Webpage of JAMSTEC, available at <http://www.jamstec.go.jp/j/about/suii/> (last visited 30th Oct. 2018).

⁴⁰ In this paper, national scientific institutions are categorized into NSAs, because in most States its legal personality and decision making are independent of the government.

dent workshop unrelated to a larger effort. The second type is a supplement to a larger meeting or diplomatic negotiation, such as the ISA Annual Conference or a conference on BBNJ⁴¹. The first type has a clear and specific purpose for specialists, whereas the second type casts a wider net. These workshops are conducted by ENGOs, and other relevant NSAs, such as governments, contractors, and research institutions, usually as collaborative engagement. The 2007 workshop that triggered the CCZ-EMP was hosted by researchers, but the Pew Charitable Trusts supported it, as explained above.

Eight workshops have been held since 2015 regarding draft regulations on exploitation⁴². Sometimes, workshops are organized as a series, such as the Payment Regime Workshops (PRW) jointly organized by the ISA, RESOLVE⁴³ and Global Sea Mineral Resources⁴⁴, which have been held three times to date. These workshops have involved both researchers and governments, and future possible payment regimes have been developed. However, most workshops are independent and *ad hoc*, so their records are not unified and data availability to non-participants varies by workshop⁴⁵.

The workshop's value should be assessed based on the extents of participation by the numerous multi-stakeholders in the ISA's activities, particularly when legislation is at stake. Two aspects are important to note. First, transparency must be guaranteed. Workshops are useful ways for stakeholders to directly exchange opinions and viewpoints, but obtaining records of the workshops' contents depends on the organizers' willingness to provide them. Certainly, it seems difficult for the ISA to require the organizers to submit records, but, because some workshops are strongly influential, such as the Pew workshop in 2007 described above, ISA-established formats for records from ISA-related workshops are highly desirable so that the ISA can provide electronic access to them via the internet. For example, to evaluate the extent of transparency, the following information should be clarified: the names of the participants, whether the workshop was closed or open to the public and how the participants were invited.

Second, the financial differences among the stakeholders are important to know because sponsoring and conducting workshops are expensive endeavors. Moreover, participants often have high travel and accommodations expenses. Thus, under certain circumstances, all of a workshop's participants could be citizens of developed States because only they could afford to pay for the trip. Future

⁴¹ For example, the International Organization for Standardization and JAMSTEC jointly held a workshop with the ISA; See List of Side Events at the Third Session of the BBNJ Preparatory Committee, available at http://www.un.org/Depts/los/biodiversity/prepcom_files/BBNJ_PrepComIII_side_events_schedule_website%20-%20rev%2029%20March%202017%20-%20rev.pdf (last visited 30th Oct. 2018).

⁴² Webpage of the ISA, available at <https://www.isa.org.jm/legal-instruments/ongoing-development-regulations-exploitation-mineral-resources-area> (last visited 30th Oct. 2018).

⁴³ See Webpage of the RESOLVE, available at <http://www.resolve.org/about> (last visited 30th Oct. 2018).

⁴⁴ See Webpage of the Global Sea Mineral Resources, available at <https://www.deme-group.com/gsr/about-gsr> (last visited 30th Oct. 2018).

⁴⁵ Probably because of differences among host organizations, the reports of PRWs are different in format.

workshops involving the ISA's activities must consider these two aspects before proceeding.

4.2.2. *Comments*

Establishing regulations on exploitation is an on-going process in which stakeholders can occasionally submit comments via the internet. Three unresolved questions relate to this question. First, it is not clear how to handle comments submitted by individuals who belong to the organizations or States which submit a comment. For example, on *Draft Regulations on Exploitation of Mineral Resources in the Area* [ISBA/24/LTC/6], Stefan Bräger, an ISA scientific affairs officer submitted a comment⁴⁶. His comment emphasized that the opinion expressed therein was his personal opinion and did not represent the ISA. However, whether the ISA's employees should be permitted to submit comments is not clear, because whereas they should be allowed to do so as individuals, it might be desirable that decision-making members, such as the members of the LTC, should not have that right.

As another example, Yuwei Li, a former member of the LTC and currently working for PRC's government as a consulting expert for the PRC's contractor, China Ocean Mineral Resource R&D Association (COMRA), submitted a comment⁴⁷. His comment should be accepted as an individual statement, and not as a reflection of COMRA's position on any matter. However, if his comment diverged from his affiliation or focused on matters outside the scope of his affiliation, it would be a cause of confusion. From the perspective of cost effectiveness by avoiding that confusion, it seems better to avoid the submission of such an individual.

The second unresolved question regarding comments is the extent to which and how to accept submissions. As explained above, the scope of stakeholders has broadened, and anyone can submit an opinion without verifying that they have an official stake in the matter. This aspect should be highly evaluated, from the perspective of accepting a wide variety of opinions. To submit comment requires nothing more than computer and internet access, but, considering the current need for scientific knowledge, it is not clear that this extent of openness is useful and should be maintained.

Third, it is not clear how comments might best be used. Obviously, the ISA would expand a great deal of time scrutinizing every comment in situations where hundreds of comments are submitted. Some comments are important to the drafting process of regulations on exploitation. For example, comments from some

⁴⁶ BRÄGER, S., «Individual Submission in Response to the Draft Regulations on Exploitation of Mineral Resources in the Area (ISBA/23/LTC/CRP.3*) as Part of a Stakeholder Consultation Process», available at <https://www.isa.org.jm/files/documents/EN/Regs/2017/Private/SBrager.pdf> (last visited 30th Oct. 2018).

⁴⁷ LI, Y., «Feedback on Enaction of the Seabed Mineral Exploitation Regulations», available at <https://www.isa.org.jm/files/documents/EN/Regs/2017/Private/LYuwei-En.pdf> (last visited 30th Oct. 2018).

member States, such as PRC, Germany and Japan⁴⁸, helped the LTC to streamline Part XII of *Draft Regulations on the Exploitation of Mineral Resources in the Area* [ISBA/24/LTC/6] regarding pacific dispute settlement⁴⁹. However, it must be pointed out that the modification might be conducted because the comments were from powerful Member States. There should be rules to clarify the reasons for accepting and using some, but not other, comments to avoid arbitrary decisions and biased outcomes.

5. CONCLUSION

NSAs involved with the ISA's activities and have contributed to decision-making and the development of regulations. Although challenges remain, the ISA seems to be moving in an effective direction. By comparing the process of establishing the CCZ-EM to the regulations on exploitation, the progress of the ISA was clarified. The process of drafting regulations on exploitation, namely, inviting comments whenever the ISA submits documents and holding workshops with numerous multi-stakeholders, seems to be a more transparent approach than the way the CCZ-EMP was established, in which decided most matters were decided in one workshop with a few participants.

Moreover, NSAs' involvement is expected to increase and be formalized. According to *Consideration, with a View to Adoption, of the Draft Strategic Plan of the International Seabed Authority for the Period 2019-2023* [ISBA/24/A/4], adopted in 2018, the ISA included «Commit to transparency» as one of the eight strategies, and increased the transparency by involving NSAs⁵⁰. In particular, regarding protection of the marine environment, it provides: «(t)he process for developing the framework and its implementation must be transparent and allow for stakeholder input»⁵¹. The ISA, like all human organization, is not perfect, but, after only 25 years since its inception, and considering the extent of scientific uncertainty of the Area, its gradual positive development of ISA should be highly evaluated.

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⁴⁸ Comments of three States are respectively available at the following link: PRC, <https://www.isa.org.jm/files/documents/EN/Regs/2017/MS/ChinaEN.pdf>; Germany, <https://www.isa.org.jm/files/documents/EN/Regs/2017/MS/Germany.pdf>; Japan, <https://www.isa.org.jm/files/documents/EN/Regs/2017/MS/Japan.pdf> (last visited 30th Oct. 2018).

⁴⁹ *Draft Regulations on the Exploitation of Mineral Resources in the Area* [ISBA/24/LTC/6], para. 13.

⁵⁰ *Consideration, with a View to Adoption, of the Draft Strategic Plan of the International Seabed Authority for the Period 2019-2023* [ISBA/24/A/4], para. 33.

⁵¹ *Ibid.*, para. 14.