

# **CODE PROJECT**

## **Template National Sponsorship Law for Seabed Mining Beyond National Jurisdiction**

**October 2020**

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## Preface: The Code Project

The Code Project is a cooperative enterprise, now in its fourth year, established by The Pew Charitable Trusts. The Code Project brings together scientists and legal scholars from different nations to provide analyses of the rules and regulations that will constitute the Mining Code of the International Seabed Authority (ISA).

Previous Code Project Reports can be found here: <https://www.pewtrusts.org/en/projects/seabed-mining-project/development-of-seabed-mining-regulations>.

In 2019, the Code Project established a standalone remote working group with specialized membership to focus on the national legislation required for a sponsoring State’s regulation of seabed mining in the area beyond national jurisdiction (as opposed to the international-level regulations). The outcome document presented here is structured as a template law, with explanatory annotations.

We hope it will be useful to inform the ISA’s development of its Mining Code, as well as for States that are developing or revising their national laws for seabed mining beyond national jurisdiction, or for other stakeholders engaged on the issue.

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Members of the Working Group and Reviewers are gratefully acknowledged for the time and insights provided in the development of this document; and it is noted that such contributions do not necessarily indicate agreement by a contributor to every element of the final document.

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*The Pew Charitable Trusts contributed financially to the Code Project. Pew is not responsible for errors within and does not necessarily endorse the opinions and conclusions herein.*

## User's Guide

The template seeks to provide recommended contents for a national law, based on the Code Project Working Group's understanding of the legal duties of an ISA sponsoring State.

Though presented as a template, this document is intended to be a generic tool to assist ISA stakeholder discussions about national law related to ISA sponsorship. As such, the document's interpretation and use will be to some extent subject to the individual interests, legal mechanisms, and adaptations of different readers and jurisdictions.

It is intended as a discussion document and guide, not as a "model law" to be copied wholesale or where a few blanks can be filled in and the document adopted.

Text-boxes throughout the document seek to explain the source of the text, where it is drawn from international law, or provide other narrative explanatory text or discussion notes.

Square bracketed wording in the document indicates either:

- optional supplementary suggestions which may be considered advisable good practice, or more stringent than minimum requirements (but are not requirements of international law); or
- terminology that may vary from jurisdiction to jurisdiction, depending on individual government and legislative structures, and legislative style, etc.

The Working Group has tried to capture some alternative perspectives from different readers in different jurisdictions. But we recognize there may well be many other viewpoints.

With this template Bill, the Working Group wishes to facilitate and encourage a robust debate, ultimately with the aim to see high and appropriate legal standards for seabed mining upheld worldwide.

## Key/Acronyms

DR	Draft Regulation
EIA	Environmental impact assessment
EIS	Environmental impact statement
Exploration Regulations	The Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area [ISBA/19/C/17]; the Regulations on Prospecting and Exploration for Polymetallic Sulphides in the Area [ISBA/16/A/12/Rev.1]; and the Regulations on Prospecting and Exploration for Cobalt-rich Ferromanganese Crusts in the Area [ISBA/18/A/11]
ISA	International Seabed Authority
ITLOS AO	International Tribunal for the Law of the Sea Advisory Opinion No. 17 of 1 February 2011 “Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area,” Seabed Disputes Chamber.
Rio Declaration	The Rio Declaration on Environment and Development U.N. Doc. A/CONF.151/26 (vol. I), 31 ILM 874 (1992)
SDG	The Sustainable Development Goals, contained in United Nations General Assembly “Transforming our World: the 2030 Agenda for Sustainable Development,” 21 October 2015, A/RES/70/1
UNCLOS	The Convention on the Law of the Sea, U.N. General Assembly, 10 December 1982

## **Template Bill**

# **SEABED MINERALS (INTERNATIONAL SEABED AREA) BILL [YEAR]**

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**An Act to provide for the administration by [State] of seabed mineral activities in the area beyond national jurisdiction, including provisions pertaining to the effective control and obligations of any party sponsored by the State to conduct such activities, and related matters.**

**Text-Box 1**

This template “Bill” is drafted with the aim to assist a State discharge its duties as an ISA Sponsoring State. An ISA Sponsoring State has specific duties under international law, including:

- (a) the “due diligence” responsibility to ensure, by adopting laws and taking appropriate measures within its legal system, that a sponsored contractor complies with UNCLOS, its ISA contract, and the rules, regulations and procedures of the ISA, and
- (b) direct responsibilities imposed upon Sponsoring States by UNCLOS and the rules, regulations and procedures of the ISA (for example, environmental impact assessment, the application of the precautionary approach, assistance to the ISA in its regulatory role, provision of recourse to domestic courts for compensation for damage caused by the contractor, etc.).

While UNCLOS allows that individual Sponsoring States have discretion to adopt different laws and administrative measures, as may be appropriate under their specific legal regimes, this template Bill recognizes that:

- the principles of responsibility and liability of a Sponsoring State apply equally to all States, whether developing or developed [ITLOS AO, paragraph 158],
- States should “exercise best possible efforts, to do the utmost” [ITLOS AO paragraph 110],
- there is some requisite minimum content, that should feature in the domestic regimes of all Sponsoring States, and
- some degree of harmonization between Sponsoring State regimes may be in the common interest.

The Bill is also predicated on the basis that:

- A Sponsoring State’s role is to “assist” the ISA (termed “the subordinate role of the Sponsoring State” in the ITLOS AO).
- No State Party may impose conditions on a contractor that are inconsistent with Part XI UNCLOS, save for the application of laws relating to the protection of marine environment that are more stringent than the ISA’s rules [UNCLOS Annex III Article 21(3); ITLOS AO, paragraphs 230-231].
- National laws concerning pollution of the marine environment from activities in the Area shall be no less effective than the ISA’s rules, regulations and procedures [UNCLOS Article 209(2)].

Taking these points in conjunction, combined with the absence of settled ISA rules and the evolving status of ISA institutional set-up for Exploitation at this time, the Bill presumes a primary regulator role for the ISA, while also reserving State powers (but not obligations) to supplement ISA rules and practice in the monitoring and enforcement of contractor compliance, in the event that the State finds it necessary to do so to meet its direct obligations as a Sponsoring State.

Further annotated comments throughout the Bill contained in numbered text-boxes will provide relevant cross-references to explain the source or rationale for the proposed content.

[General references: UNCLOS Articles 139, 153; Annex III, Articles 4(4) and 21(3); and ITLOS AO]

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The [Parliament of State] enacts as follows—

## PART 1: PRELIMINARY

### *Short Title and Commencement*

1. This Act is the Seabed Minerals (International Seabed Area) Act [year], and shall come into force [on a date appointed by [the Minister/President] by notice published in the *Gazette*].

### *Interpretation*

2.

(1) In this Act,

“**the Area**” – means the seabed and ocean floor and subsoil thereof beyond the limits of national jurisdiction, as defined in Article 1(1) of the U.N. Convention on the Law of the Sea.

“**Contingency Plan**” – means the emergency response and contingency plan required of Sponsored Parties by the Rules of the ISA.

#### **Text-Box 2**

The ISA Exploration Regulations and the draft Exploitation Regulations [ISBA/25/C/WP.1] require a Contingency Plan from the contractor, aimed at controlling the risks and managing response actions arising from unexpected incidents and emergencies, etc.

“**Contract Area**” – means any part of the Area in respect of which there is in force a contract between a Sponsored Party and the ISA for the conduct of ISA Seabed Mineral Activities.

“**Exploitation**” – means the recovery for commercial purposes of Seabed Minerals in the Area as is defined as “Exploitation” by the Rules of the ISA.

**Text-Box 3**

There is some ambiguity at the international level regarding how “Exploitation” should be defined. The ISA’s Exploration Regulations, currently in force, contain the following definition: “*Exploitation – means the recovery for commercial purposes of Seabed Minerals in the Area and the extraction of minerals therefrom, including the construction and operation of mining, processing and transportation systems, for the production and marketing of metals.*” This definition is notable for including transport and processing, not phrased as being restricted to activities taking place at sea and in the Area.

The Seabed Disputes Chamber queried the logic of this definition in the ITLOS AO, noting the wording of UNCLOS Article 145, Annex III Article 17(2)(f), and Annex IV Article 1(1) – which taken together strongly suggest that transporting to land, and onland processing, are activities that fall outside of the ISA’s jurisdiction.

The latest draft Exploitation Regulations [ISBA/25/C/WP.1] propose to define Exploitation differently, namely: “*the recovery for commercial purposes of Resources in the Area with exclusive rights and the extraction of Minerals therefrom, including the construction and operation of mining, processing and transportation systems **within the Area**, for the production and marketing of metals, as well as the decommissioning and closure of mining operations.*” [our emphasis]. This definition addresses the ITLOS AO point. It also contains other differences from the Exploration Regulations (e.g., inclusion of decommissioning). The definition has evolved over time, as the draft Regulations have been redrafted in different iterations. As the draft Regulations remain under negotiation, it may not yet be settled.

A number of stakeholders have raised that the definitions need to be aligned between the ISA’s Exploration and Exploitation Regulations. It seems generally acknowledged that the Exploration Regulations’ definition could be improved (but there is reluctance to open those adopted Regulations for redrafting).

So the definition proposed in this template Bill, by simply referring to the “Rules of the ISA,” aims to address this uncertainty by allowing for an evolving definition, which can also vary between Exploration or Exploitation (if the ISA does not align its Regulations in this regard).

**“Exploration”** – means the searching for deposits of Seabed Minerals in the Area with exclusive rights, the analysis of such minerals, the use and testing of recovery systems and equipment, processing facilities and transportation systems, and the carrying out of studies of the environmental, technical, economic, commercial and other appropriate factors that must be taken into account in Exploitation.

**Text-Box 4**

This definition is taken from the ISA Exploration Regulations. If a State wishes to be consistent with the approach taken to the definition of “Exploitation” above (i.e., to refer to the ISA Rules for the definition) [see text-box 3], the language could be amended here instead to read: *“Exploration” means the searching for deposits of Seabed Minerals in the Area with exclusive rights, as is defined as “Exploration” by the Rules of the ISA.*

An **“Incident”** occurs when –

- (a) a ship or installation or other similar item or structure while engaged in ISA Seabed Mineral Activities is lost, abandoned, capsized, collides or incurs significant damage;
- (b) loss of life or injury requiring hospitalization occurs on board any ship or installation while engaged in ISA Seabed Mineral Activities, except in the case of a loss of life that is certified by an independent medical practitioner as being the result of natural causes;
- (c) the conduct of ISA Seabed Mineral Activities results in significant unanticipated or unlawful adverse impact to or pollution of the Marine Environment or damage to submarine cables or other marine user;
- (d) the ISA issues an emergency order in connection with the ISA Seabed Mineral Activities, or the Sponsored Party, at the requirement of the ISA or the Rules of the ISA, implements the Contingency Plan or other emergency response plan or protocol; or
- (e) any other event occurs that is defined as an “Incident” by the Rules of the ISA.

**Text-Box 5**

The draft Exploitation Regulations [ISBA/25/C/WP.1] envisage the use of “Incident” as a defined term, and as a trigger for regulatory or contract action; so the template Bill adopts the same approach. However, at the time of drafting, the definition of “Incident” is not settled under the ISA rules. Hence the template Bill proposed a definition here which lists some specific events that a Sponsoring State is likely to wish to use as a trigger for follow-up action (regardless of whether the ISA also considers these trigger events), as well as encompassing the ISA definition (when settled) – which may or may not cover the same events as those listed above.

**“The International Seabed Authority”** or **“ISA”** – means the International Seabed Authority established by Part XI Section 4 of the U.N. Convention on the Law of the Sea as the organisation through which States Parties shall organise and control ISA Seabed Mineral Activities in the Area.

**“ISA Seabed Mineral Activities”** – means activities for the Exploration or Exploitation of Seabed Minerals within the Area conducted pursuant to a contract with the ISA, and under [State] sponsorship.

**Text-Box 6**

UNCLOS uses the defined term “Activities in the Area” to mean “*all activities of exploration for, and exploitation of, the resources of the Area.*” A different defined term is used here, to denote that for the purposes of this Bill, the term covers more specifically such Activities in the Area as are sponsored by [State].

“**Marine Environment**” – means the environment of the sea, and includes the physical, chemical, geological and biological components, conditions and factors which interact and determine the productivity, state, condition, quality and connectivity of the marine ecosystem(s), the waters of the seas and oceans and the airspace above those waters, as well as the seabed and ocean floor and subsoil thereof.

**Text-Box 7**

This definition of “Marine Environment” reflects the definition included in the draft Exploitation Regulations [ISBA/25/C/WP.1]. Alternative definitions might be considered, though it should be clear that the definition is not restricted to national jurisdiction, in case a similar defined term is adopted from another domestic law.

“**The Minister**” – means the Minister responsible for this Seabed Minerals Act and the Seabed Minerals Authority.

“**Person**” – means any natural person or business enterprise and includes, but is not limited to, a corporation, partnership, cooperative, association, the State or any subdivision or agency thereof, and any foreign State, subdivision or agency of such State or other entity.

**Text-Box 8**

Some jurisdictions will have generic terms like “person” and “prescribed” covered in an Interpretations Act.

“**the Precautionary Approach**” – means that, in order to protect the environment, where there are threats of serious or irreversible damage, lack of full scientific certainty must not be used as a reason for postponing cost-effective measures to prevent environmental degradation.

**Text-Box 9**

Some jurisdictions will prefer to use the term the ‘Precautionary Principle’.

This Bill adopts the Rio Declaration on Environment and Development 1992 definition of the precautionary approach, as does the ISA in its Exploration Regulations (and draft Exploitation Regulations as of March 2019 [ISBA/25/C/WP.1]). Those ISA Regulations require the Sponsoring State to apply the precautionary approach (using that Rio Declaration definition). However, a State may in fact prefer to use a different and less restricted definition in its national legislation to ensure it is meeting its obligations as a Sponsoring State, mindful of the ITLOS Advisory Opinion, in which the Seabed Advisory Chamber noted its opinion that:

- Precaution is an integral part of a state’s duty of due diligence, which is applicable even outside the scope of the Regulations [paragraph 131].
- The ISA Regulations’ definition of the precautionary approach limits its scope, by focusing only on threats of “serious or irreversible damage,” “cost-effective” measures adopted in order to prevent “environmental degradation,” and indicating that it shall be applied by States “according to their capabilities” [paragraphs 128-129].
- The precautionary approach should not be so circumscribed and applies “*where scientific evidence concerning the scope and potential negative impact of the activity in question is insufficient but where there are plausible indications of potential risks*” [paragraph 131].
- If a Sponsoring State were to disregard “plausible indications of potential risks” of negative environmental impacts, this would constitute failure to comply with the precautionary approach, and would place the State in breach of its sponsorship obligations [paragraph 131].

“**Prescribed**” – means prescribed by Regulations or other subordinate legislation made under this Act.

“**Prospecting**” – means the search for Seabed Minerals, including estimation of the composition, size and distribution of deposits and their economic values, without any exclusive rights;

“**Public Official**” – means a person in the permanent or temporary employment of the Government of [State].

**Text-Box 10**

Some jurisdictions will have other laws that can be cross-referenced here for a definition of a public official – e.g., Public Services Act, Civil Services Act, etc.

“**Qualification Criteria**” – means the criteria that must be met before a Sponsorship Certificate can be issued, as stipulated in section 18(2) of this Act.

“**Rules of the ISA**” – means any rules, regulations, procedures, or other standards [/ instruments], adopted by the ISA pursuant to powers conferred on the ISA by the U.N. Convention on the Law of the Sea that are from time to time in force and intended to be legally binding upon States or Sponsored Parties, and any contractual terms contained in a plan of work in the form of a contract between the ISA and a Sponsored Party relating to ISA Seabed Mineral Activities.

**Text-Box 11**

The obligation of a Sponsoring State under UNCLOS is “to ensure” that the activities conducted by the Sponsored Party are “in conformity” or in “compliance” with the rules which are referred to in UNCLOS Article 139, Article 153 (4), and Annex III Article 4(4). These provisions specify that the relevant rules comprise: UNCLOS itself, the rules, regulations and procedures of the ISA, and the individual contractor’s plan of work agreed by way of an ISA contract. The definition of “Rules of the ISA” proposed in this template Bill mirrors that list, but adds an additional legally binding instrument recently introduced at the ISA via the draft Exploitation Regulations [ISBA/25/C/WP.1] (DR94), entitled “Standards.” The evolution of this concept remains subject to final negotiations and agreement. It is unclear from the current draft Exploitation Regulations whether Standards are classified as “rules, regulations and procedures” of the ISA, or whether they have a different status. So for the avoidance of doubt, the definition for “Rules of the ISA” used in this Bill includes “Standards” and applies the wording “intending to be legally binding,” to clarify and ensure that only legally binding ISA instruments are captured by the definition.

The ISA also proposes another new subsidiary instrument under the exploitation regime: “Guidelines.” While these have been described as being recommendatory in nature only (in contrast to binding “Standards”), there has also been a suggestion that the legal status of the Guidelines will be determined by their content and that each Guideline should contain a clear statement of its purpose and legal status. So it is not currently entirely clear that Guidelines will not be legally binding. For this reason, and in case further types of ISA subsidiary instruments are developed over time, which are intended to be binding (on contractors, or States), the more general square-bracketed term “instruments” may be preferred in this defined term.

**“Seabed Minerals”** – means the solid mineral resources of any part of the Area, including polymetallic nodules, cobalt-rich ferromanganese crusts, and polymetallic sulphides, whether in situ at or beneath the seabed, or recovered from the Area.

**Text-Box 12**

UNCLOS does not use the term ‘seabed minerals’ but uses two separate terms [Article 133]:

- “resources” means all solid, liquid or gaseous mineral resources *in situ* in the Area at or beneath the seabed, including polymetallic nodules;
- resources, when recovered from the Area, are referred to as “minerals.”

For the purposes of this Bill it is deemed more convenient only to use one term encompassing solid minerals only, both in situ and when recovered from the sea floor.

**“Seabed Minerals Authority”** is the entity so designated under section 8(1) of this Act.

**“Sponsored Party”** – means a person who holds a Sponsorship Certificate, and that person’s representatives or officers.

**“Sponsorship Applicant”** – means a person applying for a Sponsorship Certificate under this Act.

“**Sponsorship Application**” – means an application made by a person for a Sponsorship Certificate under this Act.

“**Sponsorship Certificate**” – means a certificate validly issued by [State] under this Act.

“**Sponsoring State**” – means a State party to the U.N. Convention on the Law of the Sea, sponsoring a person to carry out exploration or exploitation in the Area in accordance with Article 153(2)(b) of the U.N. Convention on the Law of the Sea.

“**Technical Committee**” means any Technical Committee, appointed by the Minister in accordance with section 13 of this Act.

“**U.N. Convention on the Law of the Sea**” – means the United Nations Convention on the Law of Sea of 10 December 1982 entered into force on 16 November 1994; the 1994 Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982, and any Annexes thereto.

(2) Unless a contrary intention appears, other words and expressions used in this Act are accorded the same meaning as used in the U.N. Convention on the Law of the Sea, and the Rules of the ISA.

### *Scope of this Act*

3.

(1) The objectives of this Act are to –

- (a) Assist [State] to discharge its legal duties as a Sponsoring State;
- (b) Regulate any ISA Seabed Activities, ensuring they are carried out –
  - (i) only by entities that are under [State]’s effective control,
  - (ii) in conformity with the U.N. Convention on the Law of the Sea and the Rules of the ISA, and other applicable requirements of international law,
  - (iii) for the benefit of humankind as a whole,
  - (iv) so as to ensure the effective protection of the Marine Environment against any harmful effects of those activities, and
  - (v) in the public interest of [State];
- (c) Empower [State] to participate in ISA Seabed Mineral Activities whether directly, or through sponsorship of Sponsored Party; and



(d) Establish a stable, transparent and accountable legal operating environment for persons sponsored by [State] to undertake ISA Seabed Mineral Activities in the Area.

(2) To achieve its objectives, this Act *inter alia* –

(a) Identifies the responsible authorities within Government to manage and regulate [State] involvement with ISA Seabed Mineral Activities.

(b) Establishes a system for Sponsorship Application, and the grant of Sponsorship Certificates under which Sponsored Parties may be authorized to engage in ISA Seabed Mineral Activities under specific and enforceable conditions.

**Text-Box 13**

Throughout the Bill, the key instrument that creates the sponsorship relationship is the “Sponsorship Certificate.” Terminology of “licence” is avoided, as a Sponsoring State does not have legal powers to confer rights over minerals in the Area; only the ISA can approve a plan of work and issue a contract.

(c) Provides for [State] to receive, and manage responsibly, revenue in return for its sponsorship of ISA Seabed Mineral Activities.

(3) This Act is made on the basis that the Rules of the ISA and the ISA’s monitoring and enforcement capacity are developed and implemented in an appropriate manner to secure compliance by a Sponsored Party with relevant standards and obligations of international law.

**Text-Box 14**

At the time of drafting (mid-2020) the Rules of the ISA for Exploitation remain unsettled, and the ISA’s monitoring and enforcement capacity is evolving. Although UNCLOS appears to envision Sponsoring States’ role as being largely to “assist” the ISA in the discharge of its duties as primary regulator, this template Bill recognizes that States enacting sponsorship legislation in the near future may wish to include additional rules and powers which can be exercised at the State’s discretion, particularly in case the international regime is not finalized in due time, or to cover a situation where the State wishes to apply higher standards to its nationals in certain regards than those agreed at the international level (and it is not prohibited under international law to do so).

***Jurisdiction***

4.

(1) This Act is made pursuant to Articles 139 and 153(4), and Article 4(4) of Annex III, of the U.N. Convention on the Law of the Sea.

(2) In enacting this Act, the [State] recognizes –

(a) Seabed Minerals to be the common heritage of humankind;

- (b) That the rights to Seabed Minerals are governed by the U.N. Convention on the Law of the Sea and the Rules of the ISA;
- (c) The ISA's responsibility under the U.N. Convention on the Law of the Sea to organize and control activities in the Area on behalf of humankind as a whole, including to:
  - (i) Process applications for approval of plans of work for Exploration and Exploitation;
  - (ii) Monitor compliance with plans of work, approved in the form of a contract, including through a staff of inspectors;
  - (iii) Adopt rules, regulations and procedures necessary for the conduct of Exploration and Exploitation;
- (d) The development of Rules of the ISA for the:
  - (i) protection and preservation of the natural resources of the Area and the prevention of damage to the flora and fauna of Marine Environment,
  - (ii) prevention, reduction and control of pollution and other hazards to, and the interference with the ecological balance of, the Marine Environment,
  - (iii) exercise of such control over activities in the Area as is necessary for the purpose of securing compliance with the U.N. Convention on the Law of the Sea and the Rules of the ISA by persons carrying out activities in the Area
- (e) The responsibility of States Parties to assist the ISA in discharging its duty outlined in section 4(2)(d)(iii) of this Act;
- (f) That seabed mineral activities in the Area may be conducted only by:
  - (i) the State, or
  - (ii) a Sponsored Party; and
- (g) Where [State] is a Sponsoring State, the State's duty to:
  - (i) meet obligations imposed directly upon the State by the U.N. Convention on the Law of the Sea and the Rules of the ISA;
  - (ii) only sponsor persons which possess the nationality of [State] or are effectively controlled by [State] or [State] nationals;
  - (iii) ensure conformity of ISA Seabed Mineral Activities with the U.N. Convention on the Law of the Sea and the Rules of the ISA.

***Nothing to authorize unlawful interference with other sea users***

5. Nothing in this Act authorizes the unlawful interference with the freedom of the high seas or the conduct of marine scientific research under the general principles of international law.

**Text-Box 15**

The ISA Exploration Regulations contains a similar provision (“*These Regulations shall not in any way affect the freedom of scientific research, pursuant to article 87 of the Convention, or the right to conduct marine scientific research in the Area pursuant to articles 143 and 256 of the Convention. Nothing in these Regulations shall be construed in such a way as to restrict the exercise by States of the freedom of the high seas as reflected in article 87 of the Convention.*”) which is mirrored again in the draft Exploitation Regulations, DR1(4) [ISBA/25/C/WP.1].

***Rights of other States***

6. Nothing in this Act in any way affects the rights of coastal States in accordance with Article 142 and other relevant provisions of the U.N. Convention on the Law of the Sea and the Rules of the ISA.

**Text-Box 16**

The ISA Exploration Regulations contain a similar provision (“*Nothing in these Regulations shall affect the rights of coastal States in accordance with article 142 and other relevant provisions of the Convention.*”) which is mirrored again in the draft Exploitation Regulations, DR4(1) [ISBA/25/C/WP.1]. The draft Exploitation Regulations also include a process by which a coastal state can raise concerns with the ISA about possible adverse environmental impacts to its territory arising as a result of activities in the Area, which includes notification to the Sponsoring State and opportunity for the State to provide comment.

***[State] may apply to the ISA to conduct ISA Seabed Mineral Activities***

- 7.
- (1) [State] may, in accordance with the provisions of the U.N. Convention on the Law of the Sea and the Rules of the ISA, apply to the ISA to be issued a contract for seabed mineral activities in the Area, either directly or in partnership with a Sponsored Party.
  - (2) A Sponsored Party must be under the effective control of [State] which requires that it is –
    - (a) A body corporate registered in [State], and
    - (b) Majority-owned [and/or] controlled in terms of day-to-day administration by the State, or nationals of [State].

**Text-Box 17**

UNCLOS requires a twofold connection between States Parties and domestic law entities who wish to become ISA contractors, namely that of nationality or effective control, and that of sponsorship. UNCLOS does not expressly define “effective control,” though does indicate that “nationality” and “effective control” are separate concepts, not to be conflated [UNCLOS Articles 139 and 153(2)]. Many ISA contractors currently are either States Parties (not requiring sponsorship) or State-owned enterprises, where questions of effective control do not arise. ISA practice in granting Exploration contracts to non-state actors has hitherto appeared to focus on the location of the registration of a company only. Recent analysis suggests a more logical interpretation of the “effective control” criterion might look also at ownership and management as factors relevant to determine the level of de facto control by the State [for example, Rojas and Phillips “*Effective Control and Deep Seabed Mining: Toward a Definition*” 2019, Centre for International Governance Innovation]. A de facto approach was also taken in the Convention on the Regulation of Antarctic Mineral Resource Activities (CRAMRA), which requires “*a substantial and genuine link*” between Sponsoring State and operator, which includes for non-State actors an examination of the location of the company’s management; and then defines “effective control” as “*the ability of the Sponsoring State to ensure the availability of substantial resources of the Operator for purposes connected with the implementation of this Convention, through the location of such resources in the territory of the Sponsoring State or otherwise.*”

Having a Sponsored Party that is owned and managed by non-state nationals, and/or which has little meaningful presence or resources within the sponsoring State, would not seem to be an optimal arrangement for a Sponsoring State. So the template Bill (here, and in s.18(2)(b), below) proposes this approach to “effective control,” aimed to maximize State supervisory reach, taking into account the economic reality of controlling influences and corporate structures. This approach may also help prevent forum shopping within the context of deep-seabed mining in the Area.

- (3) [[Name, or description of a state-owned enterprise] is empowered by this Act to undertake the necessary steps to act as a Sponsored Party.]

**Text-18**

This subsection (3) is an optional section, for a State that has a specific State-owned enterprise already established that it wishes to empower by law to hold an ISA contract. This may be a useful inclusion, in the case that the statute or governing documents establishing the State-owned enterprise did not give this power. Specifying the name of a State-owned enterprise here that *may* apply to conduct ISA Seabed Mineral Activities does not require that enterprise to do so, nor does it preclude any other party from applying to conduct ISA Seabed Mineral Activities under [State] sponsorship.

**PART 2 – [STATE] SPONSORSHIP OF ISA SEABED MINERAL ACTIVITIES*****Administration***

8.

- (1) [Name of Ministry/Statutory Authority] is the Seabed Minerals Authority, responsible for undertaking sponsorship oversight and regulatory activities required under this Act.

**Text-Box 19**

This section 8 presumes that there is an existing body that can be assigned the role of responsible agency for the State's ISA sponsorship. If there is no such existing entity within government appropriate for the role, then a new body may need to be created. The State may also wish to consider whether there may need to be different agencies designated for different functions, for example: (a) engagement with ISA processes by the State as an ISA members State, (b) Sponsored Party contract management, and (c) monitoring and enforcement of environmental management performance.

This Bill adopts an approach whereby the Seabed Minerals Authority is funded by core government funding allocation; any fees raised by its activities are paid into central funds (and any other proceeds are paid into ring-fenced sovereign wealth funds). See Part 8, below. This is to avoid correlation between decisions taken by the Seabed Minerals Authority (e.g., whether to sponsor, whether to issue a penalty fine) and its own funding.

- (2) Where [State] sponsors a Sponsored Party to conduct ISA Seabed Mineral Activities, the Seabed Minerals Authority will be responsible for the regulatory supervision of the sponsorship, and in particular for ensuring that the performance of the contract takes place in accordance with the Rules of the ISA, this Act and other relevant national laws of [State] and international law to which [State] is subject.
- (3) Where a Sponsored Party is a state-owned enterprise, the [chief executive officer] responsible for that state-owned enterprise will be responsible for the performance of the ISA contract, under the regulatory supervision of the Seabed Minerals Authority.
- (4) In discharging its duties under this Act the Seabed Minerals Authority:
  - (a) shall establish an independent monitoring function.
  - (b) has all reasonable powers required to perform the functions required by this Act, including a power to appoint qualified personnel.
  - (c) must act in good faith, and a way that is compatible with principles of best regulatory practice, including that regulatory activities should be proportionate, accountable, consistent, transparent, carried out with impartiality, outcome-focused, and targeted only at cases in which action is needed.

**Text-Box 20**

UNCLOS Articles 157 and 300 require States to fulfil in good faith the obligations assumed by them under UNCLOS. This proposed Bill provision about 'best regulatory practice' reflects this, draws upon theories of regulatory practice generally developed, and also reflects the Seabed Disputes Chamber comments that a Sponsoring State must act in good faith, that the State's standard of due diligence should correlate to the riskiness of the relevant activities, and that "*reasonableness and non-arbitrariness must remain the hallmarks of any action taken by the sponsoring State.*" [ITLOS AO paragraphs 117 and 230].

### ***Consultation***

9. In addition to consultations required under this Act, or any other enactment or Rules of the ISA, the Seabed Minerals Authority may at any time and in any way that it sees fit consult with persons of relevant expertise, interest groups, the Technical Committee or the general public.

#### **Text-Box 21**

Consultations are required in this Bill for sponsorship decisions (see s.15(2)(b)) and in environmental impact assessments for ISA Seabed Mineral Activities (see s.17(2)(b)). This section 9 enables additional consultations.

A Sponsoring State may wish to include more specific requirements or options in this section to indicate how public participation will be prioritized, for example: mandatory consultations for certain decisions (in addition to s.15(2)(b) and s.17(2)(b)), detail about the length and methods of consultation, requirements for stakeholder mapping, or defined procedures for how consultation responses are dealt with by the State.

Drafters of a national Bill could also consider inclusion in the law of a specific definition of “consultation,” aimed to ensure the efficacy and meaningfulness of any consultation exercise, e.g.:

*“consult and consultation means to—*

- (a) provide appropriate access to relevant information in accessible terminology and format;*
- (b) provide reasonable opportunity for those consulted to raise enquiries and to make known their views;*
- (c) record those views in written form and, where appropriate, provide that record to Government and third parties;*
- (d) consider those views in the government’s administration of this Bill; and*
- (e) continue or repeat these processes, as appropriate, if the subject matter of a prior consultation substantially alters (including as a result of prior consultation).”*

The term “general public” used in this section 9 may be interpreted to extend beyond national population. The UNCLOS requirement that Activities in the Area should be for the “benefit of humankind as a whole” [Article 140] suggests a need to receive inputs from humankind generally to inform decision-making, including by Sponsoring States. (Though it is noted that some States may find such an international scope difficult to address within national law, and may prefer to see the ISA as the forum for wider global consultations, rather than national efforts.)

### ***Objectives of the Seabed Minerals Authority***

10. In performing its functions under this Act, the Seabed Minerals Authority must work to the objectives provided in section 3(1) of this Act.

*Functions of the Seabed Minerals Authority*

11.

- (1) The Seabed Minerals Authority, in relation to ISA Seabed Mineral Activities, has the following functions, to –
- (a) Receive and review and make recommendations upon Sponsorship Applications, in accordance with the requirements of this Act.
  - (b) Solicit, receive, and consider comments and recommendations regarding Sponsorship Applications.
  - (c) Prepare and issue Certificates of Sponsorship for successful Sponsorship Applicants.
  - (d) Monitor whether a Sponsored Party continues to be under the effective control of the State or [State] nationals.
  - (e) Liaise with the ISA and any other relevant international organisations to facilitate a Sponsored Party's application to the ISA for a contract or contract extension, and to maximize [State] and a Sponsored Party's understanding of and compliance with relevant international laws, standards and rules.
  - (f) Assist the ISA in its work to establish, monitor, implement and secure compliance by the Sponsored Party with the Rules of the ISA.

**Text-Box 22**

All States have a direct obligation pursuant to Article 153(4) of UNCLOS to assist the ISA to control activities in the Area to secure compliance by contractors with UNCLOS and the Rules of the ISA. The ISA's emerging rules reiterate this State obligation – e.g., DR96(2) of the draft Exploitation Regulations [ISBA/25/C/WP.1].

- (g) Monitor the Sponsored Party's compliance with this Act and the Rules of the ISA, and take administrative action in accordance with this Act to enforce compliance.
- (h) Undertake any further advisory, supervisory or enforcement activities in relation to ISA Seabed Mineral Activities or the protection of the Marine Environment, in the event this is required in addition to the work of the ISA in order for [State] to meet its obligations under the U.N. Convention of the Law of the Sea;
- (i) Require and review relevant reports and information, and maintain appropriate records, pertaining to ISA Seabed Mineral Activities.
- (j) Share publicly information about ISA Seabed Mineral Activities, and conduct stakeholder engagement, and expert consultations, to inform the work of the Seabed Minerals Authority.

- (2) The Minister may give such directions, not inconsistent with the provisions of this Act and the U.N. Convention on the Law of the Sea or the Rules of the ISA, as to the performance of functions and duties by the Seabed Minerals Authority.

### *Financial negotiations*

12. [Insofar as they are not prescribed by law, the [Finance Ministry] is responsible to negotiate financial terms in respect of ISA Seabed Mineral Activities with Sponsored Parties or other parties engaged in ISA Seabed Mineral Activities.]

#### **Text-Box 23**

States may prefer not to include this provision or the possibility of case-by-case financial negotiations. Legislating only for uniform, transparent financial conditions is preferable. However, this optional provision is included in the template Bill to indicate that if financial negotiations are envisaged, this should not be a role for the seabed minerals regulatory body in order to preserve independence, but should rather be undertaken by a separate authority – e.g., the Finance Ministry.

“Other parties” here may include subcontractors and procurers of minerals from the State.

### *The Technical Committee*

- 13.
- (1) The [Head of the statutory authority/Ministry designated as the Seabed Minerals Authority] may from time to time appoint a Technical Committee to provide technical and policy advice and recommendations to the Seabed Minerals Authority to assist the Seabed Minerals Authority in the performance of its functions.
- (2) [*Insert details about composition, size, appointments, procedures, etc., of Technical Committee.*]

#### **Text-Box 24**

Section 8(4)(a) gives the Seabed Minerals Authority powers to appoint qualified personnel. But it is considered there is added value in having this separate provision regarding a Technical Committee, as a signal that (a) Government does not have to attempt to have in-house people on permanent employment covering all areas of expertise, and (b) Government has a power which it should use, in order to equip itself appropriately to manage its responsibilities as a Sponsoring State. Subsection (2) can be completed on a State-by-State basis, to provide more details about the composition and procedures of the Technical Committee.

### *Jurisdiction of National Courts*

14. The [High Court] is given jurisdiction by this Act to conduct –



- (a) judicial review of administrative decisions, determinations, actions or inquiries taken under this Act, or

**Text-Box 25**

Each State would need to assess according to practice and the individual national legal system in that State which Court(s) should be made responsible for the judicial review of administrative decisions and for liability claims. In some jurisdictions, it may not be the same Court.

- (b) proceedings to establish liability and to provide recourse for prompt and adequate compensation in the event of damage caused by ISA Seabed Mineral Activities, in accordance with Article 235(2) of the U.N. Convention on the Law of the Sea [– with regard to which strict liability will apply].
- (c) [Limits on damages recoverable may be prescribed in relation to strict liability proceedings brought under section 14(b).]

**Text-Box 26**

As noted by the ITLOS AO, a Sponsoring State has a direct obligation pursuant to Article 235 UNCLOS to 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 the State’s jurisdiction.

This section 13’s proposed application of strict liability (i.e., a no-fault standard) would mean that any (environmental) damage caused outside of the impacts permitted by the Rules of the ISA will give rise to an actionable claim, regardless of contractor fault or negligence. UNCLOS actually uses ‘wrongful acts’ terminology (Annex III, Article 22), which *prima facie* implies a fault-based standard. It has however been argued that this does not preclude the application of a strict liability approach in domestic laws by States parties (Craik, A.N. “*Determining the Standard for Liability for Environmental Harm from Deep Seabed Mining Activities*” 2018, Centre for International Governance Innovation.) Analysis of current Sponsoring State practice suggests that one or two States may have this approach in their laws, while other national laws either have not, or are silent on the point. [See Lily, H “*Sponsoring State Approaches to Liability Regimes for Environmental Damage Caused by Seabed Mining*” 2018, Centre for International Governance Innovation].

Liability caps (as suggested in optional subsection (c)) may prevent the regime placing unfair liability burden for no-fault actions upon the Sponsored Party.

Also see text-box 59 below, on these points).

### **PART 3 –APPLICATION FOR CERTIFICATE OF SPONSORSHIP**

#### ***Processing of Sponsorship Applications***

15. The Seabed Minerals Authority –

- (1) must deal with Sponsorship Applications –

- (a) promptly [and within 60 days from receipt of the Application, or receipt of further information or an amended Application provided by the Applicant in accordance with this section], and
  - (b) in accordance with this Act;
- (2) at any time before making a recommendation under section 19 of this Act –
- (a) may request further information from a Sponsorship Applicant, or request the Sponsorship Applicant to amend any part of its Sponsorship Application within 45 days from the date of the request;

**Text-Box 27**

Some States may wish additionally to prescribe expressly for a feedback loop process, once the application for a sponsorship has been received, whereby Government first checks and confirms to the Applicant whether the file is admissible and complete. However, this is not included in the template Bill on the basis that it is already enabled (if not required) by the wording of proposed section 15(2)(a); and in the event that an application is rejected (e.g., for not being complete), the Applicant has the chance to resubmit anyway (see s.21(1)).

- (b) must conduct a public consultation to identify stakeholder views on the Sponsorship Application;
- (3) may return a Sponsorship Application without a decision if the Sponsorship Applicant fails to comply with a reasonable request under subsection (2).

***Evidence relevant to review of a Sponsorship Application***

16.

- (1) In making a recommendation under section 19 of this Act to sponsor or not to sponsor, the Seabed Minerals Authority must take into account any or all of the information submitted by the Sponsorship Applicant, and any other relevant information whether in the public domain, received from the Technical Committee or other consultation, or otherwise held in the Government of [State]'s records.
- (2) A previous decision by the ISA to grant a Sponsorship Applicant a contract for activities similar to those that are the subject of a Sponsorship Application may be considered by the Seabed Minerals Authority as evidence towards the Qualification Criteria for that Sponsorship Application.

***Content of a Sponsorship Application***

17. A Sponsorship Application must be made in writing to the Seabed Minerals Authority and must –

- (1) provide evidence that the Sponsorship Applicant meets the Qualification Criteria, and

(2) include –

- (a) the same content that is required by the Rules of the ISA for an application for approval of a plan of work to obtain a contract for the proposed ISA Seabed Mineral Activities;
- (b) insofar as not covered by paragraph (a), [where significant and harmful changes to the marine environment are possible as a result of the proposed ISA Seabed Mineral Activities] a statement of environmental impact assessment for the proposed ISA Seabed Mineral Activities, having undertaken public consultation procedures, and prepared in accordance with the [State's national law on EIA] and any applicable Rules of the ISA [which must include:
  - (i) identification of any potentially affected persons and details of consultations with those persons,
  - (ii) description of the Applicant's knowledge of the Marine Environment of the relevant area,
  - (iii) a description of a programme for oceanographic and baseline environmental studies and monitoring activities to be conducted by the Applicant during the proposed Seabed Mineral Activities,
  - (iv) identification of changes that the proposed Seabed Mineral Activities are anticipated to have to the Marine Environment, with information about their predicted harmfulness and significance,
  - (v) identification of any potential social or environmental impacts that may occur outside the proposed Contract Area or within the national jurisdiction of any State,
  - (vi) copies and summaries of any studies conducted by the Sponsorship Applicant or other data in relation to potential impact of the ISA Seabed Mineral Activities on the Marine Environment];

**Text-Box 28**

Sponsoring States have a direct obligation for environmental impact assessment (EIA) under both treaty and customary international law [ITLOS AO, paras. 141-150] – e.g., where practicable, for any activity under their jurisdiction or control that may cause ‘significant and harmful changes to the marine environment’ [Art 206].

Section 1(7) to the Annex to the UNCLOS 1994 Agreement also imposes an indirect obligation upon Sponsoring States, by requiring that an application for approval of a plan of work shall be accompanied by an assessment of the potential environmental impacts of the proposed activities and by a description of a programme for oceanographic and baseline environmental studies in accordance with the rules, regulations and procedures adopted by the ISA. But the Exploration Regulations require submission of (only): ‘*A preliminary assessment of the possible impact of the proposed exploration activities on the marine environment*’ and also more generally require Sponsoring States to ‘*cooperate with the ISA in the establishment and implementation of programmes for monitoring and evaluating the impacts of deep seabed mining on the marine environment.*’ The draft Exploitation Regulations [ISBA/25/C/WP.1] require a more detailed environmental impact statement (EIS), and require publication of the EIS submitted to the ISA (though do not stipulate required consultations during the EIA process).

This section 17(2)(b) seeks to ensure the Sponsoring State’s compliance with its duty to conduct EIA as outlined above, in view of the fact that: (a) there is no comprehensive EIA requirement for Exploration contract applications at the ISA, and (b) the EIA requirements for Exploitation contract applications at the ISA are under development and may omit elements required in national laws (e.g., stakeholder consultation processes). Where the ISA has fully comprehensive EIA rules in place covering all necessary matters, no further EIA stipulations will be required by the State and 17(2)(b) will not apply. Insofar as a contractor at pre-exploration stage may have insufficient data to conduct a comprehensive EIA, or believes that the proposed activities and studies during exploration do not have potential for causing significant and harmful changes to the marine environment, then this can be stated in the EIS required by this section. The EIS required at this stage need not be an onerous hurdle, but should provide an important opportunity for the current state of knowledge and predicted impacts to be provided to the public and to the State decision makers, even if in early form. As it seems highly likely that an exploration contractor intending to move to exploitation will wish to conduct large-scale sampling, disturbance monitoring experiments and mining equipment testing before moving to apply for an exploitation contract, a blanket approach to EIA for the exploration phase from the Sponsoring State seems reasonable and appropriately precautionous.

The drafting of this section presumes that a Sponsoring State has an effective and applicable EIA law in place, which will cover seabed mining activities appropriately. If this is not the case, some further provisions could be added to this section to specify what is required in this EIA – and some examples are given in square brackets. It is noted that public consultation procedures as referenced in this section may entail being open to receiving inputs from outside the nation (and from humankind generally), to inform decision-making. Full consultation will enable the State better to discharge its direct obligation for EIA, and there may be many useful and informed stakeholders, and potentially affected people, based outside the Sponsoring State (including some who are specifically recognized in international law – e.g., adjacent coastal states).

States enacting a sponsorship law should check whether national environmental laws are drafted to have extraterritorial effect. If not, an amendment to the environment law may be required.

- (c) written undertakings by way of a statutory declaration that the Sponsorship Applicant –
- (i) will fully comply with its obligations under the Rules of the ISA and this Act, including by submitting to the respective regulatory authorities of the ISA and the Seabed Minerals Authority;
  - (ii) warranties that the content of the Sponsorship Application is true and accurate to the best of its belief, and
  - (iii) intends to apply for a contract with the ISA to conduct Exploration or Exploitation in the Area under sponsorship by [State];

**Text-Box 29**

This paragraph (c), requiring written undertakings from an applicant, is similar to the ISA Exploration Regulations requirement that “*each applicant, including the Enterprise, shall, as part of its application for approval of a plan of work for exploration, provide a written undertaking to the ISA that it will:*

*(a) Accept as enforceable and comply with the applicable obligations created by the provisions of the Convention and the rules, regulations and procedures of the ISA, the decisions of the organs of the IS and the terms of its contracts with the ISA;*

*(b) Accept control by the ISA of activities in the Area, as authorized by UNCLOS; and*

*(c) Provide the ISA with a written assurance that its obligations under the contract will be fulfilled in good faith.”*

It is noted that some States may not find the submission of a written statement a necessary requirement at the application stage. But it has been proposed here in the template Bill as a means for a Sponsoring State to evidence taking every possible due diligence step. Also, in some jurisdictions an undertaking may be a legally binding promise, which could provide some additional degree of comfort, and/or legal recourse for breach.

- (d) Where available, copies and summaries of any studies conducted by the Sponsorship Applicant or other data in relation to the potential of the site or sites within which the proposed ISA Seabed Mineral Activities will be conducted;
- (e) A statement and evidence as to any amounts the applicant has already expended in research and exploration activities related to the Sponsorship Application;
- (f) Evidence of the Sponsorship Applicant’s:
  - (i) financial capabilities to carry out the proposed ISA Seabed Mineral Activities, including:
    - (a) information about the size and structure of the Sponsorship Applicant’s authorized capital,
    - (b) the Sponsorship Applicant’s current and projected debt-to-equity ratio,

- (c) copies of financial accounts and statements for the preceding three years (or a lesser period if the Sponsorship Applicant has not been in existence for three years), and
  - (d) a statement about the intended methods for financing the ISA Seabed Mineral Activities.
- (ii) technical capabilities to carry out the ISA Seabed Mineral Activities, including information on the equipment, vessels, methods, qualification of staff, and technologies that are planned to be used in the implementation of the proposed ISA Seabed Mineral Activities;
- (g) An indication of the Sponsorship Applicant's insurance, contingency funding or other methods proposed to cover damage that may be caused by the ISA Seabed Mineral Activities or the costs of responding to an Incident or an emergency order by the ISA;

**Text-Box 30**

The Exploration Regulations place an obligation upon Sponsoring States, where requested by the ISA, to ensure the Sponsored Party provides sufficient guarantee or other measures, to comply promptly with emergency orders if issued by the ISA.

- (h) A list of employee positions required to operate the ISA Seabed Mineral Activities, and an indication of the extent to which these will be recruited from [State];
- (i) A capacity-building programme providing for the training of personnel of [State] in relation to the ISA Seabed Mineral Activities;
- (j) [A statement of the Sponsorship Applicant's view as to how sponsorship of the proposed ISA Seabed Mineral Activities aligns with the international sustainable development agenda, and related national policy priorities;]

**Text-Box 31**

While ISA decision-making follows the requirements of UNCLOS Part XI, individual States have other international obligations and commitments that may also be relevant to a sponsorship decision. For example, an international sustainable development agenda and goals (SDGs) were agreed by all United Nations member States in 2015. These include a goal dedicated to the conservation and sustainable use of the oceans and marine resources (SDG 14), and other goals related to, for example, sustainable consumption and production patterns (SDG 12), and combating climate change and its impacts (SDG 13). Most States will also have National Development Plans, and other national policies that governments work to further. While aligning its decisions with that agenda is of course the responsibility of the State, not the Sponsorship Applicant's, it may be insightful to allow the Sponsorship Applicant an opportunity to plan, and explain, its application in light of those priorities.

- (k) The fee required by section 45 of this Act;
- (l) A statement as to whether the Sponsored Party or any of its Directors has previously been found on reasonable evidence to have:

- (i) breached a material term or condition of the laws of [State] or the Rules of the ISA,
  - (ii) been convicted of an offence or incurred a civil penalty pertaining to the conduct of ISA Seabed Mineral Activities or similar sea- or land-based activities in [State] or in another jurisdiction; or
  - (iii) been convicted of an offence involving fraud or dishonesty in any jurisdiction;
- (m) Any further matters as may be prescribed.

### *Qualification Criteria*

18.

- (1) The Seabed Minerals Authority may only recommend the issue of a Sponsorship Certificate under section 19 where it is satisfied that
- (a) the Qualification Criteria are met; and
  - (b) [[State] has, or will have at the commencement of the proposed ISA Seabed Mineral Activities, the legal, financial and technical capability to meet its obligations under the Rules of the ISA as a Sponsoring State; and
  - (c) [State] is satisfied that the ISA has developed or will develop in a timely manner sufficient rules and capabilities to discharge its duties under the U.N. Convention on the Law of the Sea.]

#### **Text-Box 32**

Paragraphs (b) and (c) are square-bracketed. Some States may not consider it appropriate to include these criteria, assessing State and ISA readiness, in a domestic law. But other States may consider it a sensible consideration to ensure ISA sponsorship is not entered into by a government in the absence of appropriate rules and capacity to manage the sponsored activities within the requirements of international law. At the time of drafting (mid-2020) the ISA is still evolving its rules, regulations and procedures, and capacity and expertise to monitor and enforce compliance with those rules. If a State's Sponsored Party were to obtain an ISA contract for Exploitation before the ISA regime is comprehensively established, the State could find itself required to step up as the primary regulator of the activities to fill the gaps, in order to meet the State's direct obligations (to protect and preserve the marine environment, apply the precautionary approach, etc.) in a way that may not have been taken into account in taking the sponsorship decision.

- (2) The Qualification Criteria are that –
- (a) the undertakings required by section 17 have been given,
  - (b) the Sponsorship Applicant:
    - (i) meets the effective control requirements of section 7(2);

- (ii) has, or will have at the commencement of the proposed ISA Seabed Mineral Activities, sufficient financial and technical resources and capability, to:
  - (a) properly perform the ISA Seabed Mineral Activities in compliance with the Rules of the ISA; and
  - (b) cover damage that may be caused by the ISA Seabed Mineral Activities or the costs of responding to an Incident; and

**Text-Box 33**

States may wish to require evidence of financial capabilities in hand at the time of the Sponsorship Application. However, the template Bill allows for Applicants instead to demonstrate a plan to obtain such funds. This is because some Sponsored Parties may need to raise funds to carry out the Seabed Mineral Activities (for example, from private investors or lending institutions), and may need an ISA contract to use as security before they can raise such funds. So requiring evidence of funds at Sponsorship Application stage could be pre-emptive. The Bill is consistent in this regard with DR13(1) of the draft Exploitation Regulations [ISBA/25/C/WP.1]. There are also in the Bill other protective measures for a Sponsoring State, including ultimately revocation of a Certificate of Sponsorship.

- (iii) has paid any applicable fees.
- (c) the proposed ISA Seabed Mineral Activities:
  - (i) are consistent with the Rules of the ISA, including in relation to the effective protection of the Marine Environment and the common heritage of humankind;

**Text-Box 34**

Considerations relevant to this 'common heritage of humankind' criterion may include: non-appropriation (UNCLOS Article 137), international cooperation (UNCLOS Article 138), benefit of humankind as a whole (UNCLOS Article 140), and peaceful purposes (UNCLOS Article 141).

- (ii) are compatible with applicable national and international laws, including those relating to safety at sea, the protection and preservation of the Marine Environment, human rights, labour laws, marine scientific research and cultural heritage;
- (iii) will not result in irreversible harm to any community, cultural practice or industry in [State];
- (iv) [would be generally in the public interest of [State], taking into account the potential for capacity-building and/or local employment and the long-term economic benefit to [State].]



**Text-Box 35**

Sub-paragraph (iv) is in square brackets, as an optional inclusion. It could be questioned whether imposing a condition clearly prioritizing national interests is compatible with the status of the Area and its natural resources as common heritage of mankind (UNCLOS Article 136) and the resulting duty to carry out activities in the Area for the benefit of mankind as a whole (UNCLOS Article 140). Article 140 takes “into particular consideration the interests and needs of developing states,” so there may be a stronger argument that developing states are entitled to impose such a condition; indeed paragraph (iv) may be a useful criterion for developing states, for example to avoid one-sided partnerships with foreign entities. For other states, it can also be argued that the fact that ISA Seabed Mining Activities contribute to job creation, foreign investment and capacity building in the Sponsoring State does not necessarily at all diminish the benefits for humankind as whole.

(v) In the opinion of [State] are likely to lead to the benefit of humankind as a whole.

**Text-Box 36**

UNCLOS requires that “*Activities in the Area shall, as specifically provided for in this Part, be carried out for the benefit of mankind as a whole*” [Article 140]; tasks the ISA to organize, carry out and control Activities in the Area on behalf of humankind as a whole [Article 153] and requires States to assist the ISA in taking measures to exercise that control [Article 154(4)]. The ITLOS AO indicates the Seabed Dispute Chamber’s view that these provisions taken together imply a duty upon States to act in the common interest in discharging their duties as a Sponsoring State. As stated above [see text-box 31], States have also made international commitments beyond Part XI UNCLOS, which may be relevant to a consideration whether to sponsor ISA Seabed Mineral Activities. This template Bill therefore proposes to include ‘benefit of humankind as a whole’ as one of the State’s decision-making criteria, recognizing (with the “in the opinion of” wording) that a national government may be limited in the extent to which it can properly evaluate this consideration. As also noted above [see text-box 35] individual States may need to consider how that requirement aligns with development of national interests.

(vi) will not unduly affect:

- (a) the rights of other legitimate users of the Marine Environment,
- (b) the rights of adjacent or other coastal states,
- (c) the protection and preservation of the Marine Environment, or
- (d) international peace and security.

***Sponsorship Certificate Recommendation***

19.

- (1) The Seabed Minerals Authority must make a recommendation to [the Minister][*specify time frame*] whether to sponsor or not sponsor the Sponsorship Applicant.
- (2) In making a recommendation under subsection (1), the Seabed Minerals Authority must include a written statement of rationale for the recommendation, which includes a summary of

any recommendations made by the Technical Committee and any responses made in stakeholder consultations, and indicates how these have been taken into account in the recommendation of the Seabed Minerals Authority.

**Text-Box 37**

The template Bill suggests consultative processes inclusive of experts [s.13] as well as general public or other stakeholders [s.15(2)(b), s.17(2)(b)] recording of rationale for government decisions [s.21], publication of those decisions [s. 21], opportunities for administrative review [s.21(3)] and judicial review of those decision [s.14] in an effort to meet the protected human rights to information, participation and remedy, which are enshrined in international and regional agreements (as well as Sustainable Development Goal 16), and which are particularly well-recognized in relation to State decisions that concern the environment. The public participation measures included in this Bill, encompassing transparency and accountability mechanisms, are also recommended simply because they are likely to lead to better decisions taken in the interests of humankind, and higher public confidence in those decisions.

***Sponsorship Certificate Decision***

20.

- (1) [The Minister] must within [30] days decide, based upon the Seabed Minerals Authority's recommendation, whether or not to proceed with sponsorship of the Sponsorship Applicant.

**Text-Box 38**

The Bill suggests 'Minister,' but there may be alternative decision makers, depending on each Government's set-up. A larger administration, or one with more layers of hierarchy, may prefer a mining commissioner or similar specialized senior official to be the decision maker, and his or her Minister to be the certificate signatory. The import and cross-cutting nature of the decision may cause some States to include interministerial consultation or decision approval.

- (2) The Seabed Minerals Authority will inform the Sponsorship Applicant of the decision taken under section 20(1) of this Act within 10 days of the decision having been notified to the Seabed Minerals Authority by [the Minister].

***Notice of Sponsorship Certificate Decision***

21.

- (1) Where the decision taken by [the Minister] under section 20(1) of this Act is not to proceed with sponsorship, the Seabed Minerals Authority will provide the Sponsorship Applicant with a written statement of reasons for that decision, and will give the Sponsorship Applicant a reasonable opportunity to resubmit an amended version of that Sponsorship Application, without requiring another Application fee.
- (2) Where a decision is taken by [the Minister] under section 20(1) of this Act, whether it is to proceed or not proceed with sponsorship, the Seabed Minerals Authority will publish notice of

the decision [in a national newspaper, on the Seabed Minerals Authority’s website and in the Government’s gazette] and a written statement of reasons for the decision within 30 days of the decision having been notified to the Seabed Minerals Authority by the Minister.

- (3) [Where an Applicant or other stakeholder considers a decision taken under section 20(1) of this Act has been improperly made or unreasonably arrived at, that person may apply to the Seabed Minerals Authority for an administrative review of the decision, which must be conducted promptly, in accordance with any published guidelines, and by [a person of suitable authority not involved in the original decision]].

**Text-Box 39**

This section would allow for such a decision to be subject to judicial review [see section 14(a)]. In some jurisdictions this may be considered a complicated and time-consuming process, and States could also consider inclusion in national law of a specific administrative review procedure for third-party stakeholders to challenge a decision to award a sponsorship certificate – as indicated in square brackets.

***Terms of the Sponsorship Certificate***

22. Where the decision taken by the Minister under section 20(1) of this Act is to proceed with sponsorship, a Sponsorship Certificate, signed by the Minister, will be issued to the Sponsored Party in a form necessary to satisfy the Rules of the ISA, which must include –
- (a) the name of the Sponsored Party;
  - (b) the name of [State];
  - (c) a statement that the Sponsored Party is –
    - (i) a national of [State]; or
    - (ii) subject to the effective control of [State] or its nationals;
  - (d) a statement by the State that it sponsors the Sponsored Party;
  - (e) the date of deposit by the State of its instrument of ratification of, or accession or succession to, the U.N. Convention on the Law of the Sea;
  - (f) a declaration that the State assumes responsibility in accordance with article 139, article 153, paragraph 4, and Annex III, article 4, paragraph 4, of the U.N. Convention on the Law of the Sea;
  - (g) the date at which the sponsorship commences;

- (h) a statement that the Sponsorship Certificate will remain in force for the duration of any ISA contract awarded to the Sponsored Party under the State's sponsorship, including any period of contract renewal, unless otherwise terminated in accordance with this Act;
- (i) any other content reasonably required by the ISA, or that the Seabed Minerals Authority considers fit to include.

**Text-Box 40**

This reflects the ISA Exploration Regulations requirement that *“Each certificate of sponsorship shall be duly signed on behalf of the State by which it is submitted, and shall contain:*

- (a) The name of the applicant;*
- (b) The name of the sponsoring State;*
- (c) A statement that the applicant is: (i) A national of the sponsoring State; or (ii) Subject to the effective control of the sponsoring State or its nationals;*
- (d) A statement by the sponsoring State that it sponsors the applicant;*
- (e) The date of deposit by the sponsoring State of its instrument of ratification of, or accession or succession to, the Convention, and the date on which it consented to be bound by the Agreement; and*
- (f) A declaration that the sponsoring State assumes responsibility in accordance with articles 139 and 153 (4) of the Convention and article 4(4) of annex III to the Convention.”*

Which is also mirrored in the draft Exploitation Regulations, DR6(3) [ISBA/25/C/WP.1].

***Material Changes and Updated Information***

23.

- (1) A Sponsored Party must without delay notify in writing the Seabed Minerals Authority if –
  - (a) any of the information provided pursuant to section 17 of this Act is proposed to be changed in any material particular, including as a result of comment received or amendments required by the ISA during the Sponsored Party's application for an ISA contract, or in the event the Sponsored Party wishes to modify its plan of work contained in its ISA contract; or
  - (b) any new information arises or data is collected that materially affects the Sponsored Party's ability to meet the Qualification Criteria.

- (2) Where a notification is made pursuant to subsection (1), the Sponsored Party must take into account any comments provided by the Seabed Minerals Authority in relation to such proposed changes.

**Text-Box 41**

This section 23 is suggested because the draft Exploitation Regulations [ISBA/25/C/WP.1] envisage quite an involved and iterative process of review and communication back and forth between an applicant for an Exploitation contract and the ISA organs, which seems likely to result in changes to the content of the application (DR10-DR14). The ISA rules do not however require Sponsoring State consultation or notification in relation to any such amendments. Equally, DR57 envisages agreement between a contractor and the ISA to change a plan of work, without requiring consultation or notification of the Sponsoring State. This has the potential for the Sponsoring State to end up a sponsor of a plan of work that is different to the one it had originally reviewed and approved at Sponsorship Certificate grant stage. The Sponsoring State must also retain effective control over the Sponsored Party for the duration of the ISA contract, and any change of ownership or management may be relevant to this point (and is also relevant to the draft Exploitation Regulations' provisions relating to "change of control" – DR24). This section 23, by placing a responsibility on the Sponsored Party proactively to notify the State of any such changes, is aimed to assist the State to receive sufficient and timely information in those scenarios. (Some further protection is also provided in this regard to the State by section 37, which enables the State to terminate its sponsorship in the event that the Qualification Criteria of section 18(2) are deemed no longer to be met by the Sponsored party – but this is a drastic step, likely to be an option of last resort.)

***Sponsorship agreements***

24. [The Minister, with [Cabinet's] approval] upon the Seabed Minerals Authority's recommendation, may enter into written agreements with the Sponsored Party at any time to establish additional terms and conditions as to the sponsorship arrangement, provided:
- (a) The Technical Committee has been consulted, and its views taken into account, by the Seabed Minerals Authority before the Seabed Minerals Authority makes any recommendation to [Cabinet] to enter into such an agreement;
  - (b) The terms of such an agreement do not or are not likely to lead to a contravention by [State] or the Sponsored Party of the Rules of the ISA or this Act; and

**Text-Box 42**

Sponsorship Agreements may not be relevant or advisable in all jurisdictions, so this section 24 is provided in square brackets, as an optional item. The Seabed Disputes Chamber noted that “a sponsorship agreement may not be publicly available and, in fact, may not be required at all”. [ITLOS AO paragraph 225]. In practice many of the sponsorship arrangements currently in place for ISA Sponsoring States are covered by contractual agreements, which have not been made public. The more that terms between the State and the Sponsored Party can be covered in legislation, rather than agreements, the more transparent and fixed the terms will be, which is generally deemed likely to lead to more optimal outcomes to the State. If a State does include section 24 on Sponsorship Agreements, consideration could also be given to adding provisions to restrict the types of clauses that can be agreed by contract on a case-by-case basis.

- (c) The Seabed Minerals Authority publishes a copy of any such written agreements, or a summary of key terms.]

**PART 4 – OBLIGATIONS PERTAINING TO THE CONDUCT OF ISA SEABED MINERAL ACTIVITIES**

*Eligibility to Perform ISA Seabed Mineral Activities*

25.

- (1) To be eligible to perform ISA Seabed Mineral Activities a Sponsorship Applicant must first –
- (a) obtain a valid Sponsorship Certificate from the Seabed Minerals Authority, and
  - (b) obtain a valid contract from the ISA,
- pertaining to those ISA Seabed Mineral Activities.
- (2) Any national of [State] who attempts to conduct Exploration or Exploitation other than in accordance with the provisions of this Bill [commits an offence and is liable to a fine not exceeding [\$amount] or to a prison term not exceeding [X] years or both.]

**Text-Box 43**

Some States’ legal systems may only allow the creation of punishments for administrative and criminal offences by special laws or codes, and not in general legislation on other subject matters such as a Bill like this one. In that case, the State will have to make relevant changes and additions in those specialized laws or codes to create the new offences proposed in this Bill. And throughout this template Bill, where an offence is created with specific penalties, in place of the suggested wording given in this template, a general provision should be inserted instead, indicating that the person would incur liability in accordance with administrative and/or criminal legislation.

***Duties pertaining to ISA Seabed Mineral Activities***

**Text-Box 44**

In this template Bill, it is presumed that the final version of the (currently draft) ISA Exploitation Regulations will include a requirement to apply the precautionary approach, best environmental practice and other environmental management rules – as has been included in the ISA Exploration Regulations. Hence these would be included in “the Rules of the ISA” [see s.26(1)] and are not stipulated in the Bill as separate requirements. Where a State is concerned that the ISA Rules may not be sufficiently stringent, or concerned that reliance on the ISA rules will not be sufficient for the State to meet its own duties of the State (e.g., under UNCLOS Part XI or XII, under other international or regional rules, or under customary international law) then additional duties can be added to these provisions in section 26.

26. Any person engaging in ISA Seabed Mineral Activities is required, *inter alia*, to:

- (1) Adhere to the provisions of the Rules of the ISA, this Act and any other applicable national laws of [State], including *inter alia* environmental, maritime, employment, investment and anti-corruption laws.

**Text-Box 45**

The draft Exploitation Regulations [ISBA/25/C/WP.1] specify that an ISA contractor must comply with the Sponsoring State’s national laws pertaining to: installation standards and crew safety, worker rights, human health and safety, and anti-corruption, but the Exploration Regulations do not contain equivalent provisions. Inclusion of national laws in this s.26 (1) is important so as to make a breach of a national law condition (e.g., contravention of a foreign investment permit or an environmental permit) a trigger event for the purposes of regulatory action under this Act.

- (2) Provide sufficient training, supervision and resources to employees, agents or officers so as to ensure capability to comply with the Rules of the ISA and any other instructions or requests of the ISA or the Seabed Minerals Authority.

**Text-Box 46**

This seems a sensible inclusion for the Sponsoring State’s national regime, in view of the “due diligence” obligation of the State. The draft Exploitation Regulations [ISBA/25/C/WP.1] also require the contractor to ensure all of its personnel have the necessary experience, training and qualifications to conduct their duties (but the Exploration Regulations do not contain an equivalent provision).

- (3) Facilitate the ISA’s and the Seabed Minerals Authority’s regulation of ISA Seabed Mineral Activities in accordance with the Rules of the ISA and this Act and comply with the reasonable requests, directions or orders of the ISA, or of the Seabed Minerals Authority made pursuant to this Act.
- (4) Regularly consult, refer any technical matters to, and take into account in its decision-making relating to ISA Seabed Mineral Activities any recommendations from the Seabed Minerals Authority.

- (5) Conduct environmental impact assessment procedures in compliance with [national EIA law] as well as the Rules of the ISA, and submit the resulting report to the Seabed Minerals Authority for approval before submission to the ISA.

**Text-Box 47**

A Sponsoring State has a direct duty to ensure conduct of environmental impact assessment (EIA), not only to ensure ISA rules about EIAs are followed. This proposed s.26(5), which requires contractors to follow national EIA laws as well as the ISA rules in the conduct of EIAs, does not necessitate two separate EIA processes. But such an approach should provide an additional layer of assurance to the State that procedures acceptable to the State have been followed by a contractor in carrying out an EIA for ISA Seabed Mineral Activities. In the event that the ISA Rules are sufficiently comprehensive, then it is likely that those rules will cover the same requirements as the national laws, and this provision will impose no additional burdens upon the contractor. However, the safety net provided by this s.26(5) is recommended, as the ISA's rules for EIA are evolving, and may currently be seen as incomplete [see for example Lily H, Roady S.E. (2020) "Regulating the Common Heritage of Mankind: Challenges in Developing a Mining Code for the Area," In: Ribeiro M., Loureiro Bastos F., Henriksen T. (eds) *Global Challenges and the Law of the Sea*. Springer].

- (6) Facilitate inspections, audits and monitoring activities conducted by the ISA and the Seabed Minerals Authority, including collecting and sharing observation data, cooperating with the implementation of remote monitoring technologies, and providing access to vessels and premises wheresoever situated.

**Text-Box 48**

The ISA Exploration Regulations require both ISA contractors and Sponsoring States to cooperate with the ISA in the establishment and implementation of programmes for monitoring and evaluating the impacts of deep seabed mining on the Marine Environment. A similar provision is included in the draft Exploitation Regulations [ISBA/25/C/WP.1] [DR3(e)], which also includes a requirement to cooperate with the ISA in conducting audits [DR75(5)], and more detailed requirements for facilitation of inspections [DR96].

- (7) Notify the Seabed Minerals Authority before the embarkation of any vessel or installation engaging in ISA Seabed Mineral Activities, including a description of where in the Area it will be operating and its planned activities while there.

**Text-Box 49**

This is not a specific requirement of the Rules of the ISA, but seems a sensible additional measure that the Sponsoring State can take to increase its level of awareness and its monitoring capabilities for the ISA Seabed Mineral Activities it is sponsoring.

- (8) [Provide notice of opportunities for training in relation to, and participation in, the ISA Seabed Mineral Activities to the Seabed Minerals Authority, to be afforded to relevant [State] government officials and other nationals upon application.]



- (9) [In the employment of employees for the purpose of carrying out the ISA Seabed Mineral Activities, give preference to citizens of [State] who have the requisite expertise or qualifications.]
- (10) [Give preference to goods supplied, produced and manufactured in [State] and services supplied in [State], where these are available at a price and quality comparable with the goods and service from outside [State]].

**Text-Box 50**

Draft subsections 26(8), 26(9) and 26(10) include optional “local content” type provisions – e.g., requirements to hire employees, equipment and support services from the Sponsoring State. Whether a State includes this in its sponsorship law is a matter of policy (and also practicality – for example a micro-State with limited workforce and export industries, or a State located nowhere near the mining site, may not be viable options for sourcing materials). A decision to include these provisions could be seen as a restriction that would drive down profitability of the mining project (taking into account that the contractor also has additional training requirements for personnel of the ISA and/or developing State nationals under UNCLOS and its contract with the ISA); or for a developed State may be seen as prioritization of national interests in a way that is incompatible with the “common heritage of [hu]mankind” status of the minerals, and the requirement that activities in the Area are carried out for the benefit of humankind as a whole [UNCLOS Article 136 and 140]. Each State may have a different approach to the types of benefits the State wishes to prioritize from the operation, and should amend the wording of the Bill accordingly.

- (11) Keep copies at the Sponsored Party’s registered address of books, accounts and financial records pertaining to ISA Seabed Mineral Activities prepared in accordance with internationally accepted accounting principles, and such other records in such form as may be prescribed or directed by the Seabed Minerals Authority.

**Text-Box 51**

The ISA Exploration Regulations (and draft Exploitation Regulations) require contractors to keep a proper set of books and records, but this provision additionally specifies that copies must be held within the State’s jurisdiction. This is aimed to facilitate inspection, or seizure for evidence, by the State.

- (12) [Submit to the ISA Seabed Mineral Authority within 90 days of the end of each calendar year an annual report detailing all ISA Seabed Mineral Activities conducted in the reporting period, a report as to how each subsection of this section 26 has been complied with, annual audited financial statements and any other information that is prescribed.]

**Text-Box 52**

This s.26(12) is an optional inclusion, because the Contractor is already required to provide an annual report to the ISA, and is required (by virtue of section 26(20) below) also to provide the same report to the State. However, adding this separate reporting requirement enables the State to tailor reporting due to the State, so that as well as covering the content required by the ISA Rules for annual reports, the Sponsored Party's reports meet any specific additional demands of the State. The timing suggested in s.26(12) coincides precisely with the timing of the required annual reports to the ISA, so that a contractor need only prepare one report.

- (13) At all material times maintain appropriate insurance policies, and also any other guarantees or contingency funding that may be prescribed or agreed between the Sponsored Party and the Seabed Minerals Authority, including under section 50 of this Act, to provide adequate cover for identified risks and costs of damages that may be caused by the ISA Seabed Mineral Activities.

**Text-Box 53**

The draft Exploitation Regulations [ISBA/25/C/WP.1] require each contractor to obtain and maintain insurance to the ISA's satisfaction. This proposed s.26(13) Bill provision is not intended to be duplicative but it does allow the Sponsoring State (a) to have its own say in the adequacy of the insurance, and/or (b) to require additional guarantees or funding that may be identified as prudent in addition to insurance.

- (14) Notify the Seabed Minerals Authority prior to commencement of testing of collecting systems and processing operations, and jointly review with the Seabed Minerals Authority any guarantees in place, providing additional guarantees where required by the Seabed Minerals Authority.

**Text-Box 54**

This proposed s.26(14) is included in the template Bill in order to reflect the Exploration Regulations, which place a direct obligation on a Sponsoring State to ensure that its Sponsored Party provides a guarantee of its financial and technical capability to comply with emergency orders, prior to the commencement of testing of collecting systems and processing operations. This was identified as a direct responsibility of a Sponsoring State, to which liability attaches, by the Seabed Disputes Chamber [ITLOS AO paragraph 122].

- (15) Submit to the Seabed Minerals Authority a copy of the Contingency Plan before commencing the programme of activities under the ISA contract.
- (16) On becoming aware of an Incident, in addition to initiating the Contingency Plan, following other applicable Rules of the ISA and any directions from the ISA, ensure report to the Seabed Minerals Authority daily or at other frequency agreed with the Seabed Minerals Authority, and follow any directions of the Seabed Minerals Authority that do not conflict with the foregoing requirements.

**Text-Box 55**

The Exploration Regulations require a Contingency Plan from an ISA contractor (after ISA contract award, but before the contractor commences operations), but there is no requirement in the Regulations for the Sponsoring State to be informed or involved in agreeing to the Contingency Plan (hence s.26(15) in this template Bill). Nor do the Exploration Regulations contain specific provisions regarding initiation of the Plan's implementation in an emergency (hence including a trigger for "initiating the Contingency Plan" in this s.26(16)). The draft Exploitation Regulations [ISBA/25/C/WP.1] contain more detailed trigger and procedural provisions, but as these do not specifically require continued reporting to, or compliance with instructions from, the Sponsoring State, those elements are also added in this s.26(16).

(17) At all material times ensure that:

- (a) any vessels, installations and equipment engaged in ISA Seabed Mineral Activities are [registered with a reputable shipping registry,] in good repair and comply with the laws of the flag state;

**Text-Box 56**

There is some disparity between the shipping requirements in the Exploration Regulations and those in the draft Exploitation Regulations [ISBA/C/25/WP.1]. The Exploration Regulations require that the Contractor shall comply with "*the generally accepted international rules and standards*" concerning "safety of life at sea, and the prevention of collisions," and that "*each vessel used for carrying out activities in the Area shall possess current valid certificates required by and issued pursuant to such international rules and standards.*" Whereas the draft Exploitation Regulations require that all vessels and installations are "in good repair, in safe and sound condition, adequately manned," and comply with "*applicable international rules and standards*" concerning "*safety of life at sea, the pollution of the Marine Environment by vessels, the prevention of collisions at sea and the treatment of crew members.*" In addition, contractors must comply with relevant national laws relating to vessel standards and crew safety, as well as worker rights and human health and safety for non-crew members [DR30]. The wording of s.26(17) in this template Bill seeks to bring consistency to the requirements of the Sponsored Party in this regard, whether it is conducting Exploration or Exploitation.

The legal position seems to be that vessel and crew member conditions are governed by national laws of the flag state (which may, but most likely will not, be the same as the Sponsoring State). But conditions of the mining/science crew are governed by the laws of the Sponsoring State. Also, if any ISA Seabed Mineral Activities are carried out from an installation rather than a ship, these are likely to fall under the jurisdiction of the laws of the Sponsoring State. This is why s.26(17) uses the wording "applicable."

Section 26(17)(a) references "reputable shipping registry," with the aim to avoid a Sponsored Party using a flag of convenience, which could lead to breaches in requisite shipping standards. It is noted that "reputable" may be considered a subjective term that is hard to measure. If individual States make use of an internationally accepted list of ship registries that have passed certain standards (or conversely an internationally accepted list of ship registries that are deemed inadequate), this could be referenced in this section of the Bill instead of or to supplement the "reputable shipping registry" language.

- (b) working conditions for personnel engaged in ISA Seabed Mineral Activities meet applicable employment rules and health and safety standards;
  - (c) the Sponsored Party has in place and implements policies and codes of conduct that prohibit discriminatory practices and harassment or bullying, and promote diversity and equality in the workplace.
- (18) Not dump mineral materials or waste from any vessel except in accordance with relevant international law and the Rules of the ISA.
- (19) Not proceed or continue with the ISA Seabed Mineral Activities without obtaining prior specific written consent from the Seabed Minerals Authority to proceed, if evidence arises that to proceed is reasonably likely to cause significant and harmful changes not anticipated in the plan of work agreed with the ISA, to:
- (a) the Marine Environment,

**Text-Box 57**

This wording reflects State obligations under Articles 204 and 206 of UNCLOS.

- (b) the safety, health or welfare of any person, or
  - (c) other existing or planned legitimate sea uses including but not limited to lawful: marine scientific research, navigation, submarine cables, fisheries or conservation activities.
- (20) Upon submitting applications, data, reports, studies, notifications, plans, royalty returns or other information to the ISA in relation to the ISA Seabed Mineral Activities –
- (a) ensure that the content of these documents is true, accurate and comprehensive, and
  - (b) provide copies of the same information to the Seabed Minerals Authority, along with summary documents aimed to be comprehensible to a non-technical reader.

**Text-Box 58**

This provision ensures the State receives the same information flow for regulatory purposes as the ISA, without needing to duplicate the obligations.

- (21) Notify the Seabed Minerals Authority promptly, in the event of –
- (a) receiving any notification from the ISA relating to unsatisfactory performance or any concern regarding non-compliance with the Rules of the ISA;

**Text-Box 59**

The draft Exploitation Regulations [ISBA/C/25/WP.1] contain a few provisions whereby the ISA may communicate potential dissatisfactions to the contractor (e.g., by way of a compliance notice) but do not require the ISA or the contractor to communicate this to the Sponsoring State [DR4, DR52, DR102, DR103]. (NB conversely the draft Regulations relating to inspector instruction or reports *do* require notification by the ISA to the Sponsoring State [DRs 99(3) and 100(1)].)

- (b) agreeing with the ISA to a reduction or suspension in production under an ISA contract for Exploitation.

**Text-Box 60**

The draft Exploitation Regulations [ISBA/C/25/WP.1] enable an agreement for suspension or reduction of production between contractor and ISA, but do not make provision for consultation with, or notification of that decision to, the Sponsoring State [DR29].

- (22) Only enter into trading arrangements or subcontracts with third parties for the delivery of services pertaining to the performance of ISA Seabed Mineral Activities, where such subcontracts contain provisions to ensure the conformity of any subcontractor's activities with the Rules of the ISA, this Act and any other applicable laws of [State], and provide evidence to verify this to the Seabed Minerals Authority upon request.

***Liability of Sponsored Party and indemnity against third-party claims***

27.

A Sponsored Party hereby:

- (a) is responsible for the performance of all ISA Seabed Mineral Activities carried out within the Contract Area, and their compliance with this Act and the Rules of the ISA,
- (b) is liable [on a strict liability basis] for any actionable damage to third parties or the environment arising out of any of its acts or omissions in the conduct of the ISA Seabed Mineral Activities,

**Text-Box 61**

This provision suggests use of a “strict liability” standard. This notably departs from the “wrongful” terminology that is used in UNCLOS [Annex III Article 22]. Some States may prefer to adhere to that UNCLOS language in their domestic law. However it is – to some extent – unclear what “wrongful” means in that use; and that could give rise to dispute about attribution of liability, in the event that a third-party claim is brought against the Sponsored Party and the Sponsored State. It therefore is proposed instead to reflect clearly in the sponsorship law what standard the Sponsoring State’s national regime imposes upon a Sponsored Party for any damage the Sponsored Party may cause. Here a strict liability standard (i.e., causation-based, not fault-based) is recommended (in conjunction with limits on liability quantum – see section 14(c), above). For further discussion on this point, please see Craik, A.N. “*Determining the Standard for Liability for Environmental Harm from Deep Seabed Mining Activities*” 2018, Centre for International Governance Innovation. Please cross-refer to text-box 26 also.

- (c) is liable for any penalties arising out of its failure to comply with this Act or the Rules of the ISA,
- (d) must at all times keep [State] indemnified against all actions, proceedings, costs, charges, penalties, claims and demands which may be made or brought by any third party in relation to its ISA Seabed Mineral Activities.

## **PART 5 – ROLE OF [STATE] AS SPONSORING STATE**

### ***Duties as Sponsoring State***

28. Where [State] is sponsoring a Sponsored Party, [State] via the Seabed Minerals Authority will –

- (1) In relation to the ISA, and ISA Seabed Mineral Activities, adhere to the requirements and standards established by the Rules of the ISA, applicable general principles of international law and principles of best regulatory practice, including:
  - (a) compliance with its due diligence obligations as a Sponsoring State;
  - (b) application of the Precautionary Approach; and
  - (c) promotion of:
    - (i) the application of best environmental practices [and best available techniques],
    - (ii) the conduct of prior environmental impact assessment where significant and harmful changes to the marine environment are anticipated,
    - (iii) [the integration of best scientific evidence in environmental decision-making; and
    - (iv) accountability and transparency with regards environmental data];

**Text-Box 62**

This s.28(1) reflects a number of specific legal responsibilities of a Sponsoring State. A Sponsoring State has a direct obligation to apply the precautionary approach and best environmental practices through the operation of the ISA Exploration Regulations (which include the following provision: “In order to ensure effective protection for the marine environment from harmful effects which may arise from activities in the Area, the ISA and sponsoring States shall apply a precautionary approach, as reflected in principle 15 of the Rio Declaration, and best environmental practices” [emphasis added]). A Sponsoring State is also required by the ISA Exploration Regulations to cooperate with the ISA in the establishment and implementation of environmental impact assessments (EIA), and to use appropriate means to ensure that the contractor complies with its obligation to conduct an EIA. A State additionally has direct EIA obligations pursuant to UNCLOS (Article 206, 1994 Agreement Annex s.1(7)) as well as customary international law (see ITLOS AO, paragraph 145)). The Exploitation Regulations as currently drafted [ISBA/25/C/WP.1], also place new direct obligations upon Sponsoring States [DR44(b)-(d)], which are marked in square brackets in s.28(1)(iii) and (iv).

- (2) Develop, implement and promote effective, accountable and transparent administration, consultation and public participation procedures, including subject experts, affected persons, members of the public and other stakeholders where appropriate.

**Text-Box 63**

See text boxes 21, 28 and 37 (above) for commentary on the importance of transparent and participatory consultation measures, which may extend beyond the confines of national public.

- (3) Provide all reasonable cooperation with the Sponsored Party to facilitate the preparation, submission and support of the Sponsored Party’s application to the ISA for a contract to Explore or Exploit minerals in the Area under [State] sponsorship.
- (4) Where the Seabed Minerals Authority has reasonable grounds for believing that planned ISA Seabed Mineral Activities may cause substantial pollution of or significant and harmful changes to the Marine Environment
- (a) assess the potential effects of those ISA Seabed Mineral Activities pursuant to the [State’s national law on EIA] and any applicable Rules of the ISA on the Marine Environment, and publish reports of the results of that assessment; and
  - (b) take appropriate measures to ensure the effective protection of the Marine Environment.
- (5) Maintain effective control over Sponsored Parties and withdraw sponsorship in the event that the Sponsored Party has changed nationality or is no longer effectively controlled by the State.
- (6) Do all things reasonably necessary to give effect to its sponsorship of a Sponsored Party, including undertaking any communications with, and providing any assistance, information,

documentation, certificates and undertakings to the ISA or other relevant party required in respect of the Sponsorship.

- (7) Not sponsor any other ISA Seabed Mineral Activities that would unduly interfere with the rights of the Sponsored Party; and give the Sponsored Party a preferential right above other entities to apply for [State] sponsorship for Exploitation in a Contract Area, following the successful completion of Exploration under [State] sponsorship.

**Text-Box 64**

This subsection 28(7) seeks to reflect within national laws the rights granted to contractors under UNCLOS Annex III Articles 6 and 10.

- (8) Use best endeavours to cooperate with the ISA to provide such data and information as is reasonably necessary for the ISA to discharge its duties and responsibilities under the U.N. Convention on the Law of the Sea.

**Text-Box 65**

The draft Exploitation Regulations [ISBA/25/C/WP.1] require States to “*use their best endeavours to cooperate with the ISA to provide such data and information as is reasonably necessary for the ISA to discharge its duties and responsibilities under UNCLOS*” [DR3(a)].

- (9) Facilitate the ISA in carrying out monitoring, audits and inspections of the Sponsored Party, and cooperate with coastal states and flag states where relevant, with the aim to ensure the Sponsored Party’s compliance with the requirements of the ISA, and to share the results with the aim to assist in the development of best environmental practices.

**Text-Box 66**

The ISA Exploration Regulations require both contractors and Sponsoring States to cooperate with the ISA in the establishment and implementation of programmes for monitoring and evaluating the impacts of deep seabed mining on the marine environment. A similar provision is included in the draft Exploitation Regulations [ISBA/25/C/WP.1] with an additional requirement for sharing results and assisting towards development of best environmental practices [DR 3(e)], and a separate requirement for Sponsoring States to cooperate with the ISA in conducting audits [DR75(5)].

- (10) Not impose unnecessary, disproportionate or duplicate regulatory burden on Sponsored Parties, nor impose requirements upon a Sponsored Party except insofar as these are consistent with existing requirements imposed by applicable national law or standards of international law, or are otherwise in the best interests of [State];



**Text-Box 67**

The draft Exploitation Regulations [ISBA/25/C/WP.1] require States to cooperate with the ISA “*towards the avoidance of unnecessary duplication of administrative procedures and compliance requirements*” [DR3(b)].

- (11) [Take any reasonable steps required to assist the ISA to ensure that ISA Seabed Mineral Activities are carried out for the benefit of humankind as a whole.]

**Text-Box 68**

This s.28(11) is proposed as a general measure designed to take into account UNCLOS Article 140 (“*Activities in the Area shall [...] be carried out for the benefit of [hu]mankind as a whole.*”) While the ISA may be the principal actor to secure the outcome required by Article 140, the Seabed Disputes Chamber highlighted a Sponsoring State’s “common interest role” to assist the ISA [ITLOS AO paragraphs 76 and 226].

***Monitoring powers***

29.

- (1) The Seabed Minerals Authority reserves the power, alone or with the ISA, to make such examinations, inspections and enquiries of Sponsored Parties and the conduct of ISA Seabed Mineral Activities as are necessary to meet its responsibilities under national and international law, which may include the sending of observers or an inspector to the site of the ISA Seabed Mineral Activities and vessel, installation or premises of the Sponsored Party, the use of remote monitoring technologies, and the inspection of relevant books, records and other relevant data, from time to time, upon giving reasonable notice to the Sponsored Party.

**Text-Box 69**

The ISA’s power to inspect a Sponsored Party’s activity seems to be restricted to within the scope of all installations in the Area used in connection with activities in the Area [UNCLOS Article 154(5)]. This s.29 sees a Sponsoring State reserve a more general power, encompassing also the vessel and onshore premises of the Sponsored Party, which can supplement the ISA’s inspection power. It also serves to enable joint or coordinated inspections between the State and the ISA, which should avoid duplication of effort and undue burden on the State, ISA or Sponsored Party.

- (2) Observers or an inspector sent under subsection (1) must take all reasonable steps to avoid interference with the safe and normal operations on board vessels.
- (3) The Seabed Minerals Authority may under this section direct any person to furnish it within a reasonable time with any information it reasonably believes is in that person’s possession and which is directly relevant to the discharge of the Seabed Minerals Authority’s functions.

- (4) A person who fails to comply with a direction made under subsection (3) without reasonable justification [commits an offence and is liable to a fine not exceeding [\$amount] or to a prison term not exceeding [X] years or both].

### *Complaints procedure*

30.

- (1) The Seabed Minerals Authority must develop and implement a whistle-blowing policy for its own staff and personnel of the Sponsored Party, and a public complaints procedure, to facilitate the reporting to the Seabed Minerals Authority by any person of any concerns about the activities of the Sponsored Party, or the actions of Public Officials implementing this Act.

#### **Text-Box 70**

This is another provision designed to enhance public accountability and the information flow to the State. This should assist in maximizing the State's opportunity to identify risks and take informed regulatory action to prevent non-compliance, harm or other Incidents from occurring.

- (2) The Seabed Minerals Authority must, in cooperation with the ISA where appropriate, promptly investigate, verify and deal with any credible report received of illegal activity or other wrongdoing by the Sponsored Party.

#### **Text-Box 71**

The draft Exploitation Regulations [ISBA/25/C/WP.1] imply that the ISA may take some regulatory action in the event of a complaint about a contractor – e.g., DR34(5) – or an adverse outcome as a result of contractor activity – e.g., DR33, DR34(1)-(4). But the provisions as currently drafted are not clear nor robust, so it seems sensible for the Sponsoring State to maintain its own powers in this

- (3) The Minister must promptly cause an independent inquiry to be carried out into any credible report received of illegal activity or other wrongdoing by the Seabed Minerals Authority or other Public Official implementing or purporting to implement this Act.

### *Administrative action*

31.

- (1) In the event of the Seabed Minerals Authority determining that a Sponsored Party has materially breached, or in the Seabed Minerals Authority's reasonable opinion is at serious risk of materially breaching the Rules of the ISA, or this Act, the Seabed Minerals Authority may:
- (a) issue written warnings, including warnings in relation to possible action the Seabed Minerals Authority may take in the event of future material breaches;
  - (b) enter into a written agreement providing for the Sponsored Party to undertake a programme of remedial action and to mitigate the risk of breach occurrence or recurrence;

- (c) issue a written direction requiring the Sponsored Party to take specified action, or not take specified action, within a specified time frame, aimed to stop, remedy or mitigate the risk of breach occurrence or recurrence;
- (d) in the case of actual material breach of the Rules of the ISA or a direction made under section 31(1)(c),
  - (i) impose upon the Sponsored Party monetary penalties proportionate to the seriousness of the violation [and no greater than [\$amount] for each day for which the breach continues, which amount excludes any compensation payable for damage or harm].

**Text-Box 72**

Preferred national legislative style may be to draft this monetary penalty provision without stating an amount, or to prescribe a specific amount (expressed in the State's currency), or to prescribe an amount with reference to a points-based system used in the State's legislation so enabling the amount to increase over time without requiring amendment to primary legislation. There may also be some jurisdictions in which monetary penalties can only be created in specialized laws or codes, which would need to be enacted or amended separately, in conjunction with the enactment of this Bill.

- (ii) commence a process under section 37 of this Act to revoke the Sponsorship Certificate.
- (2) Action taken under subsection (1) must be commensurate with the gravity, frequency and other circumstances of the material or reasonably anticipated breach, including the Sponsored Party's previous conduct under [State] Sponsorship, and should also take into account any penalty imposed by the ISA in relation to the same breach.
  - (3) The Seabed Minerals Authority must communicate and cooperate with the ISA before and in the event of taking any action under subsection (1).
  - (4) The Seabed Minerals Authority may accompany any action taken under subsection (1) with public notice of the action taken.

***Response to Incidents***

32.

- (1) The Seabed Minerals Authority may hold or may commission inquiries into Incidents.
- (2) A Sponsored Party who knowingly or recklessly fails to comply with the Rules of the ISA concerning Incidents [commits an offence and is liable to a fine not exceeding [\$amount] or to a prison term not exceeding [X] years or both].

**Text-Box 73**

The draft ISA Exploitation Regulations [ISBA/25/C/WP.1 envisage that failure to respond properly to incidents may be a criminal offence under Sponsoring State national law. [DR33(3)]

### ***Records***

33.

- (1) The Seabed Minerals Authority must retain up-to-date and accurate records of Sponsorship Applications received, Sponsorship Certificates issued, ISA contracts held, and all ensuing communication, reports or other information created or received.
- (2) The Seabed Minerals Authority must hold all such records with appropriate confidentiality and will not disclose information reasonably categorized by the Sponsored Party as being commercially sensitive information, unless required by law or agreed otherwise with the Sponsored Party.
- (3) Data pertaining to the Marine Environment is not deemed confidential for the purposes of this Act.

#### **Text-Box 74**

The ISA Exploration Regulations have this formulation: “*Data and information that is necessary for the formulation by the Authority of rules, regulations and procedures concerning protection and preservation of the marine environment and safety, other than proprietary equipment design data, shall not be deemed confidential.*” While the draft Exploitation Regulations [ISBA/25/C/WP.1] specify that there shall be a presumption that any data and information regarding the Plan of Work, Exploitation contract, its schedules and annexes or the activities taken under the Exploitation contract are public, other than information agreed between the contractor and the ISA or designated by the Council to be confidential, or private personnel matters [DR89], categories of non-confidential data are also provided, which include “*data and information that [...] relate to the protection and preservation of the Marine Environment*” [DR89(3)(f)].

## **PART 6 – DURATION, REGISTRATION, TERMINATION AND TRANSFER OF SPONSORSHIP**

### ***Security of Tenure***

34. A Sponsorship Certificate will remain in force unless and until it is terminated in accordance with section 35 of this Act.

### ***Termination***

35. A Sponsorship Certificate terminates if –

- (a) the Sponsored Party’s contract with the ISA expires, is surrendered, or is terminated,
  - (b) it is surrendered by the Sponsored Party in accordance with section 36 of this Act,
  - (c) it is revoked by the Seabed Minerals Authority in accordance with section 37 of this Act,
- and upon termination all rights granted to the Sponsored Party by [State] will cease.

**Text-Box 75**

It should be noted that the Sponsoring State and the Sponsored Party will still be liable for their respective responsibilities in the period between receiving or giving notice of termination and the time at which the contract actually terminates.

***Surrender of Sponsorship***

36. A Sponsored Party may at any time surrender a Sponsorship Certificate without penalty by giving to the Seabed Minerals Authority not less than six months' previous notice in writing to that effect, and by complying with any relevant Rules of the ISA.

***Revocation of Sponsorship***

37. The Minister[, with [Cabinet] approval,] may revoke a Sponsorship Certificate upon the Seabed Minerals Authority's recommendation for the following reasons –

- (1) in any case, with the written consent of the Sponsored Party;
- (2) where the Sponsored Party has failed to apply to the ISA for a contract or has applied but failed to obtain a contract with the ISA, within [three] years of the date of issue of the Sponsorship Certificate;
- (3) where no material efforts have been made by the Sponsored Party to undertake the ISA Seabed Mineral Activities for a period exceeding [five] years from the date of signing the contract with the ISA;
- (4) where the Sponsored Party has conducted its activities in such a way as to result in a serious, persistent or wilful violation of the Rules of the ISA, the requirements of this Act or a final binding decision of a dispute settlement body applicable to it; and such violation either cannot be remedied or has not been remedied to the [State's] satisfaction upon request;
- (5) where the Sponsored Party knowingly or recklessly provides the ISA or the Seabed Minerals Authority with information which is false or misleading in a material particular, or fails to retain for a reasonable time period, wilfully alters, suppresses, conceals or destroys any document which is required to be produced to the ISA or the Seabed Minerals Authority;
- (6) where the Qualification Criteria are deemed by the Seabed Minerals Authority no longer to be met in any material particular; or

**Text-Box 76**

This subsection 37(6) would capture a situation where the Sponsored Party is in the opinion of the Seabed Minerals Authority no longer effectively controlled by the State, due to change in nationality, management or ownership.

- (7) where, following at least two written notices given by Seabed Minerals Authority in accordance with this Act, any payment or deposit required under section 44 or 50 of this Act is in arrears or unpaid for [six] months following the day on which it ought to have been paid.

***Notice of revocation***

38.

- (1) Before the Minister takes a decision to revoke sponsorship under section 37 of this Act, the Seabed Minerals Authority must –
- (a) give to the Sponsored Party at least [30] days’ written notice of the Minister’s intention to make the decision, setting out details of that proposed decision and the reasons for it, and inviting the Sponsored Party to make a written submission to the Minister about the proposed decision within a specified time frame, if there are any objections; and
  - (b) take into account any submissions received under subsection (a) in deciding whether to make a new or different recommendation to the Minister.
- (2) Once the Minister takes a decision to revoke sponsorship under section 37 of this Act, the Seabed Minerals Authority –
- (a) must notify the ISA in accordance with the Rules of the ISA;

**Text-Box 77**

This section seeks to take into account the ISA Rules, which variously provide:

- *“If a State terminates its sponsorship it shall promptly notify the Secretary-General in writing. The sponsoring State should also inform the Secretary-General of the reasons for terminating its sponsorship. Termination of sponsorship shall take effect **six months** after the date of receipt of the notification by the Secretary-General, unless the notification specifies a later date.”* [Exploration Regulations]; and
- *“A State may terminate its sponsorship by providing to the Secretary-General a written notice describing the reasons for terminating its sponsorship. Termination of sponsorship takes effect no later than **12 months** after the date of receipt of the notification by the Secretary-General, save that where such termination is due to a contractor’s non-compliance under its terms of sponsorship, termination of sponsorship shall take effect no later than 6 months after the date of such notification.”* [draft ISA Exploitation Regulations ISBA/C/25/WP.1]

It is slightly unclear from this drafting whether this is a disparity between the Exploration or Exploitation regimes. The terminology “no later than” used in the latter rules seems to imply that the termination can take place before a 12-month period – i.e., within six months, as envisaged under the Exploration Regulations (or indeed, even in a shorter time frame?). It may also be considered debatable to what extent the ISA has power to restrict or dictate the terms under which a State can offer or withdraw sponsorship. But nonetheless this section aims to align with the ISA regime.

- (b) must give the Sponsored Party no fewer than [six] months’ notice before the revocation takes effect, or a longer period where so required by the Rules of the ISA; and
- (c) may issue directions to the Sponsored Party under section 31(1)(c), stipulating required actions from the Sponsored Party during the notice period set pursuant to subsection (1)(c).

***Ongoing liability after termination***

39. A Sponsored Party remains –

- (1) subject to any ongoing obligations with respect to ISA Seabed Mineral Activities that occurred prior to termination, including requirements to submit reports and to make payments to the Seabed Minerals Authority or the ISA; and
- (2) responsible in accordance with this Act for any damage or claims arising from Seabed Minerals Activities carried out prior to termination,

notwithstanding that its Sponsorship Certificate has terminated.

#### **Text-Box 78**

The Exploration Regulations state “*A contractor shall continue to have responsibility for any damage arising out of wrongful acts in the conduct of its operations, in particular damage to the marine environment, after the completion of the exploration phase.*” The standard contract terms in the draft Exploitation Regulations [ISBA/C/25/WP.1] include the following: “*The Contractor shall be liable to the Authority for the actual amount of any damage, including damage to the Marine Environment, arising out of its wrongful acts or omissions, and those of its employees, subcontractors, agents and all persons engaged in working or acting for them in the conduct of its operations under this Contract, including the costs of reasonable measures to prevent and limit damage to the Marine Environment, account being taken of any contributory acts or omissions by the Authority or third parties. This clause survives the termination of the Contract and applies to all damage caused by the Contractor regardless of whether it is caused or arises before, during or after the completion of the Exploitation activities or Contract term.*” [Annex X, section 7]

### ***Transfer of Sponsorship***

40.

- (1) A Sponsored Party may transfer or assign its rights and obligations under an ISA contract, Sponsorship Certificate, or agreement made pursuant to section 24, or mortgage or otherwise encumber its ISA contract, in whole or in part, only with the prior written consent of the Minister and pursuant to the Rules of the ISA.
- (2) Before providing any consent pursuant to subsection (1) in relation to any transfer or assignment, the Minister –
  - (a) must determine that the Qualification Criteria are met by the transferee or assignee, taking into account the recommendations of the Seabed Minerals Authority and the Technical Committee;
  - (b) may require the transferee or assignee to follow all or part of the procedures prescribed for Sponsorship Application, as if the transferee or assignee were a new Sponsorship Applicant.
- (3) Where the Minister consents to a transfer under this section, a new Sponsorship Certificate will be issued in the name of the transferee, if so required.

**Text-Box 79**

This section 40 may be deleted and replaced by a prohibition on transfer of sponsorship rights, if a State prefers to avoid a situation in which the Sponsored Party may be able significantly to alter its personality from that originally assessed and approved at Sponsorship Application stage. However, it is noted that UNCLOS Annex III Article 20 does envisage the transfer of rights and obligations with the consent of the ISA. Furthermore, the uncertainties pertaining to this new industry, and challenges in raising investment, may mean takeovers or other transfer transactions are necessary to maintain the performance of the ISA contract. So this section is drafted for a Sponsoring State that may wish to facilitate such a transaction so as to enable continuation of ISA Seabed Mineral Activities, while maintaining control (and a right of veto) over that transfer. The draft Exploitation Regulations [ISBA/25/C/WP.1] also enable a Contractor to mortgage, etc., its contract with prior consent of Sponsoring State and ISA Council [DR22] and to transfer its rights and obligations under its ISA contract with prior consent of the Council [DR23].

## **PART 7 - ENFORCEMENT OF DECISIONS AND AWARDS**

### *Registration of Seabed Disputes Chamber decisions*

41.

- (1) The [High Court] may, on the application of an interested person, order a final decision rendered by the Seabed Disputes Chamber or other court or tribunal having relevant jurisdiction under the U.N. Convention on the Law of the Sea to be registered in the [High Court].
- (2) To avoid doubt —
  - (a) a decision of the Seabed Disputes Chamber or other relevant court or tribunal involving a State may be registered under subsection (1); but
  - (b) nothing in this Act affects any privilege or immunity that a State may claim against the enforcement of a registered decision of the Seabed Disputes Chamber or other relevant court or tribunal.

### *Effect of registration*

42. A registered decision of the Seabed Disputes Chamber is to be treated as if the decision were a judgment of the [High Court] made on the date on which the decision was registered, for the following purposes:
  - (a) the force and effect of the decision in relation to the enforcement of the decision;
  - (b) the exercise of the powers of the [High Court] in relation to the enforcement of the decision;
  - (c) the taking of proceedings for or in relation to the enforcement of the decision;
  - (d) where the decision is for the payment of a sum of money, the carrying and computation of interest on that sum.



**Text-Box 80**

UNCLOS Annex VI Article 39 stipulates that the decisions of the Seabed Disputes Chamber of ITLOS shall be enforceable in the territories of the States Parties in the same manner as judgments or orders of the highest court of the State Party in whose territory the enforcement is sought; and UNCLOS Annex III Article 21(2) provides: “*Any final decision rendered by a court or tribunal having jurisdiction under this Convention relating to the rights and obligations of the ISA and of the contractor shall be enforceable in the territory of each State Party.*” This wording is mirrored in the ISA Exploration Regulations and the draft Exploitation Regulations [ISBA/25/C/WP.1]. In some national jurisdictions, these provisions may require specific legislative implementation, as is provided by the wording contained in these proposed sections 41 and 42.

***Recognition and Enforcement of arbitral awards***

43. An arbitral award made pursuant to Article 188(2)(a) of the U.N. Convention on the Law of the Sea is to be treated in accordance with [*insert reference to relevant domestic law that deals with the recognition and enforcement of international arbitration orders*].

**PART 8 - FISCAL ARRANGEMENTS*****Costs of Contract Application to the ISA***

44. [The costs of presenting an application to the ISA for a contract for Exploration or Exploitation under [State] sponsorship must be met by the Sponsored Party, including any costs reasonably incurred by the Government of [State] in taking actions either requested by the Sponsored Party or deemed necessary by [State] under the Rules of the ISA, to support the application before the ISA.]

**Text-Box 81**

The Exploration Regulations currently require an upfront fee of US\$500,000 from applicants for an Exploration contract, which can be refunded in part or increased by <10% should the administrative costs of processing the application be less or more than the charged amount, in practice. The fee for Exploitation applications is not yet settled [see DR86 and Appendix II of ISBA/25/C/WP.1]. This section is square bracketed, in recognition that it may not be required where the Sponsored Party is a State-owned enterprise, or for a developed country Sponsoring State. Or because States may prefer to address this matter by way of a sponsorship agreement, rather than legislation.

***Payments by Sponsored Parties***

- 45.
- (1) **Sponsorship Application fee** – A Sponsorship Applicant must pay to the Seabed Minerals Authority upon submission of a Sponsorship Application, a non-refundable fee of [\$ x], including all other related costs and fees.

**Text-Box 82**

The Sponsoring State may wish to add provisions similar to those in the Rules of the ISA, which allow for the fee to be refunded in part or increased by <10% should the administrative costs of processing the application differ from the charged amount in practice. The same principle may also be applied to the administration fee charged pursuant to subsection (2). The State may wish to include a fixed sum in its law (both here, and in subsection (2) below), or may wish to prescribe the fee by subsidiary legislation or other method that enables the amount to change over time.

**(2) Administration fees –**

- (a) The holder of a Sponsorship Certificate must pay to the Seabed Minerals Authority an annual administration fee of [\$x]:
  - (i) within six months from the date of the issue of the Sponsorship Certificate, and
  - (ii) every year after that, on the anniversary each year of the date of the issue of the Sponsorship Certificate.
- (b) During the fifth year of the Sponsorship Certificate term, and each five-year anniversary thereafter, the Seabed Minerals Authority may review the amount of the annual administration fee for the remainder of the term of the Sponsorship Certificate, and may reasonably increase the amount where this is required to cover the actual costs to [State] of administering and supervising the sponsorship.

**(3) Seabed Mineral recovery payment**

- (a) [A Sponsored Party holding an ISA contract for Exploitation under [State] sponsorship, subject to paragraph (b), must pay to the Seabed Minerals Authority such sums by way of a recovery payment [as and when is agreed and specified in a written agreement made under section 24 of this Act] prior to the commencement of Exploitation by the Sponsored Party.
- (b) The amount of the recovery payment will:
  - (i) take into account the set-up, Exploration and Exploitation costs incurred by the Sponsored Party,
  - (ii) be based on [*e.g., a percentage of the latest market value of the metal content contained in the Seabed Minerals to be extracted by the Sponsored Party through the ISA Seabed Minerals Activities*],

**Text-Box 83**

States may have different policy reasons for undertaking sponsorship of ISA Seabed Mineral Activities. Some States may enter into sponsorship on the basis of benefits to be accrued via taxation and/or local employment and investment and/or technology transfer and/or mineral supply and/or revenue generated by State-owned Enterprises; in which case an additional recovery payment, as envisaged by subsection (3), may not be required. States which do not anticipate obtaining sufficient benefit via these other means may conversely wish to include such a recovery payment to secure national benefit from the sponsorship arrangements. This may, for example, be a priority for developing States whose sponsorship arrangements might, for different reasons, not capture the above examples of benefits, or revenue by way of taxation within the domestic jurisdiction. In this case, it is recommended that the State provide uniform standards regarding such a recovery payment in the domestic legislation, rather than negotiated and settled case by case in an agreement.

Consideration may also be given to the appropriateness of the Sponsoring State pursuing direct revenue from the ISA Seabed Mineral Activities (or, perhaps at least, to the quantum of that revenue), where this may diminish the proceeds flowing to the ISA – given the common heritage of humankind status of the minerals, and the purpose of those activities being to provide benefits for humankind as a whole [UNCLOS Articles 136 and 140].

(iii) be published by the Seabed Minerals Authority.

***Seabed Minerals Fund*****Text-Box 84**

Where a Sponsoring State anticipates significant new income from its sponsorship of ISA Seabed Mineral Activities, it is recommended to take measures to ensure the sustainable management of those funds, taking into account the potential for long-term and intergenerational benefits, and the importance to avoid economic destabilization. This proposed s.46 signals that revenue management decisions should be taken by another Ministry and under another enactment. States should verify this conforms with appropriate national legislative practice, and also may wish to check there is not already a national sovereign wealth fund or similar that could be adapted for these purposes.

46.

- (1) There will be established under the control and management of [the Ministry of Finance] a fund to be called the Sovereign Wealth Fund (for Seabed Minerals revenues) into which must be paid any sums paid to the Government under section 44, excepting any funds allocated by [the Ministry of Finance] to be used directly for the purposes of covering the costs of the Seabed Minerals Authority and performing its functions under this Act.
- (2) The Seabed Minerals Fund is established with the objective to ensure the wise management of [State]'s revenues collected pursuant to this Act for the benefit of both current and future generations.

- (3) Rules for the operation and management of the Seabed Minerals Fund will be laid down by Regulations made under separate enactment.]

### *Taxation*

47. A Sponsored Party is subject to the laws relating to the payment of corporate tax within [State] in relation to its profit from ISA Seabed Mineral Activities.

### *Financial payments to the ISA*

48. A Sponsored Party will be responsible to make prompt and full payment of any sums due to the ISA, under the Rules of the ISA.

### *Recovery of payments owed by Sponsored Parties*

49. A sum of money payable pursuant to section 44 of this Act is a debt due to the State and may be recovered in a court of competent jurisdiction; and
- (1) in any such proceedings a certificate of the Seabed Minerals Authority certifying that a specified sum of money is so payable, must be received as evidence of that fact;
  - (2) any debt of the Sponsored Party may at the court's discretion be recovered from any security deposited by the same Sponsored Party under section 50 of this Act; and
  - (3) interest on the amount outstanding may additionally be charged at a Prescribed or otherwise reasonable rate.

### *Security*

- 50.
- (1) The Seabed Minerals Authority may after an Exploitation contract has been granted by the ISA to the Sponsored Party, and prior to Exploitation commencing, require a Sponsored Party to deposit security as a guarantee of performance of its obligations under the Rules of the ISA and this Act.
  - (2) The form and value of any such security required, and the terms upon which it will be held, will be specified in a written agreement made under section 24 of this Act, and will take into account the type and quantum of any security that the Sponsored Party is also required to deposit with the ISA.
  - (3) A security deposited in accordance with this section may be used by the Seabed Minerals Authority to take steps towards fulfilling any obligations that the Sponsored Party fails to fulfil

#### **Text-Box 85**

A Sponsored Party will be required to lodge an "Environmental Performance Guarantee" with the ISA as a condition of Exploitation [ISBA/C/25/WP.1, DR26]. It may be unfeasible to require a Sponsored Party to tie up large amounts of capital in two separate similar guarantees. However, it is noted that the ISA's Environmental Performance Guarantee appears to focus only on decommissioning costs and also is not accessible to the Sponsoring State. For these reasons the Sponsoring State is recommended to retain the discretionary power proposed by section 50.

under this Act, or to rectify any damage or loss caused as a result of such failure, or to satisfy any order of compensation or damages made against the Sponsored Party by the [High Court] or other applicable court or tribunal.

## PART 9 – MISCELLANEOUS

### *[Prospecting]*

51. Any national of [State] who submits a notification of prospecting to the ISA pursuant to the Rules of the ISA must provide a copy of that notification, and of any annual report submitted to the ISA, to the Seabed Minerals Authority within 30 days of that submission.]

#### **Text-Box 86**

This s.51 on Prospecting is proposed as an optional provision. Under UNCLOS, Prospecting (as a precursor to Exploration) does not require State sponsorship, and if a State national prospects in the Area, it does not entail responsibilities or liabilities for the State. However, a State interested in future sponsorship of activities in the Area may wish at least to be informed of any national's prospecting activities. Some obligations for prospectors are included in the ISA's Exploration Regulations, and States could also choose to include additional obligations upon national prospectors in domestic legislation if they so wish.

### *Interference with ISA Seabed Mineral Activities or the Seabed Minerals Authority*

52.

- (1) Unless authorized under this Act or Regulations made under this Act, any person who interferes with –
- (a) ISA Seabed Mineral Activities,
  - (b) The Seabed Minerals Authority or its representative in the performance of duties under this Act, or
  - (c) The ISA or its representative in the performance of duties under the Rules of the ISA or the U.N. Convention on the Law of the Sea,

or incites another person to so behave,

[commits an offence and is liable to a fine not exceeding [\$amount] or to a prison term not exceeding [X] years or both].

- (2) For the purposes of subsection (1), “interfere” means commit wilful sabotage, or violence or similar physical interference to any person referred to in subsection (1).

### *Public Officials prohibited from acquiring Seabed Mineral rights*

53.

- (1) No Public Official may, directly or indirectly, personally acquire any right or interest in any Sponsored Party contract for ISA Seabed Mineral Activities, and any document or transaction purporting to confer any right or interest on any such Public Official will be null and void.
- (2) No Public Official engaged by the Seabed Minerals Authority may directly or indirectly acquire or retain any personal shareholding in a private company carrying on ISA Seabed Mineral Activities.

***Offence committed by a body corporate***

54. Where an offence under this Act committed by a body corporate has been committed with the consent or connivance, or is attributable to the neglect, of any officer of the body corporate, that officer as well as the body corporate is guilty of that offence

***Notice***

55. Any application, request, notice, warning, report or direction made or given under this Act must be made by the Minister or by the designated representative of the Sponsored Party, as the case may be, in writing, and will be deemed served the day after delivery, if delivered by hand, facsimile, or email containing an authorized electronic signature to the Ministry or to the designated representative.

**Text-Box 87**

Some jurisdictions may like to include notice provisions such as this in primary legislation; others may not consider it necessary.

***Disputes***

- 56.
- (1) Any dispute arising between [State] and another State, or [State] and the ISA, in connection with ISA Seabed Mineral Activities will be resolved pursuant to the relevant provisions of the U.N. Convention on the Law of the Sea;
  - (2) Any dispute between [State] and the Sponsored Party arising in connection with the administration of this Act will first be dealt with by:
    - (a) the parties attempting to reach settlement by mutual agreement or mediation, and in the event this is not successful then,
    - (b) by referral to arbitration to be conducted in accordance with [the Arbitration Act of [State]].

***Regulations***

57. [The Minister] may under this Act make (and when made vary, alter, amend, revoke or cancel) Regulations, with the [Cabinet's] consent, prescribing anything required or authorized to be Prescribed under this Act or generally for carrying this Act into effect, and any such Regulations must be consistent with the U.N. Convention on the Law of the Sea, the Rules of the ISA, and other applicable standards of international law.

***Transitional Arrangements***

58. *[State may wish to include some provisions to explain what happens to sponsorship relationships that predate the passing of the Act.]*

***Savings***

59. *[State may wish to include some provisions to amend existing legislation, where required, to give proper effect to this Act.]*

**Text-Box 88**

For example, some relevant national laws (e.g., pertaining to EIA or anti-corruption) may be drafted so as not to have extraterritorial effect, in which case an amendment to those laws to extend their applicability to Sponsored Parties (via this sponsorship Bill) may be required.

