

# The Draft Mining Code

Future Exploitation of Seabed Minerals

# Outline

- A phased approach to developing the Mining Code
- The applicable policy framework
- The development of Standards & Guidelines (S&G)
- The Draft Regulations on Exploitation
  - The Structure
  - Understanding the DR – Part I Introduction
  - From Exploration to Exploitation- the application & process
  - Rights & Obligations of Contractors
  - Pre-commencement requirements
  - Commercial production
  - Monitoring compliance & enforcement
  - Close-out activities
  - Other features & dispute settlement
  - Some outstanding concerns

# Following the script

1994 Ag →  
phased  
implementation  
of mining  
regime

Interim  
period b/w  
entry into  
force of  
UNCLOS &  
approval of  
1<sup>st</sup> PoW for  
exploitation

... Measures  
necessary for the  
conduct of  
activities in the  
Area as they  
progress & timely  
elaboration of  
rules, regs &  
procedures for  
exploitation, incl.  
for protection &  
preservation of ≈E

# Exploration Regs

UNCLOS Art

162(2)(o)(ii) Priority to adoption of rules, regs & procedures re polymetallic nodules

2000 – Regs on Prospecting & Exploration for Polymetallic Nodules +

2013 - amendmts

2010 – Regs on prospecting & exploration for polymetallic sulphides

2012 – Regs on Prospecting & Exploration for Cobalt-rich Ferromanganese Crusts

# Exploitation Regs

2011

- Council requests Secretariat to prepare a strategic WP for formulating regs for mining deepsea minerals (nodules)

2012

- SG proposes ambitious WP → Exploitation regs by 2016, when 1<sup>st</sup> contracts for exploration for nodules to expire
- Consultant hired → preliminary work on scope, comm norms & precedents, & econ aspects of regs

2013

- LTC brief discussions on regs

2016

- 1<sup>st</sup> working draft regs

2017

- LTC proposed 2020 deadline\*; Council & Assembly decisions > new mtg schedule

# Policy Framework

- UNCLOS → detailed prescriptive policies for mining code, incl. granting pdn authorizations & financial terms of contracts
- 1994 “implementing” Ag. *de facto* amends UNCLOS → principles to guide dev’t of rules & regs
  - benefit humankind as a whole
  - foster comm viable & sustainable exploitation (incl. reasonable econ returns)
  - “sound comm principles”
  - w/o subsidization of activities or preferential mkt access except as permitted by WTO Ags

# Form of Regulation

- Structure of regulatory framework is established in UNCLOS, annex III,
  - art 17 → ISA “shall adopt & uniformly apply” regs
  - art 3(5) → regulatory relationship between ISA & operator shall be in the form of a contract obtained by approval of a PoW
- balance b/w content of regs vs contract

# Content

- E. policy framework, incl. REMPs?
  - Regs envisaged as implementing UNCLOS annex III on application process & establishing rights & obligations of contractors *vis-a-vis* ISA  
→ balance b/w regs vs **S&G**
  - **S** = mandatory vs **G** = recommendations
- LTC proposes an “outcomes-based” approach for dev’ing **S&G** esp. **E.S** providing for rigorous & contractually binding outcomes, while affording flexibility in processes used to achieve those outcomes



# LTC roadmap for developing S&G

- I. Complete by adoption of DR, incl. those required to guide initial consideration & dev't of an application of a PoW for exploitation
  - II. Complete prior to receipt of 1<sup>st</sup> application for a PoW
  - III. Complete by commencement of commercial mining
- 2 technical Wk'ing Groups, led by LTC members & incl. recognized experts to be established in 2019 to support dev't of E.G
  - Allow for stakeholder consultations & comments

# Developing S&G

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ISBA/25/C/37 – **S**,  
draft **E**. goals,  
objectives &  
principles  
require  
discussion &  
adoption by  
Council;  
thorough &  
timely dev'mt of  
DR ↔ necessary  
**S&G** should be  
dev'ed before  
adoption of DR

LTC Members & Secretariat prepare  
draft **E** goals, objectives & principles  
to support dev'mt of **S&G**

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Adoption of **S** by Council & applied  
provisionally pending approval by  
Assembly

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**G** issued by either LTC or SG &  
submitted to Council which may  
require their amendmt or w/drawal

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# Structure of DR

- I. Introduction
- II. Applications for approval of Plans of Work in the form of contracts
- III. Rights & obligations of Contractors
- IV. Protection & preservation of the Marine Environment
- V. Review & modification of a Plan of Work
- VI. Closure plans
- VII. Financial terms of an exploitation contract
- VIII. Annual, administrative & other applicable fees
- IX. Information-gathering & handling
- X. General procedures, Standards & Guidelines
- XI. Inspection, compliance & enforcement
- XII. Settlement of disputes
- XIII. Review of these regulations

# Understanding the DR

- Preamble → context: CHM, benefit of humankind as a whole, & accord with UNCLOS & 1994 Ag
- Terms used in DR = meaning of terms in UNCLOS, 1994 Ag & ISA rules & regs
- Words with a particular meaning for DR are defined in its Schedule
- DR are supplemented by **S&G** + further rules, regs & procedures, esp. on **≈E**
- DR should be read as compatible with UNCLOS & 1994 Ag & other rules of int'l law not incompatible with UNCLOS

# Part I - Introduction

- DR1 use of terms & scope
- DR2 fundamental principles [**& policies**] ← UNCLOS
- DR 3 duty to coop & exchange info
  - ISA acts on behalf of humankind > transparency & public participation procedures
  - overlapping jurisdictions > need to avoid unnecessary duplication of admin procedures & compliance requirements
- DR 4 protection measures re coastal States where Contractor activities are likely → Serious Harm or a threat of Serious Harm to its coastline or to ≈**E** under its jurisdiction or sovereignty

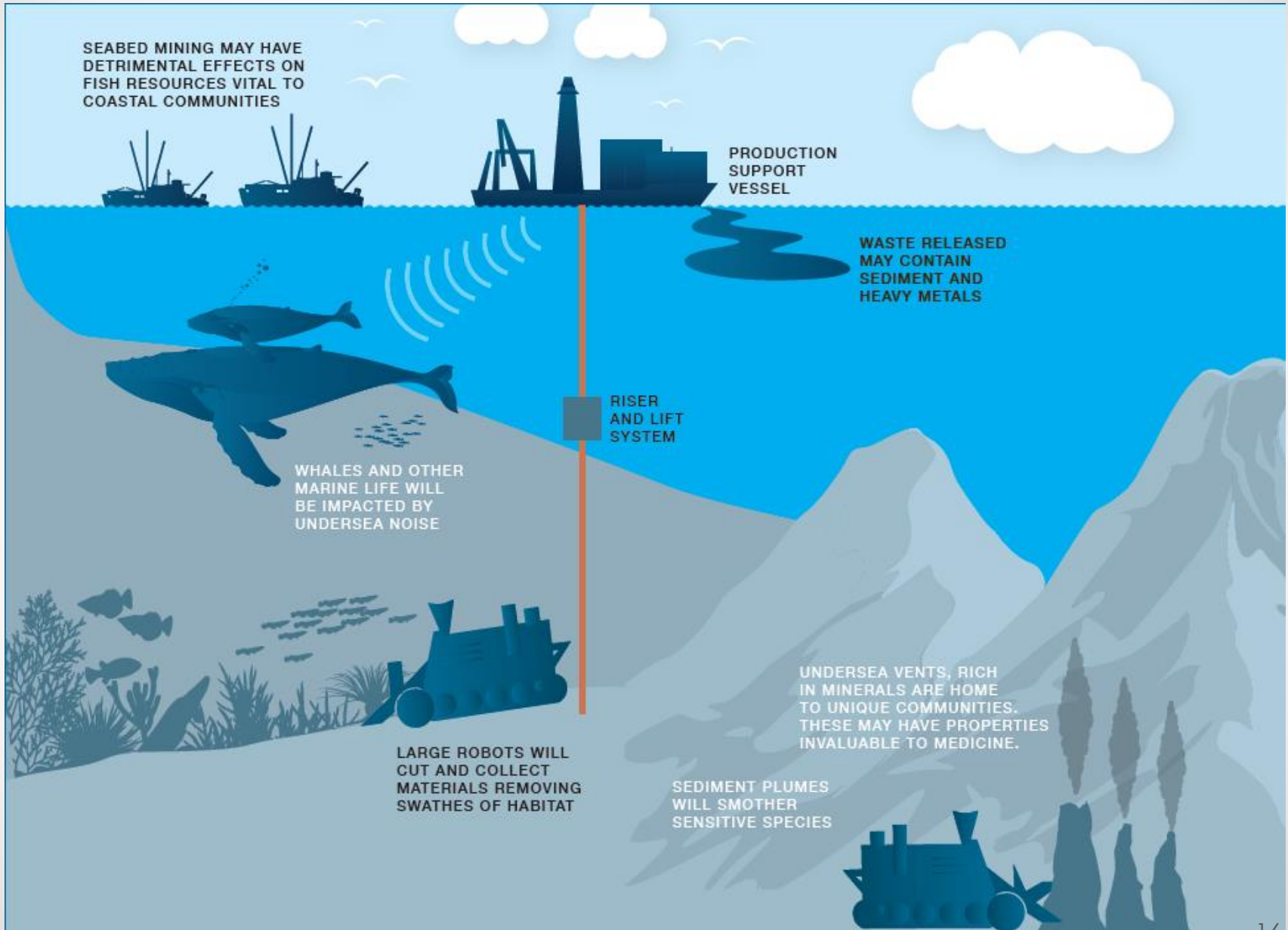
# Part II - Applications for approval of PoW in the form of contracts

- Who is qualified? Sponsorship
- Documentation to be submitted with application:\*
  - Data & info acquired under exploration contract (Exploration Regs, standard clauses, sec. 11.2)
  - Mining Workplan (DR, annex II)
  - Financing Plan (DR, annex III)
  - EIS (DR, annex IV)
  - Emergency Response & Contingency Plan (DR, annex V)
  - Health & Safety Plan & Maritime Security Plan (DR, annex VI)
  - Training Plan (UNCLOS, annex III, art III & G)
  - EMMP (DR, annex VII)
  - Closure Plan (DR, annex VIII)

# From Exploration to Exploitation

- Exploration = search for resources, use & testing of systems & equipmt, evaluation of E, tech, econ & comm factors for exploitation → **pre-feasibility data & info**
- Exploitation = comm recovery & extraction of minerals, incl. construct & operate mining, processing & transport systems ↔ **further evaluation (feasibility)**
  - **a construction & dev'mt phase**
  - **pdn phase**
  - **ultimately closure of mining site**
- Contractors may apply for PoW for exploitation over part of contract area, whilst continuing to explore & evaluate the rest

# photo: Greenpeace Australia Pacific





# EIS & EIA

- Purpose of EIS is to doc & report results of EIA incl.:
  - at outset a screening & scoping process > identifies & prioritizes main activities & impacts associated with potential mining operation
  - an **E** risk assessment
  - an impact analysis to describe & predict nature & extent of **E** Effects of mining operation
  - measures to manage **E** Effects within acceptable levels

# EIS

- EIS Template is not prescriptive but guides format & general content of an EIS
  - ✘ details of methodology or thresholds that may be resource- & site-specific ↔ possibly **S&G**
- Where an applicant considers an effect to be of no significance → sufficient info to substantiate this, or explain why further research is not warranted
- Must consider nature & extent of any interactions b/w various impacts, where they may → cumulative effects over lifetime of mining operation

# EMMP

- Based on EIA & EIS & sets out:-
  - how mitigation measures will be implemented
  - how effectiveness of such measures will be monitored
  - what will be management responses to monitoring results
  - what reporting systems will be adopted & followed
- In accordance with relevant REMP, **G**, GIP, BASE, BAT, & consistent with other plans
- Performance assessments √ compliance of mining operation with EMMP & its contd
- appropriateness & adequacy

# Environmental Management System

- Contractor implements & maintains an EMS which is capable of
  - delivering site-specific environmental objectives & **S** in EMMP
  - cost-effective, independent auditing
  - Providing effective reporting to ISA on its **E** performance

# Pollution control & management of waste

- A Contractor shall
  - take necessary measures to prevent, reduce & control pollution & other hazards to ≈E from its activities
  - not dispose, dump or discharge into ≈E any Mining Discharge, except where permitted in G & EMMP unless carried out for safety of vessel or Installation or safety of human life

# Closure Plan

- Closure incl temporary suspension of mining
  - Steps for decommissioning & closure, incl. post-closure management & monitoring of residual & natural **E** Effects
  - Residual negative **E** Effects ↔ identified, quantified, management responses
  - Restoration or rehabilitation commitments
  - ✓ Updated each time there is M∇ in PoW or ≤ every 5 ys + > 12 mths prior to planned end of Comm Pdn, or a.s.a.p where unexpected cessation, if such cessation requires a M∇ to Closure Plan
  - ✓ LTC reviews amount of EPG

# Processing Applications

- If > 1 application for same area & Resource category → SG determines whether applicant has **preference & priority**: UNCLOS annex III, art 10
- **E** Plans (EMMP, EIS & Closure Plan) placed on website (60 days) for public comment > Contractor > rev Plans > LTC > LTC report published on website
- Previous operating record of responsibility of applicant is taken into a/c
- In add to **E**, technical, financial, health & safety assessments, application must demonstrate reasonable regard for other activities in  $\approx$ **E**, incl. navigation, laying of submarine cables & pipelines, fishing & MSR

# LTC shall not recommend approval of a PoW if (DR 15)

- Council approved a PoW for Exploration for same Resource category for a diff applicant
- Proposed PoW likely → undue interference with approved PoW for other Resources
- An area disapproved for Exploitation by Council\_ UNCLOS art 162 (2)(x)
- A Reserved Area & applicant is not eligible
- Approval would permit a State or entities sponsored by it to monopolize activities in Area re Resource category, or total area allocated to Contractor under any approved PoW > certain max areas





# Council acts on LTC's recommendations

- If LTC says YES Council can only disapprove a PoW if 2/3 present & voting, incl a maj of members present & voting in each of Council's chambers disapproves
- If Council takes no decision w/in 60 days (or longer if stated), recommendation is deemed approved at the end of that period
- If LTC says NO or makes no recommendation, Council may approve PoW by 2/3 present & voting if not opposed by a maj in any chamber

# Part III Rights & Obligations of Contractors

- Exploitation contract ↔ Standard Clauses annexed to DR
- Contract is a public doc → Seabed Mining Register, except Conf Info > redactions
  - Exclusive right to explore & exploit a specified Resource category
  - Security of tenure & shall not be revised, suspended or terminated except in accordance with its terms
  - Exclusive right to apply for & be granted a renewal of its exploitation contract

# Certainty → Predictability *vs* Flexibility → Adaptability

- Standard Clauses of Exploitation Contract
  - Sec 3.2 Contractor shall implement this contract in good faith & shall in particular implement PoW in accordance with GIP
  - Sec 3.3 (a) Contractor must comply with regs, as well as other Rules of the Authority, as amended from time to time, & decisions of relevant ISA organs

# Contract duration

- Max initial term is 30 yrs incl. a reasonable period for construction of comm-scale mining & processing systems
- + renewal for successive max 10 yr periods unless non-compliant
- Terms of renewed contract are those of standard exploitation contract annexed to DR ***in effect on date that Council approves renewal application***

# Caveats

- Contractor notifies SG w/in 30 days if it finds Resources of **another Resource category**
- Exploration & Exploitation of such finds requires a **separate application** to ISA
- Contract shall not confer any interest or right on a Contractor in or over any other part of Area or its Resources other than those rights expressly granted by terms of contract or DR



Transferee  
must  
fulfill DR  
applicant  
require-  
ments

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Contract > security for raising finance to  
effect obligations under contract with  
prior consent of sponsoring State &  
Council

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Transfer of rights & obligations with prior  
consent of Council

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Change of control of Contractor or entity  
providing EPG > contract contd if SG  
determines able to meet obligations, or SG  
treat as transfer of rights &/or require  
Contractor to lodge a new EPG

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# Pre-commencement requirements

- $\geq 12$  mths prior to proposed commencement of production > Contractor submits a Feasibility Study
  - “Feasibility Study” = comprehensive study of a mineral deposit in which all geological, engineering, legal, operating, econ, social, **E** & other relevant factors are considered
- SG considers whether > requires  $M\triangledown$  to PoW
- Where, as part of a rev PoW, Contractor delivers rev **E** Plans which constitute a  $M\triangledown$  > publication for comment

# EPG

- Contractor lodges EPG in favour of ISA **no later than commencement date of pdn**
- The EPG reflects likely costs required for:
  - a) premature closure of Exploitation activities
  - b) decommissioning & final closure, incl. removal of Installations & equipmt
  - c) post-closure monitoring & management of residual **E** Effects
- EPG is reviewed & updated
  - if Closure Plan is updated
  - on LTC review of final Closure Plan
  - b/c of a performance assessmt or review of PoW





- A Contractor shall maintain & cause its subcontractors to maintain insurance
  - include ISA as an additional assured
  - endeavour to ensure that all insurances provide that underwriters waive any rights of recourse, incl subrogation rights ag ISA

# Comm Pdn

- Contractor, consistent with GIP, shall
  - make comm'y reasonable efforts to begin Comm Pdn in accord with PoW
  - manage recovery of Minerals at rates contemplated in Feasibility Study
- BUT may suspend operations for 12 mths due to mkt conditions + apply for add. 12 mth periods
- If suspension contd for > 12 mths, LTC may require submission of a final Closure Plan
- If pdn is suspended for > 5 yrs, Council may terminate contract

# Incidents & notifiable events

- Contractor shall ↓ risk of Incidents to the point where cost of further risk reduction would be **grossly disproportionate** to benefits of such reduction, taking into a/c **G**
- Shall **not proceed or continue** with Exploitation if it is reasonably foreseeable → an Incident
- Notifiable events (appendix I) e.g.
  - Medical evacuation
  - Fire/explosion or collision resulting in an injury or major damage or impairment
  - Significant contact with fishing gear or submarine pipelines or cables

# Annual reports

- Cover activities in Contract Area & reports on compliance incl:
  - details of Exploitation work carried out during yr
  - quantity & quality of Resource recovered during period & volume of Minerals & metals produced, marketed & sold
  - a financial report
  - actual results obtained from E monitoring
  - results of any Exploration activities
  - details of any proposed modification to PoW & reasons
- Published in Seabed Mining Register, except for Confidential Info > redacted

# Review & modification of PoW

- If Contractor wishes to modify the PoW → notify SG
- If SG considers =  $M\nabla$  → LTC → Council
- If  $M\nabla$  relates to EMMP → published for comment → LTC → Council
- ✓ Review of activities under a PoW at intervals  $\leq$  5 yrs from signature of contract or where various events occur, e.g.,
  - an incident
  - $\nabla$ s in BAT, BASE, operational management \
- subcontractors

# Inspection, compliance & enforcement

- ISA Inspectors may board Contractors' vessels & Installations, offshore or onshore & enter its offices wherever situated
- SG gives reasonable notice to Contractor of projected time & duration of inspections, save in cases of urgency → inspection w/o prior notification
- Contractor must accept deployment of remote real-time monitoring & surveillance equipment

# Inspectors' powers

- Seize any doc, substance or sample for examination or analysis
- Require procedures to be carried out on equipment
- May give instructions\* necessary to remedy perceived dangers to human health or safety or a threat of Serious Harm to ≈E, or breach of contract, incl.
  - suspension in mining activities for a specified period or as agreed by ISA & Contractor
  - placing conditions on continuation of mining
- \* Instructions lapse after 7 days > SG Compliance notice

# Compliance Notice

- Contractor appears in breach of contract > SG may issue compliance notice
- A compliance notice constitutes **a warning** by ISA, under UNCLOS, annex III, art 18
- Contractor may make written reps to SG
- If Contractor fails to implement measures in compliance notice & continues to act → **serious, persistent & wilful violations of fundamental terms of contract, UNCLOS Part XI & ISA rules**, Council may suspend or terminate contract or impose monetary penalties
- Contractor > DS remedies UNCLOS, Part XI, sec 5



# Close-out activities

- Closure Plan post-closure management & monitoring of residual & natural **E** Effects
- Info to be submitted upon expiration of a contract - all data & info required for effective exercise of ISA powers & functions re Contract Area as per Regs & **G**
  - SG & Contractor consult upon termination of contract > SG specifies data & info to be submitted to ISA as per **G**

# Seabed Mining Register

- Contractors' names + designated reps
- Applications by Contractors + annexed docs
- Terms of exploitation contracts
- Geographical extent of Contract & Mining Areas
- Category of Mineral Resources
- Payments made by Contractors to ISA under Regs
- Any encumbrances on contract
- Any instruments of transfer
- Other details as appropriate

# Info-gathering & handling

- Presumption that data & info re PoW, contract or activities are public, except Conf Info
- Conf Info  $\neq$  info to protect  $\approx$  E:
  - or health & safety & required to be disclosed under Rules of the Authority
  - & necessary for formulation of ISA rules, regs & procedures other than equipmt design data
  - provided that SG may agree that such info is regarded as Conf Info for a reasonable period where there are **bona fide academic reasons** for delaying its release
- An award or judgment re activities in the Area is not conf but any Conf Info is redacted

# Environmental Fund(s)

- Implementation of necessary measures designed to prevent, limit or remediate damage to Area arising from activities in the Area, where costs cannot be recovered from a Contractor or sponsoring State
- Restoration & rehabilitation of the Area
- Research into BAT for restoration & rehabilitation
- Promotion of research into marine mining engineering & practice to ↓ E damage or impairment from Exploitation activities
- Education & training on protection of ≈E
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# Settlement of Disputes

- Disputes re interpretation or application of DR & an exploitation contract shall be settled in accordance with UNCLOS, Part XI, section 5
  - Admin decisions subject to review - interests of cost & speed to be accommodated?
  - 3<sup>rd</sup> party HS users?
  - UNCLOS non-State parties?
- Decisions of courts or tribunals having jurisdiction under UNCLOS re rights & obligations of ISA & Contractors shall be enforceable in any State party to UNCLOS affected thereby

# Review of the Regs

- $\geq 5$  yrs after Assembly approves DR, Council will review the regs
- Any State party, LTC or Contractor through its sponsoring State may at any time request Council to review regs in light of new info or tech
  - \* Stakeholders must be given an opportunity & adequate time to comment
- Council may, taking a/c LTC or other subsidiary bodies' recommendations, adopt & provisionally apply amendmts to regs, pending approval by Assembly

# Additional outstanding issues

- Role of Council, LTC& SG in implementing DRs
  - What functions & levels of authority should be delegated to SG by Council? What guidance should be provided to SG in his decision-making?
  - Timelines & institutional functioning of ISA (Council, LTC mtgs) → approvals process
- Resource-specific requirements?
- Clarity on the respective roles of ISA, sponsoring States & others (e.g. flag States) > avoid over-or under regulation + liability issues
- Terminology – comm pdn, BAT, BASE, GIP, BEP

• ***THANK YOU!***