



ASEAN & BIMSTEC WORKSHOP ON DEEP SEABED RESOURCES AND THE BLUE ECONOMY



Nay Pyi Taw, Myanmar
9-11 September 2019

With the support of the Korea Maritime Institute. 

THE LEGAL FRAMEWORK FOR ACTIVITIES IN THE AREA:
TRANSITIONING FROM EXPLORATION TO EXPLOITATION

Dr. Gwenaelle Le Gurun



OUTLINE

1. Normative consolidation: constituent instruments, secondary legislation, decisions, recommendations and contract
2. Draft Regulations on exploitation: overview of the process and content
3. Development of standards and guidelines for the implementation of the Regulations
4. Next steps



1. BACKGROUND: NORMATIVE CONSOLIDATION

Main sources of law – Hierarchy and need for the secondary legislation to be consistent with the constituent instruments

1982 UN Convention on the Law of the Sea (Part XI, Annexes III and IV)

1994 Agreement for the Implementation of Part XI of the 1982 Convention

Rules, regulations and procedures of the International Seabed Authority

Other rules of International law not incompatible with the Convention

Decisions, recommendations and contracts



Fundamental principles

- Article 136** The Area and its resources are the common heritage of mankind
- Article 137** No State shall claim or exercise sovereignty or sovereign rights over any part of the Area or its resources
- All rights in the resources of the Area are vested in mankind as a whole (represented by the ISA) and no State or natural or juridical person shall exercise mineral rights except in accordance with Part XI
- Article 140** Activities in the Area shall be carried out for the benefit of mankind as a whole
- Article 141** The Area shall be open to use exclusively for peaceful purposes by all States



The Mining Code

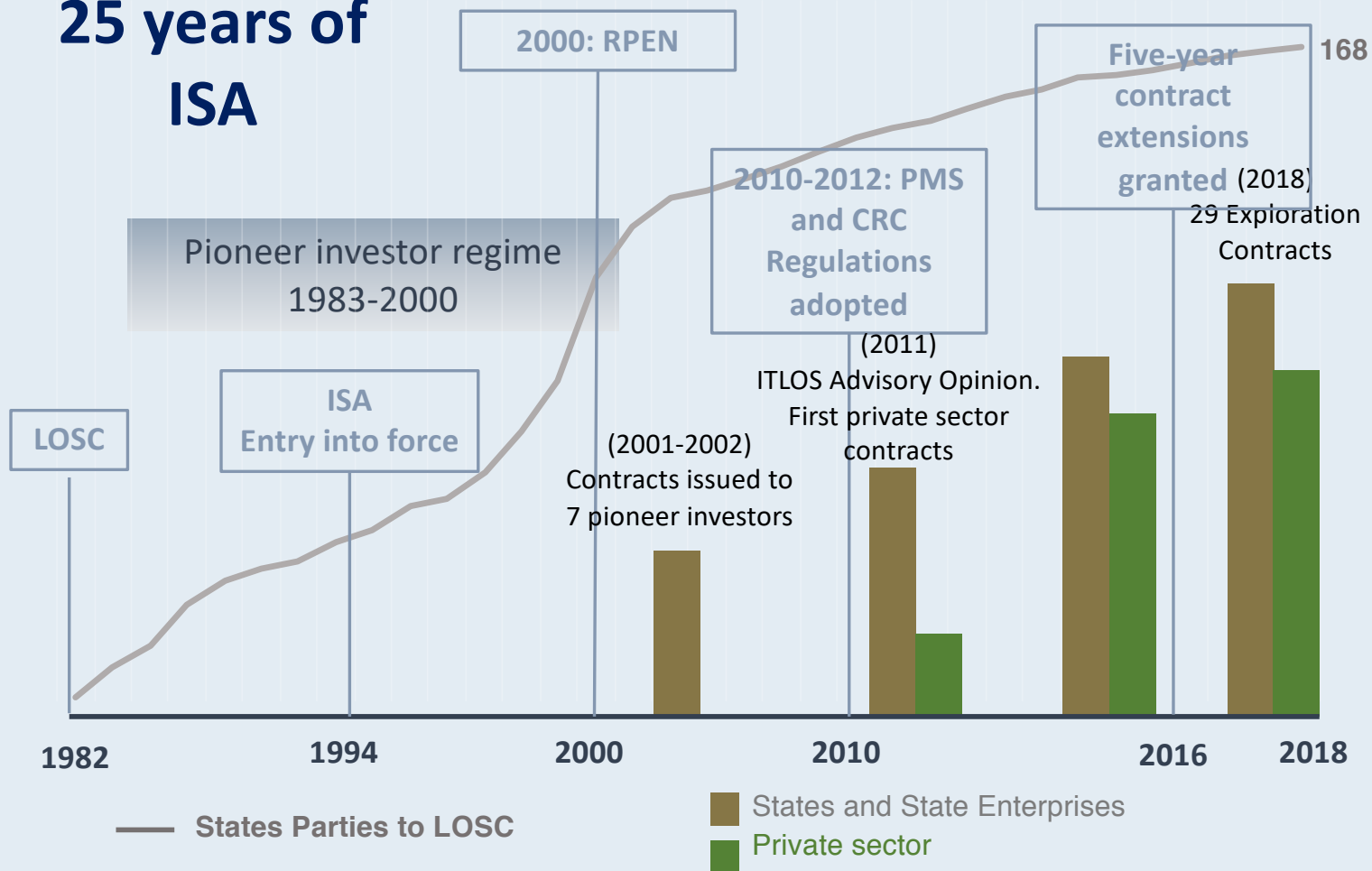
Definition and content

The comprehensive set of rules, regulations and procedures issued by the International Seabed Authority to regulate prospecting, exploration and exploitation of marine minerals in the Area.

- Regulations on:
 - Prospecting
 - Exploration
 - **Exploitation (including financial terms)**
- Recommendations on
 - Environmental, training, financial obligations, annual report recommendations
 - Data standards
- Covering:
 - Polymetallic nodules
 - Polymetallic sulphides
 - Cobalt-rich ferromanganese crusts
 - **Other resources**



25 years of ISA



EXPLORATION CONTRACTS

Key considerations

Geological: resource / reserve assessment, mineable areas

Technological: design and testing of components, processing

Environmental: establish baseline, assessment and monitoring of impacts

Economic: revenues, costs, supply / demand, returns

Regulatory: certainty and predictability in future exploitation regime & implementation

Image courtesy of Global Sea Mineral Resources



2. DRAFT EXPLOITATION REGULATIONS: DEVELOPMENTS

DRAFT REGULATIONS ON EXPLOITATION

<https://www.isa.org.jm/legal-instruments/ongoing-development-regulations-exploitation-mineral-resources-area>

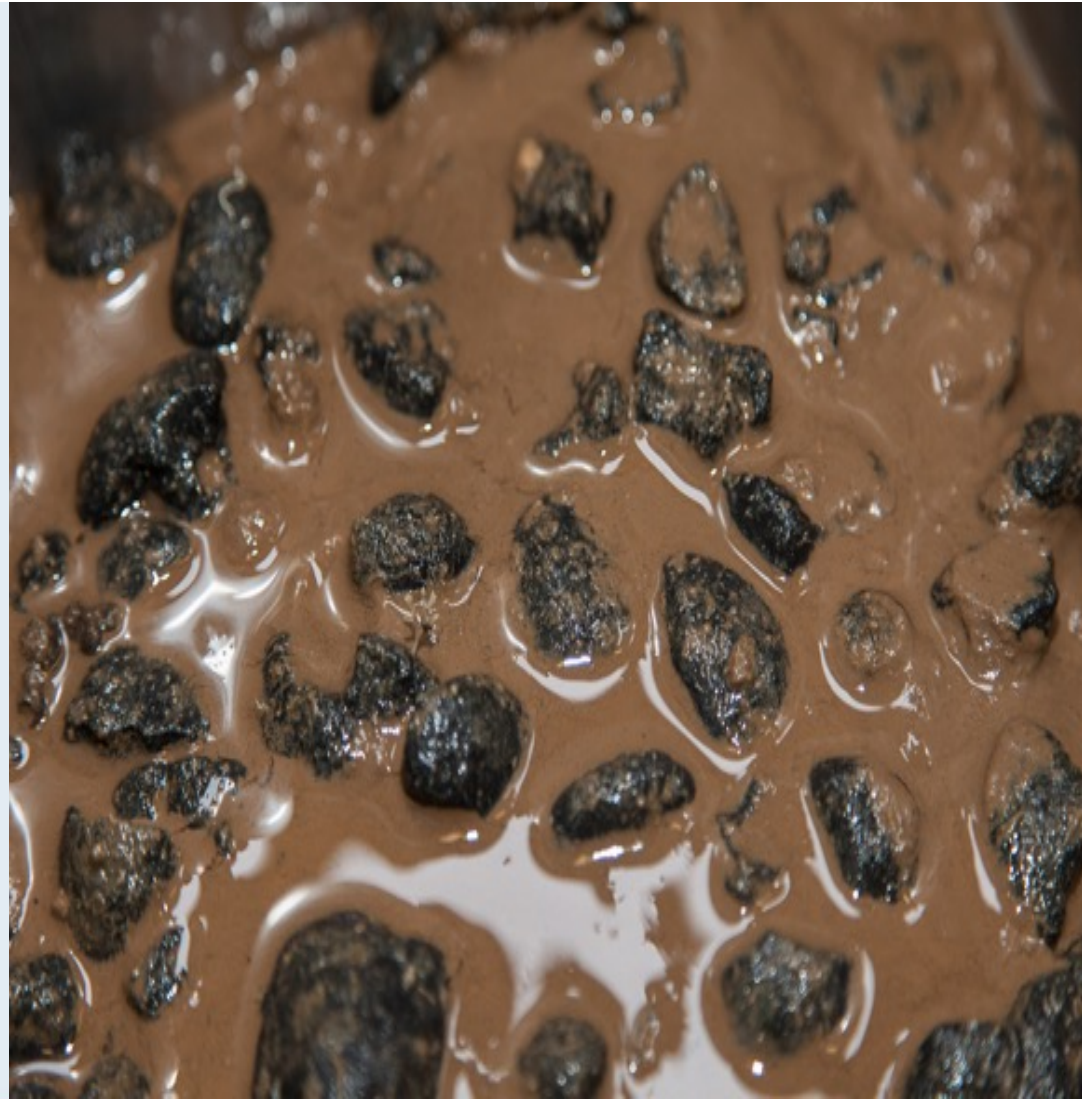


- Revised draft issued by the LTC to Council, March 2019 (ISBA/25/C/WP.1); first reading by Council in July 2019; current consultation (15/10/2019); compilation by the President of the Council to be published by 30 December 2019
- Builds on knowledge and outputs of the exploration framework
- Result of multi-disciplined stakeholder reviews and inputs over 5 years
- Sets out fundamental rights and obligations between the ISA and future mining operators
- To be supplemented by a suite of guidelines and standards (Pretoria workshop 13-15 May 2019; LTC and Council in July 2019)
- Continued development of regulatory framework to foster risk-based approach to regulation by the ISA and sponsoring States
- Ensure a level playing field across applicants and mining entities
- Comprehensiveness (environmental aspects, financial aspects): 13 Parts, 10 annexes, 4 appendices, 1 schedule



DRAFT REGULATIONS ON EXPLOITATION OF MINERAL RESOURCES IN THE AREA: CORE ELEMENTS

- Guiding policies and principles
- Duty to cooperate and exchange of information across a number of actors
- Robust application and assessment process, including stakeholder participation
- Safety, labour and health standards
- Emergency response and contingency planning
- Environmental documentation & requirements, incl. environmental performance assessment
- Review mechanism
- Financial terms of contracts: OEWG of the Council tasked with the development of payment mechanisms, the rate of payment maximized returns to the Authority while ensuring the commercial viability of mining, and a trigger or triggers for reviews of the payment mechanism, environmental aspects and economic modelling and timing for resources other than polymetallic nodules
- Inspection, compliance and enforcement
- Environmental compensation fund (AO)



A RISK-BASED APPROACH

- The “what” to regulate and “how” (and “when”) to regulate it
- Risk-based approach to regulation
 - Risk-based regulation (risk assessment framework)
 - Application of environmental and other standards
 - Evidence-based decision-making
- Certainty and predictability



OUTCOME OR RESULT-BASED REGULATION

- A performance-based regime
- Focuses on producing the desired performance (e.g. environmental performance or safety) not the production of more rules
- Determine the output or performance levels e.g. objectives, criteria, quality standards, thresholds, trigger points (contractual requirements)
- Contractor flexibility in delivering the output or performance level: drive innovation
- Constraint: state of existing knowledge
- Focus on processes



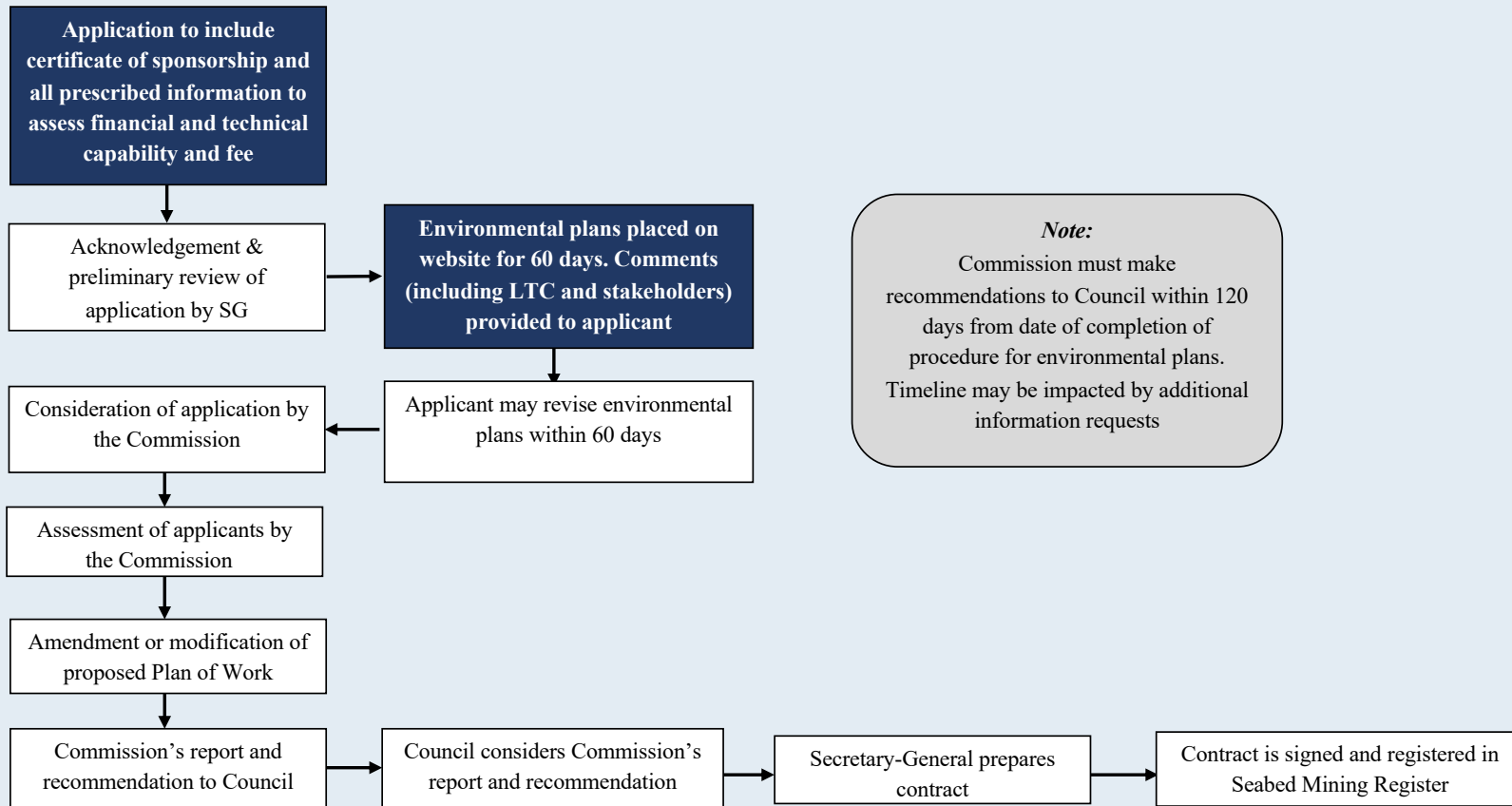
DRAFT REGULATIONS ON EXPLOITATION OF MINERAL RESOURCES IN THE AREA: APPLICATION

**Application for
Approval of a Plan
of Work for
Exploitation**

- 1. Exploration data and information**
- 2. Mining work plan**
- 3. Financing plan**
- 4. Environmental impact statement**
- 5. Emergency response and contingency plan**
- 6. Health and Safety Plan and a Maritime Security Plan**
- 7. Training plan**
- 8. Environmental management and monitoring plan**
- 9. Closure plan**

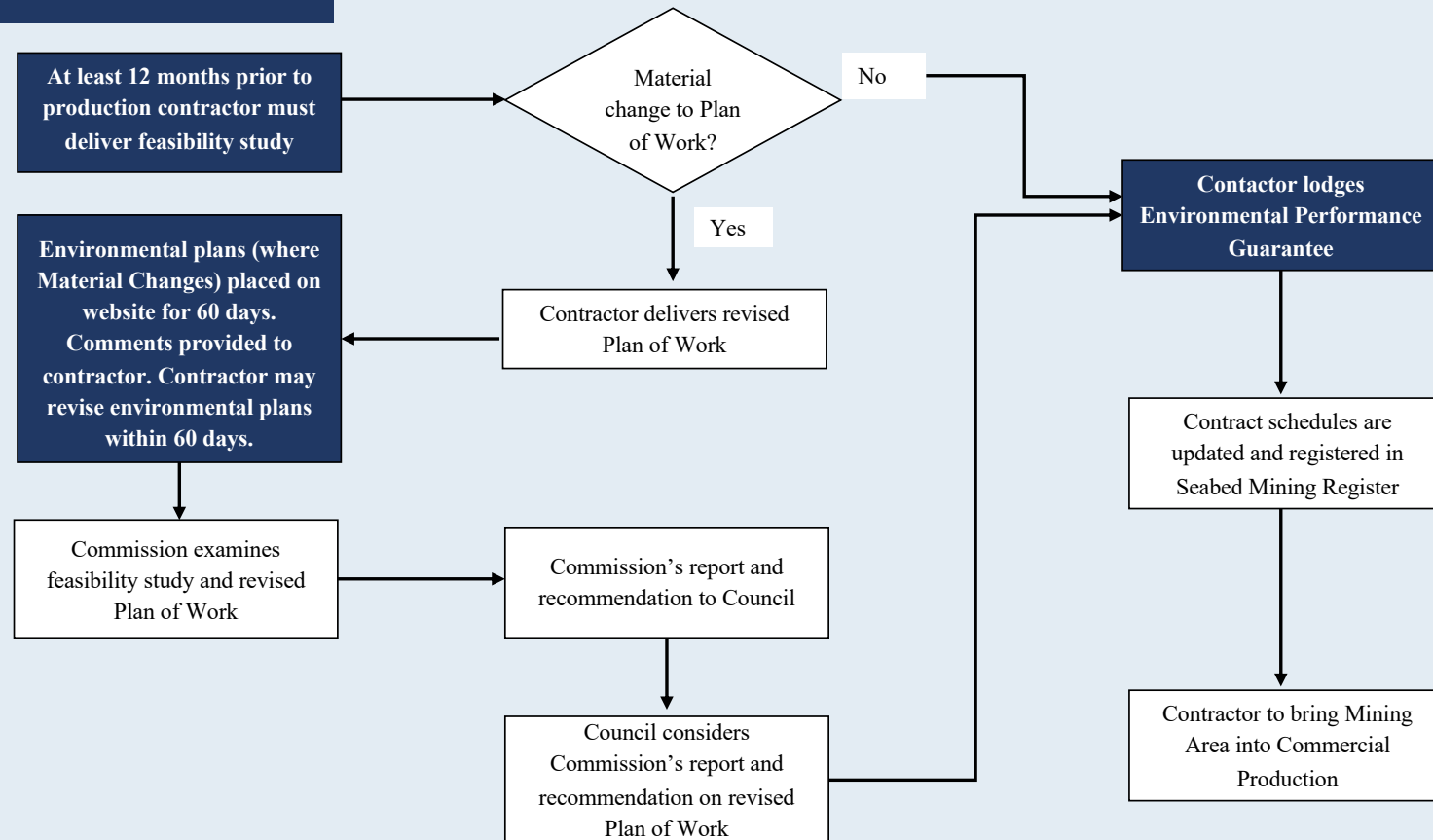
PROCESS: APPLICATION FOR APPROVAL OF A PLAN OF WORK FOR EXPLOITATION IN THE FORM OF A CONTRACT

Application



PROCESS FOLLOWING APPROVAL OF A PLAN OF WORK FOR EXPLOITATION AND PRE-PRODUCTION

After approval of a Plan of Work



3. STANDARDS AND GUIDELINES – PRIORITY LISTS AND PROCESS

BACKGROUND

- May 2019 Pretoria Workshop addressed LTC terms of reference
- The objectives of the workshop were:
 1. To establish a prioritised list of standards and guidelines, with reference sources, that will be required to support the implementation of the exploitation regulations; and
 2. To develop a process for the development of the standards and guidelines.
- Also reflected on:
 1. Risk-based approaches by national regulators
 2. Adoption of an outcomes-based approach to environmental regulation
 3. Engaging science and engineering in the development of specific standards



STANDARDS AND GUIDELINES

- Review by the LTC of the priority list and process according to the binding or non-binding nature in July 2019; endorsement by the Council in July 2019
- Standards as mandatory, whereas guidelines as recommendatory
- An outcome-based approach should be used in the development of standards and guidelines (drawing on experience in offshore oil and gas industry); regular review;
- Standards and guidelines should be put in place in phases, as follows:
 - (i) Phase 1: Completion by the time of the adoption of the draft regulations;
 - (ii) Phase 2: Completion prior to the receipt of the first application for a plan of work for exploitation;
 - (iii) Phase 3: Completion by the time of commencement of commercial mining activities;



4. NEXT STEPS



STANDARDS AND GUIDELINES

Technical working groups, led by members of the Commission and including an appropriate number of recognized experts in the field selected on the basis of art. 165, (2) (e), of the LOSC, should be established in 2019 to support the development of several environmental standards and guidelines; review of outcomes by the LTC in February-March 2020

Members of the Commission and the secretariat to prepare draft environmental goals, objectives and principles to support the development of standards and guidelines



NEXT STEPS

1. End of the 5th call for submission on 15/10/2019 (consultation@isa.org.jm), compilation to be submitted by the President of the Council, published by 30/12/2019
2. Resumed negotiation of regulatory text by Council: first reading in July 2019 to be resumed at the 26th session of the Council, in February 2020; (adoption by July 2020)
3. Craft financial terms for contracts: third meeting of the open-ended working group of the Council in February 2020:
 - systems and rates of payment, art. 13 Annex III and section 8 of the 1994 IA, options under discussion: a fixed rate ad valorem only royalty mechanism; a two-tier ad valorem only royalty mechanism; a combined ad valorem royalty and profit-based system; or a progressive ad valorem system with rates depending on changes in the market prices of minerals



NEXT STEPS

- environmental aspects: environmental compensation fund, discussion on:
 - the amount: fixed or based on the value of the extracted materials?
 - the size of the fund (annual levy of 1 per cent and a cap of \$500 million or a fixed amount and reduce the cap to \$100 million?)
 - the possibility of reimbursing part or all of the fund to contractors as an incentive for environmental performance and/or transferring part of the fund to the Authority?
1. Interfaces with sponsoring States/international organizations (IMO and ILO)
 2. Design a robust monitoring (remote), inspection and compliance mechanism





Thank you!



Image courtesy of Global Sea Mineral Resources

