

# **Towards an ISA Environmental Management Strategy for the Area**

## **Critical Statements on Content and Structure**

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# Overview

- Legal Requirements
- Structure
- Threshold
- Procedure
- Definitions
- Economic constraints

# Legal Requirements

Article	Content
Art 145	<p>Task: Necessary measures to ensure effective protection for the marine environment from <b>harmful effects</b> which may arise from such activities. To this <b>end</b> the Authority shall adopt appropriate rules, regulations and procedures for <i>inter alia</i>:</p> <p>(a) prevention, reduction, control of pollution and other hazards to marine envt including coast</p> <ul style="list-style-type: none"><li>- and of <b>interference with the ecological balance</b> of the marine environment</li><li>- particular attention being paid to the need for <b>protection from harmful effects</b> etc</li></ul> <p>(b) the <b>protection and conservation</b> of the natural resources of the Area and the <b>prevention of damage</b> to the flora and fauna of the marine environment.</p>
Art 206	<p>Conduct EIA if may cause <b>substantial pollution of or significant and harmful changes</b> to the marine environment</p>
Art 209	<p><b>International</b> and <b>national</b> rules, regulations and procedures</p>

Article / Provision	Content
Art 136	Common heritage of mankind – area & resources
Art 192	Obligation to <b>protect and preserve</b> the marine environment
194.5	<b>Protect &amp; preserve</b> rare & fragile ecosystems
And	Precautionary principle (Principle 15 Rio), polluter pays, (Principle 16 Rio), transparency (Principle 10 Rio), ecosystem approach (art 145; EMP 35). Also see UN Fish Stocks Agt art 6 (precautionary approach); art 12 (transparency)
Principles	Best available science, best environmental practices
Art 165.2	<b>LTC</b> shall... (e) make recommendations to the Council on the <b>protection of the marine environment</b> , taking into account the views of recognized experts in that field; (f) formulate & submit to Council the rules regulations and procedures referred to in article 162.2(o) taking into account all relevant factors including assessments of environmental implications of activities in Area;
Art 162.2.o	<b>Council</b> shall..(ii) adopt and apply provisionally, pending approval by the Assembly, the rules, regulations and procedures of the Authority, and any amendments thereto, taking into account the recommendations of the Legal and Technical Commission or other subordinate organ concerned.
Art 160.2	<b>Assembly</b> (ii) to consider and approve the rules, regulations and procedures of the Authority, and any amendments thereto, provisionally adopted by the Council pursuant to article 162.2 (o)(ii).

Article / Provision	Content
Annex III Art 17	<p>1. The Authority shall adopt and uniformly apply rules, regulations and procedures in accordance with article 160.2(f)(ii), and article 162.2(o)(ii), for the exercise of its functions as set forth in Part XI on, inter alia, the following matters: (xii) mining standards and practices, including those relating to operational safety, conservation of the resources and the protection of the marine environment;</p> <p>2. Rules, regulations and procedures on the following items shall fully reflect the objective criteria set out below:...</p> <p>(f) Protection of the marine environment: Rules, regulations and procedures shall be drawn up in order to secure <b>effective protection of the marine environment from harmful effects</b> directly resulting from activities in the Area or from shipboard processing immediately above a mine site of minerals derived from that mine site, taking into account the extent to which such harmful effects may directly result from drilling, dredging, coring and excavation and from disposal, dumping and discharge into the marine environment of sediment, wastes or other effluents.</p>
Art 158	<p>Organs of the Authority.... 3. Such <b>subsidiary organs</b> as may be found necessary may be established in accordance with this Part. Also 160.2(d) (Assembly); 162.2(d) (Council).</p>



Article / Provision	Content
1994 Implementing Agt Annex	<p>3. The setting up and the functioning of the organs and subsidiary bodies of the Authority shall be based on an <b>evolutionary approach</b>, taking into account the functional needs of the organs and subsidiary bodies concerned in order that they may discharge effectively their respective responsibilities at various stages of the development of activities in Area.</p> <p>5. Between the entry into force of the Convention and the approval of the first plan of work for exploitation, the Authority shall concentrate on:</p> <p>(g) Adoption of rules, regulations and procedures incorporating applicable standards for the <b>protection and preservation of the marine environment</b>;</p> <p>(h) Promotion and encouragement of the conduct of <b>marine scientific research</b> with respect to activities in the Area and the collection and <b>dissemination</b> of the results of such research and analysis, when available, with particular emphasis on research related to the environmental impact of activities in the Area;</p> <p>(i) Acquisition of <b>scientific knowledge and monitoring</b> of the development of marine technology relevant to activities in the Area, in particular technology relating to the protection and preservation of the marine environment;</p> <p>(k) Timely elaboration of <b>rules, regulations and procedures</b> for exploitation, including those relating to the <b>protection and preservation</b> of the marine environment</p>

Article	Content
1994 Implementing Agt Annex	<p>6. (a) An application for approval of a <b>plan of work</b> for exploration shall be <b>considered by the Council</b> following the receipt of a <b>recommendation</b> on the application from the <b>Legal and Technical Commission</b>. The processing of an application for approval of a plan of work for exploration shall be in accordance with the provisions of the Convention, including Annex III thereof, and this Agreement, and subject to the following:</p>
	<p>7. An application for approval of a plan of work shall be accompanied by an <b>assessment of the potential environmental impacts of the</b> proposed activities and by a description of a programme for <b>oceanographic and baseline environmental studies</b> in accordance with the rules, regulations and procedures adopted by the Authority.</p>

# Aarhus Convention

Incorporated in CCZ EMP

3 Pillars:

- access to information
- public participation and
- access to justice

## Almaty Guidelines

on Promoting the Principles of the Aarhus Convention in International Forums

### **Access to environmental information**

In order to make access by the public more consistent and reliable, each Party should encourage international forums to develop and make public a clear and transparent set of policies and procedures on access to the environmental information that they hold.



# Structure

## The Future We Want (Rio+20)

10. We need institutions at all levels that are **effective, transparent, accountable** and **democratic**.

- Need to build in robust transparent procedural mechanisms
- Need to add dispute resolution mechanisms, reviews, appeals

# Essential Elements

## Substantive

- Baseline
- Account for all impacts
- Strategic EMPs for all areas
- Protected Areas
- Effective Management
- Liability & Redress

## Procedural

- Transparency
- Clear framework: timelines
- Comprehensive, fair, public evaluations
- Reviews
- Scientific review of EIAs
- Ongoing reviews

# Procedural Needs

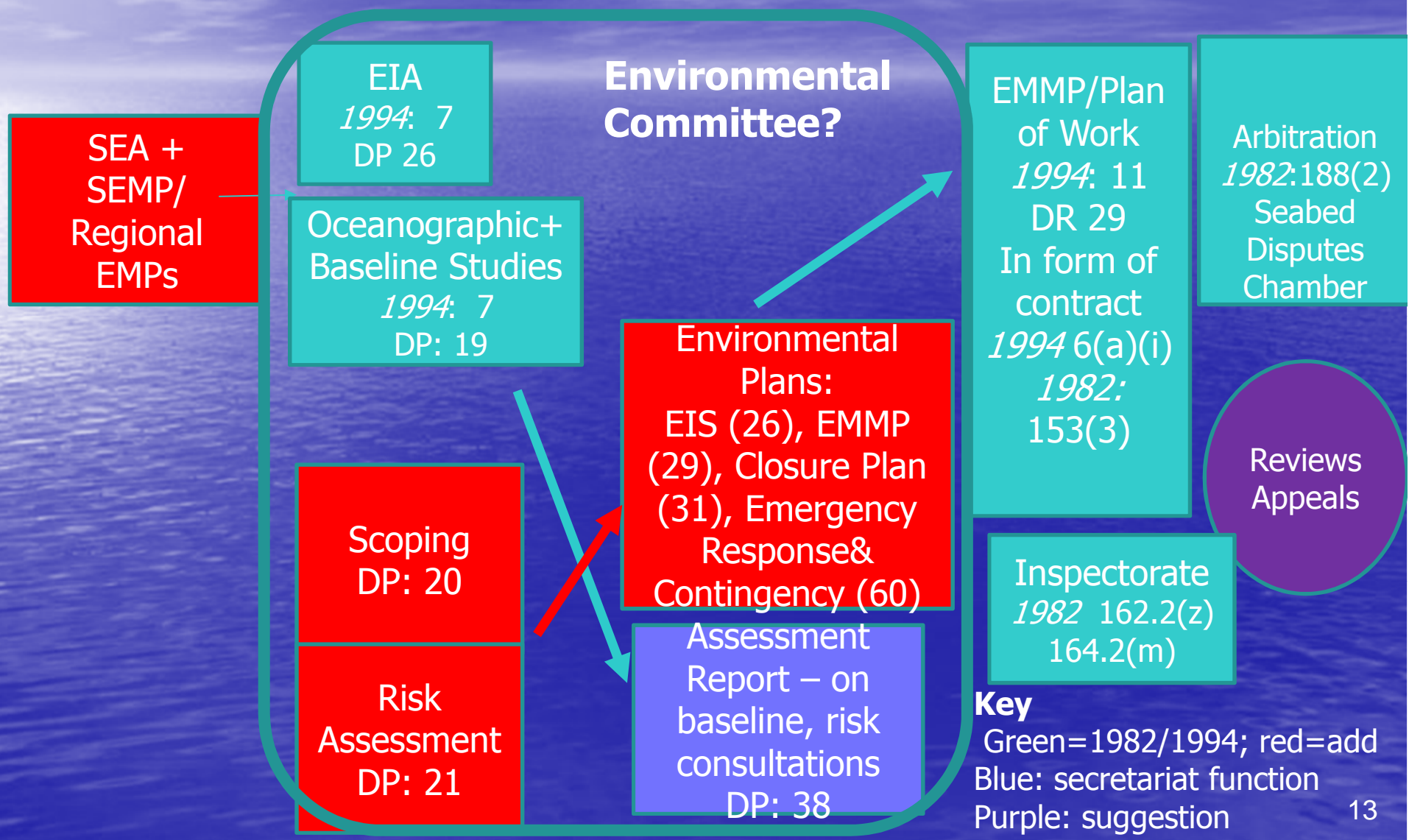
- Transparency and Public Participation
  - Aarhus Principles: 3 pillars
  - Implement access to information, public participation and access to review opportunities accessible to stakeholders.
- Process: clear, transparent, timelines
- Applications: transparent, comprehensive and fair evaluation
- Review procedures
- EIAs: independent scientific review, public, comment
- Regular reviews



# Putting it Together

- Environmental Impact assessment
  - Transparent, public review
  - Scientific peer review
  - Ask questions, seek further information
- Application and Assessment Process
  - Open hearings
  - Panel of experts – 21<sup>st</sup> Century techniques
    - Powers to seek further information
    - Public ability to question scientists, present independent evidence
- Environmental Management Plan / Plan of Work
  - Open hearings, transparent data, monitoring
- Review Process – including environmental/NGO access
- Liability, Redress, Sustainability Fund

# Building Blocks





# Elements of DSM

- Strategic Environmental Assessment
  - Regional Environmental Management Plan
- Environmental Impact Assessment
  - Scientific review, public comment
- Plan of Work / Environmental Management Plan
- Ongoing monitoring, compliance, emergencies
- Review and Appeal procedures
- Liability and Redress
- Closed areas – APEI, PRZ, IRZ

X  
X  
✓  
✓  
✓  
X  
✓  
?

# The Discussion Paper

Overall aim: ensure effective protection

Objective:

**“Serious Harm to the marine environment”** means any effect from activities in the Area on the Marine Environment which represents a Significant Adverse Change in the Marine Environment determined according to the rules, regulations and procedures adopted by the Authority, on the basis of Internationally Recognized Standards and practices.

**“Significant Adverse Change”** [means important harmful changes in ecosystem diversity and integrity, the productivity of the biological communities within the Marine Environment; or the threat to human health through direct exposure to pollutants, or through consumption of exposed aquatic organisms; or important loss of aesthetic, recreational, scientific, or economic values].



# The Discussion Paper Threshold

## Significant adverse change or serious harm?

- Art 145: 'effective protection' from 'harmful effects'  
UNCLOS: art 162.2(w): emergency orders  
162.2(x) obligation on the Council to disapprove areas for exploitation by contractors or the Enterprise in cases where substantial evidence indicates the risk of serious harm to the marine environment
- Seabed Advisory Opinion: 'harm' and 'significant harm' – citing ILC Draft Art 3: 'significant'
- Art 206: EIA 'significant and harmful' changes
- Annex III.2(f) "effective protection of the marine environment from harmful effects"

# The Discussion Paper

## Serious harm

Kuala Lumpur-Nagoya Protocol: Damage needs to be measurable and significant.

ILC Draft Articles on Transboundary Harm Art 2

**Commentary:** The term “significant”, while determined by factual and objective criteria, also involves a value determination which depends on the circumstances of a particular case and the period in which such determination is made.



# The Discussion Paper

## Serious harm

Exploration regulations: “serious harm to the marine environment” means

“any effect from activities in the Area on the marine environment which represents a significant adverse change in the marine environment determined according to the rules, regulations and procedures adopted by the Authority on the basis of internationally recognized standards and practices. E.g. Regulation 3(f) Sulphides and Nodules regulations.

*This may need to be revisited if serious harm is higher threshold*

SAI defined in FAO Deep Sea Guidelines (2009)



# The Discussion Paper: Some Definitions

- “Acceptable”
- “Adaptive Management”
- “Interested Persons”
- “Environmental Offset”

# The Discussion Paper: Some Definitions

## “Acceptable”

“**Acceptable**” in relation to a risk, means a level of risk for which the time, cost or effort of further reducing it would be **grossly disproportionate** to the benefits of such reduction. In assessing whether the time, cost or effort would be grossly disproportionate to the benefits of further reducing the risk, regard shall be had to best practice risk levels compatible with the Exploitation Activities being undertaken.

- E.g. Draft Reg 21.4. Risks classified as potential significant risks are to be assessed as to whether they are Acceptable without further Mitigation; 21.7 whether the Plan of Work is environmentally Acceptable
- *Just because costs \$\$ doesn't mean harm acceptable*

# The Discussion Paper: Some Definitions

- **“Adaptive Management”** is a planned and systematic process for continuously improving environmental management practices by learning about their outcomes. Adaptive management provides flexibility to identify and implement new Mitigation measures or to modify existing ones during the life of a mining project.



# The Discussion Paper: Some Definitions

## **New Zealand EEZ and Continental Shelf (Environmental Effects) Act 2012s 64**

(2) An ***adaptive management approach*** includes—

(a) allowing an activity to commence on a small scale or for a short period so that its effects on the environment and existing interests can be monitored:

(b) any other approach that allows an activity to be undertaken so that its effects can be assessed and the activity discontinued, or continued with or without amendment, on the basis of those effects.

## **NZ Supreme Court –Sustain Our Sounds**

*The overall question is whether any adaptive management regime can be considered consistent with a precautionary approach – extent to which reduce uncertainty and risk*

# The Discussion Paper: Some Definitions

**“Interested Person(s)”** means a natural or juristic person or an association of persons that, in the opinion of the Authority, is **directly affected** by the carrying out of Exploitation Activities in the Area or who has **relevant information or expertise**.

(Schedule 1)



# *Interested Persons*

## CCZ Environmental Management Plan:

**Transparency.** The Authority shall enable public participation in environmental decision-making procedures in accordance with the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, 1998, and its own rules and procedures.

### Aarhus Art 2

- "*The public concerned*" means the public **affected** or likely to be affected by, or **having an interest** in, the environmental decision-making; for the purposes of this definition, non-governmental organizations promoting environmental protection and meeting any requirements under national law shall be deemed to have an interest.
- Art 134 The Area and its resources are the **common heritage of mankind**.
- Who is affected in ABNJ? CHM must mean all public have interest or are affected

# Definitions:

## Environmental Offset

- **“Environmental Offset”** means an action or actions taken in accordance with these Regulations, after all reasonable Mitigation measures have been applied, to compensate or counterbalance significant Residual Environmental Changes resulting from Exploitation Activities in the Area, by replacing or providing substitute resources or environments.
- “Mitigate” and “Mitigation” includes: .... Environmental offset
- Query: legal basis? Relationship to PRZ and IRZ and APEIs?  
Relationship to Sustainability Fund and Liability Fund?
- Does offset allow serious harm/ecological damage?



# Relevance of Economic considerations

## DP 9

Improvements... become relevant and practicable through technological development and advances in scientific knowledge, **and are economically feasible.**

## DP 19 - baseline study

is capable, **within reasonable technical and economic constraints**, of providing sufficient information for an Environmental Risk Assessment;

## 3DP 2 Environmental Impact Statement

(h) a determination of the appropriate Mitigation measures that are **technically and economically feasible** ...



# Relevance of Economic considerations

## Advisory Opinion Seabed Disputes Chamber

161. The reference to different capabilities in the Rio Declaration does not, however, apply to the obligation to **follow “best environmental practices”** set out, as mentioned above,....

**162.** Furthermore, the reference to “capabilities” is only a broad and imprecise reference to the differences in developed and developing States. What counts in a specific situation is the level of scientific knowledge and technical capability available to a given State in the relevant scientific and technical fields.

117. ... The standard of due diligence has to be more severe for the riskier activities.

# Relevance of Economic considerations

## Advisory Opinion Seabed Disputes Chamber

242... (b) the obligation to apply a precautionary approach as reflected in Principle 15 of the Rio Declaration and set out in the Nodules Regulations and the Sulphides Regulations; this obligation is also to be considered an integral part of the “due diligence” obligation of the sponsoring State and applicable beyond the scope of the two Regulations;

(c) the obligation to apply the “best environmental practices”...

110... Due diligence: is an obligation to deploy adequate means, to exercise best possible efforts, to do the utmost, to obtain this result.