

Briefing note on the submissions to the draft regulations on the exploitation of mineral resources in the Area

Note by the Secretariat

I. Introduction

1. During its July 2018 meetings, the Council reflected on a revised version of the draft regulations on exploitation of mineral resources in the Area prepared by the Legal and Technical Commission (ISBA/24/LTC/WP.1/Rev.1) together with a background note from the Commission, including matters requiring the Council's attention (ISBA/24/C/20). A summary of the Council's comments on the draft regulatory text appear in document ISBA/24/C/8/Add.1. In addition, the Council agreed that written comments could be communicated to the secretariat by 30 September 2018.

2. At the date of this note, the secretariat has received 41 submissions to the draft regulations;¹ the breakdown of stakeholder submissions by stakeholder category is follows: Regional groups (1); Member States (21); ISA contractors (6); relevant international organizations (1); industry and other associations (2); environmental NGOs (1); intergovernmental organizations (1); academic / scientific (3), and private persons (5).

3. This note supplements the remarks made by the Council in July 2018 (ISBA/24/C/8/Add.1, Annex I) by providing a broad overview of the main thematic issues addressed in the written submissions. Based on an analysis of the submissions, the note also identifies 8 critical areas for discussion by the Council at its first meeting in 2019 (see Part III to this note below), with a view to providing clear policy direction to the Legal and Technical Commission as it works to revise the regulatory text.

4. Many of the written submissions provide suggested drafting changes, as well as requesting clarification on the content and purpose of a number of regulatory provisions. Detailed comments were also made on the content of the environmental plans in the annexes to the draft regulations. As requested by the Council, the secretariat will compile a summary report to capture these suggested text changes, including the accompanying rationale for such changes, and other points raised by stakeholders for review by the Commission at its March 2019 meetings. The objective will be for the Commission to produce a further revised text, taking into account all submissions received, together with any additional input from the Council at its February 2019 meetings on the items listed under Section III of this note. The Council will begin its consideration of the revised text as proposed by the Commission during the second part of the twenty-fifth session in July 2019.

5. This note does not address points raised by stakeholders in connection with the development of the economic model and the financial terms of contracts. As requested by the Council in 2018, the Massachusetts Institute of Technology (MIT) has been tasked to produce a comparative analysis of the reports and studies listed

¹ A list of stakeholders making a submission is available at [<http://bit.ly/2ScHB2v>] including links to individual submissions.

at Annex II to ISBA/24/C/8/Add.1. It is anticipated that a final report on this matter will be made available before the end of 2018.

II. Common issues identified in the stakeholder submissions

6. Overall, the submissions welcome the continuous improvement in the structure of the draft regulations and in the regulatory text, and generally endorse the matters raised by the Council (see Annex I to ISBA/24/C/8/Add.1) as being important. Stakeholders have requested that the structure of the regulations be kept under review, in particular the balance between the text in the body of the regulations, the annexes and appendices, and what should more appropriately be contained in guidelines. Several stakeholders indicated that they would welcome more flowcharts to aid understanding of the various processes under the draft regulations.

7. Based on the submissions received, the following issues have been identified as the priority areas for consideration as matters relating to the overall regulatory framework. The annex to this note provides an overview of general points arising on specific regulatory provisions.

8. **Advancing the development of Standards and Guidelines as a priority area:** Many stakeholders agreed that standards and guidelines must be developed in parallel with the regulatory text. Some stakeholders also advocated that critical standards and guidelines must be in place before the draft regulations are adopted and approved. Stakeholders also wish to see clear definitions for objectives, standards, guidelines and thresholds, the relationship between them, and their role in defining good industry practices and in the development of best practices.

9. Key to the development of standards and guidelines will be agreement as to a transparent and inclusive process for determining their content and clarity as to their legal status. As highlighted by the Council (see Annex I to ISBA/24/C/8/Add.1 at para. 2(h)), standards and guidelines must be prioritized and dealt with sequentially. In view of the importance of this matter, a separate discussion paper will be prepared in advance of the first Council meeting in 2019, including proposals for a flexible and participatory process for the development and adoption of technical standards and guidelines, building on established structures within other international organizations, and the comments made by stakeholders in connection with draft regulations 92 and 93. In addition, the secretariat will prepare a list of indicative standards and guidelines by subject area and regulatory provision.

10. **Common heritage of mankind:** stakeholders highlight the importance of recognizing the common heritage of mankind throughout the regulations and the need for its clearer operationalisation in the regulatory provisions. Stakeholders acknowledge that some progress has been made in strengthening the regulatory framework (see ISBA/24/C/20 at para. 6). There remain calls for continued examination, as well as a note of caution that the regulatory text must be precise and specific to facilitate practical implementation and enforcement (e.g. see comments on draft regulation 12(4) in the annex to this note under paragraph (e)).

11. **Efficiency in decision-making and institutional functioning: the respective roles and responsibilities of the Council, the Commission and the Secretary-General in the regulatory processes:** Effective regulatory compliance and enforcement will require the delegation of certain tasks and duties under the appropriate guidance and supervision by the Council. Stakeholder submissions indicate a range of views over the legality and appropriateness of certain powers assigned to the Secretary-General and, in some cases, the Commission under the draft regulations, in particular where no recourse to the Council is prescribed for. On the other hand, some stakeholders consider that additional approval mechanisms should be delegated to the Secretary-General given the time delay between the meetings of the respective organs of the Authority.

12. This is an area that will benefit from more detailed discussion of the role, structure and funding of the secretariat. As noted by one stakeholder there needs to be an assessment as to the types of decisions that can (or should) be delegated, and to whom, and parameters for decision-making need to be set out in a Council guidance document on the basis of which delegated decisions will be taken. Additionally, it has been noted that no specific tasks have been allocated to the Economic Planning Commission under the draft regulations and that this should be reviewed. The secretariat will prepare a short discussion paper for the Council to advance its thinking in this area.

13. Status of **Regional Environmental Management Plans (REMPs)**: the Council had invited the Commission to review the use of the words “if any” in association with REMPs (draft regulation 2(5)) and to consider making REMPs mandatory (ISBA/24/C/8/Add.1, Annex I, paras. 2(d) and 5(c)). In written submissions there was general consensus among stakeholders commenting on this point that a REMP should be in place prior to the issue of an exploitation contract. However, it was also noted that this should not be used as an opportunity to prevent the approval of a plan of work, either through stalling the development of, or blocking the adoption of a relevant REMP.

14. As highlighted previously (see ISBA/24/C/3 at para. 7), the development and implementation of REMPs is part of the Authority’s policy framework for environmental management. Questions remain as to the extent to which an environmental policy framework should be reflected in draft regulations, which are designed principally to implement Annex III of the Convention, to regulate the process for applying for plans of work and to establishing the rights and obligations of contractors vis-a-vis the Authority (see ISBA/24/C/CRP.1 at annex V). The Council needs to consider whether it wishes to create a binding legal obligation on itself to establish REMPs, which are not in themselves legal instruments. The Council also needs to consider whether legal obligations flow from REMPs and, if so, the nature and extent of those legal obligations in relation to States Parties, sponsoring States and contractors. The secretariat will outline the legal issues raised in connection with REMPs as part of a short discussion paper highlighting the issues for consideration by the Council.

15. **Examination of timelines**: stakeholders stress the need for certainty in the decision-making process, but questions have been raised as to whether time periods envisaged are workable to accommodate the review of complex documentation. Conversely, there is also concern, particularly in the application process, that the total timeline envisaged is too long, and uncertainty in the meeting schedule of decision-making organs. This is a matter the Commission will keep under review (see ISBA/24/C/20 at para. 10), and its link with the institutional functioning of the Authority under paragraph 11 above.

16. **Application of the precautionary approach**: stakeholders commented on the use and application of the precautionary approach in the regulatory text. In this regard, the key question to be addressed is *how* the precautionary approach is to be applied to activities in the Area by an applicant, contractor, the Authority and the sponsoring State or States. To facilitate further discussion of this matter, the secretariat will provide an updated analysis of how the precautionary approach is being applied in the context of the regulations.

17. **Use and definition of good and best practices and related terms**: stakeholders seek greater clarity in the content, use and purpose of the following terms in particular reflected at Schedule 1 to the draft regulations: “good industry practice”; “best environmental practice”; “best available techniques”, and “best available scientific evidence”. The secretariat will prepare a short discussion paper for consideration by the Council and the Commission on the use of these terms in

national regulatory environments, and also drawing on comments made by stakeholders.

18. **Strengthening the process and mechanism for independent expert verification of the environmental plans:** a number of submissions support the incorporation of independent advice to supplement transparent decision-making processes, which was a matter initially raised in a non-paper submitted by Belgium during the twenty-fourth session. As highlighted by one stakeholder, any such review mechanism should be consistent with the Convention framework. The secretariat proposes to draft a short discussion note for the Council's consideration, including a suggested mechanism for the selection of experts and related processes.

19. **Clarification of roles and responsibilities of the respective regulators:** stakeholders continue to express concerns over how the responsibilities of the respective regulators being the Authority, sponsoring States, flag States, and relevant international organizations dovetail. The secretariat notes that it is advancing preparation of two matrices of responsibilities to show the interfaces between the Authority and sponsoring States, and between the Authority and flag States. These matrices, and related narrative will be made available to the Council and the Commission prior to its July 2019 meetings.

20. **Inspection and inspectors:** stakeholders express some concern with the regulatory provisions of Part XI, including matters relating to the jurisdictional competence of the Authority, that the inspections provided for are too broad in scope, and that further guidance to be provided specifying the criteria for when an inspection should take place. It is also suggested that a risk assessment of what activities are to be addressed during an inspection should be undertaken, as well as support of the Council's invitation for the Commission to explore appropriate remote monitoring technology (see Annex I to ISBA/24/C/8/Add.1 at para. 12). The Commission has requested that the secretariat outline possible inspection mechanisms, interactions with other regulators, and to consider the development of a code of conduct for inspectors (see ISBA/24/C/20 at para. 29). The secretariat proposes that this outline will also be made available to the Council prior to its meetings in February 2019.

III. Next steps

21. It is suggested that the following critical areas would benefit from further discussion in the Council in order to provide clear guidance to the Commission. To this end, and as highlighted above, the secretariat will present a number of short discussion papers on the following matters:

- i. **Financial models:** consideration of the comparative report by MIT on the respective financial models and variations;
- ii. **Standards and guidelines:** review of a possible operating framework for the review, development and integration of standards and guidelines, including an indicative and prioritised list of such standards and guidelines;
- iii. **Decision-making:** matters to be considered in connection with the delegation of approval and decision-making authority under the draft regulations;
- iv. **Regional environmental management plans:** consideration of the legal background to the development and implementation of REMP's under a regulatory framework;
- v. **Precautionary approach:** examination of the application of the precautionary approach to activities in the Area;

- vi. **Key concepts:** reflection on key concepts (good industry practice and best practices) incorporated into the draft regulations, and by reference to international regulatory practice;
 - vii. **Independent assessment of environmental plans:** consideration of a mechanism for the involvement and process for the selection of independent competent experts under the draft regulations; and
 - viii. **Inspection mechanism:** examination of an outline inspection mechanism, including a mechanism for the appointment of inspectors.
22. In line with the request made by delegations during the twenty-fourth session, the secretariat will also present a proposed road map for the future development of the regulations during 2019 as well as a road map for advancing the development of REMPs, based on the outcomes and proposals of the scientific workshops held during 2018.

ANNEX

Matters arising from specific regulatory text

Part I

(a) **Draft regulation 2 (Fundamental principles):** this draft regulation has drawn both positive comment from, and constructive criticism by stakeholders. There are concerns that the language of article 150 of the Convention is not reproduced in full which could be misleading, and that article 150 relates to “policies” and not “principles”. Equally, the broad formulation of these principles could diminish the clarity and uniformity in the application of the operative regulatory provisions. Clarity is also sought in how draft regulation 2(2)(d) relating to land-based producers will be operationalised in the regulations. Furthermore, some text (e.g. in draft regulation 2(7)) does not mirror the precise language in the Convention and should be corrected.

(b) **Draft regulation 4 (Rights of coastal States):** supportive of the Council’s observations (see Annex I to ISBA/24/C/8/Add.1 at para. 2(e)), stakeholders wish to see a strengthening in the procedural (notification and consultation) mechanisms under the draft regulations, consistent with article 142 of the Convention, with clear roles and responsibilities assigned. This includes: a proper procedure to notify coastal States on an ongoing basis of unexpected effects; an examination of the threshold to be applied to “clear grounds”, and related appeal mechanisms for a coastal State, and consideration of due process given that the issue of a compliance notice could have serious repercussions. It has also been suggested that this area could be considered by the Commission as part of a capacity building initiative to develop skills in environmental assessment.

(c) **Draft regulation 5 (Qualified applicants):** some stakeholders have advocated that applicants for a plan of work for exploitation should be the holder of a current exploration contract. This matter was partially addressed by a prior regulation (see draft regulation 2, paragraph 6 of ISBA/23/LTC/CRP.3*). The paragraph was later deleted in the light of previous stakeholder submissions which questioned the legal basis for such restriction under the Convention. It is recommended that the Commission reconsider this issue in the light of further stakeholder comment, and to analyse the relevant provisions of the Convention and the 1994 Agreement. These provisions contemplate (arguably) the submission of an application for a plan of work for exploitation only (see, for example article 3(4(c), annex III of the Convention).

Part II

(d) **Draft regulation 6 (Certificate of sponsorship):** a number of questions were raised in connection with this draft regulation (and draft regulation 22 relating to the termination of sponsorship), in particular in relation to the case of sponsorship by more than one State as in the case of a consortium of States. The application of the requirement of effective control was also raised by stakeholders in connection with draft regulation 25 (Change of control). This is an area that requires further and final examination by the Commission.

(e) **Draft regulation 12 (General):** while generally supportive of the intent of the additional text in paragraph 4 relating to “the extent to which the proposed Plan of Work contributes to realizing benefits for mankind as a whole”, there is concern that its formulation is neither precise nor specific, and this could lead to problems in implementation and enforceability. Equally, other text refers to the “principles, policies and objectives relating to activities in the Area as provided for in Part XI and annex III of the Convention, and in the Agreement”, and a question as to how these will be considered in assessing a plan of work.

(f) **Draft regulation 14 (Consideration of the Environmental Plans by the Commission):** the Commission has been asked to consider setting out the basic criteria that should be taken into account (similar to the approach taken in draft regulation 13) to determine that a plan of work provides for the effective protection of the Marine Environment in accordance with article 145 of the Convention.

Part III

(g) **Draft regulation 20 (Joint arrangements):** this draft regulation has prompted consideration as to the need to include operative provisions for the role and functioning of the Enterprise. The secretariat notes it is advancing a study on issues relating to the operation of the Enterprise in accordance with the terms of reference endorsed by the Commission in March 2018 (see ISBA/24/C/9 at para. 19).

(h) **Draft regulation 21 (Term of exploitation contracts):** this regulation has drawn a number of comments in connection with the renewal process and procedure. Stakeholders propose a greater level of scrutiny at the point of any renewal application, including: the submission of a revised plan of work; a review of the contractor's environmental and regulatory performance to date, and a consultation requirement. The Authority is also asked to revisit the criteria for approval of a renewal application under paragraph 4.

(i) **Draft regulation 31 (Optimal Exploitation under a Plan of Work):** similar to observations made by the Council (see Annex I to ISBA/24/C/8/Add.1 at paras. 4(c) & (d)), stakeholders have a number of concerns relating to: the intent and purpose of this draft regulation; the lack of any intervention by the Commission or Council; the Authority's role in potentially second guessing what is seen as a commercial issue; the jurisdiction of the Authority and relevance of the data and information requirement under para. 4, and the ramifications where a contractor does not agree to any modification in the plan of work.

(j) **Draft regulation 33 (Reasonable regard for other activities in the Marine Environment):** Comments focused on the interpretation of the reasonable regard obligation in relation to specific activities including the laying of submarine cables and pipelines, and the conduct of marine scientific research in the Area. Some stakeholders suggested that the Authority formulate guidelines, including procedures, in respect of such activities. On the other hand, some noted that reasonable regard obligations are obligations between States Parties to the Convention and it is not within the power of the Authority to regulate such matters. As regards practical measures for avoiding and minimizing interactions between deep sea mining and submarine cables, workshop was held from 29-30 October 2018 by the Government of Thailand, the Authority and members of the International Cable Protection Committee, the outcome and report of which will be made available in due course

(k) **Draft regulation 38 (Insurance):** several stakeholders wished to see greater clarity in elaborating the contractor's insurance obligations, albeit the Commission has noted that this draft regulation is a placeholder and subject to further technical and legal review (see the annex to ISBA/24/C/20). Some stakeholders recommended in connection with draft regulation 13(2)(b)(iv) that the Commission assess the adequacy of insurance policies. The secretariat is presently in discussion with the insurance industry with a view to providing further technical information to the Commission on this matter.

Part IV

(l) **General comments:** stakeholders generally endorse the Council's nine points for consideration by the Commission in respect of Part IV to the draft regulations (see Annex I to ISBA/24/C/8/Add.1 at paras. 5(a) - (i)).

(m) **Draft regulation 46 (General obligations):** stakeholders wish to see greater clarity in how this draft regulation will be operationalised. As one stakeholder observes the regulation may be increasing, and perhaps duplicating the regulatory burden while not enhancing the overall protection of the marine environment.

(n) **Environmental scoping report:** some stakeholders have requested that a scoping requirement be re-introduced under Part IV. While stakeholders acknowledge that a scoping process will be provided for and detailed in the Commission's recommendations issued under the exploration regulations, there is a preference for a scoping requirement to be reflected in Part IV.

(o) **Environmental management system (EMS):** albeit details of an EMS must be outlined in the environmental impact statement and environmental management and monitoring plan, it is noted there is no specific requirement in the regulatory text for the adoption of an EMS (as well as a safety management system). An EMS is key to meeting environmental goals, and for continued improvement in environmental performance. It is recommended to re-insert an earlier definition for an EMS, and an appropriate regulation reflecting that such system be capable of independent verification, and compatible with a recognised standard as set out in guidelines.²

(p) **Draft regulation 50 (Performance assessments of the Environmental Management and Monitoring Plan):** the secretariat notes a need to re-assess the content of this draft regulation in the light of stakeholder comments. These comments relate to: the frequency of reviews; that the performance assessment should be carried out by an independent competent person drawn from a roster of qualified experts; the absence of any role for the Council under this regulation, and the grounds for further action if a performance assessment cannot be undertaken satisfactorily. In connection with continuous improvement, stakeholders have asked that consideration be given to an appropriate mechanism, at the level of the Authority, for spreading best practice as a result of improvements in learning.

(q) **Section 4 (Environmental liability trust fund):** there is general sentiment that the purpose of this fund should be restricted to that put forward by the Seabed Disputes Chamber in its Advisory Opinion of 1 February 2011 relating to an environmental liability gap that may arise. It is recommended that guidelines be put in place in due course for the operation of the fund, including who may seek compensation from the fund.

Part V

(r) **Draft regulation 55 (Modification of a Plan of Work by a Contractor):** many stakeholders see an urgent need for guidance on the parameters for "Material Change", and whether the threshold established in its definition in Schedule 1 is too low.

Part VI

(s) **Closure plans:** the Council has invited the Commission to consider a number of aspects in connection with closure plans (see Annex I to ISBA/24/C/8/Add.1 at para. 7). The Authority has been asked to consider the level of detail prescribed for in annex III to the regulations compared with the data and information that will realistically be available at the time of an application.

Part VII

(t) **Draft regulation 61 (Incentives):** while this regulation is welcomed by stakeholders, greater clarity is required on a mechanism by which the Council is to consider and endorse such incentives.

² See draft regulation 28 in A Discussion Paper on the development and drafting of *Regulations on Exploitation for Mineral Resources in the Area (Environmental Matters)*.

Part VIII

(u) **Annual and other fees:** stakeholders made a number of comments in connection with Part VIII, and in particular the purpose of the annual fixed fee (draft regulation 87). This matter is being evaluated by the Commission (see the annex to ISBA/24/C/20).

Part IX

(v) **Draft regulation 87 (Confidentiality of information):** while the approach taken in this regulation is generally endorsed, further work is required in fine tuning the definition of confidential information, the anticipated review mechanisms, and possible conflicts with the exploration regulations. As to draft regulation 87(2)(e) (see also Annex I to ISBA/24/C/8/Add.1 at para. 11), stakeholders note that this is an example of where a differential treatment of contractors may arise, and that to ensure a level playing field, this subparagraph should be deleted.

Part XII

(w) **Settlement of disputes:** the Commission noted that the administrative review mechanism provided for in an earlier draft has been deleted (see the Annex to ISBA/24/C/20) following comments by member States in particular, and that this could undermine the finely crafted dispute mechanism under the Convention. A suggestion was made that the Commission might consider a more informal mechanism for certain categories of disputes or that the Authority could explore with the ITLOS the possibility of establishing special rules of procedure to expedite hearings on specific dispute categories.
