



## Legal and Technical Commission

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### Twenty-ninth session

Legal and Technical Commission, part II

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Agenda item 7

**Consideration of the annual reports of contractors**

### **Criteria for identifying contractors that have responded insufficiently or incompletely, or failed to respond, to the calls from the Council to address issues identified by the Legal and Technical Commission in relation to their contractual obligations**

**Issued by the Legal and Technical Commission**

#### **I. Introduction**

1. In November 2022, the Council requested the Legal and Technical Commission, beginning at the twenty-eighth session of the International Seabed Authority, to annually name contractors that had responded inadequately, or failed to respond, to the calls from the Council to address issues of concern identified by the Commission in relation to their contractual obligations.<sup>1</sup>

2. In July 2023, the Commission considered the request by the Council and identified a number of general trends that required further consideration with regard to the performance of contractors, as outlined in paragraphs 10 to 27 of the report of the Chair of the Commission.<sup>2</sup> The Commission agreed to continue its consideration of the issue, including by identifying criteria for naming contractors, once the contractors had had an opportunity to respond to the comments and questions formulated in the review of the annual reports for 2023. It also decided that it would consider the matter further during the first part of the twenty-ninth session.

3. The Commission took up its consideration on the matter during the twenty-ninth session on the basis of a background document prepared by the secretariat.

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<sup>1</sup> ISBA/27/C/44, para. 7.

<sup>2</sup> ISBA/28/C/5/Add.1.



## II. Process for monitoring compliance of contractors

4. The various organs of the Authority have specific and clearly defined roles and responsibilities in relation to monitoring compliance with plans of work for exploration, which are derived from the United Nations Convention on the Law of the Sea, the Agreement relating to the Implementation of Part XI of the Convention, the regulations and the standard clauses for contracts for exploration.

5. Under article 162, paragraph 2 (1), of the Convention, the Council shall exercise control over activities in the Area in accordance with article 153, paragraph 4, and the rules, regulations and procedures of the Authority.<sup>3</sup> Only the Council may take enforcement action against contractors, by imposing monetary sanctions or suspending or terminating contracts. To evaluate compliance, the Council must rely on information provided by the Secretary-General and the Commission. In due time, the Council will be required to establish an appropriate inspection mechanism pursuant to article 162, paragraph 2. This matter is presently under discussion in the context of the draft regulations on exploitation of mineral resources in the Area.

6. Under the terms of the exploration contract, the contractor is required to submit an annual report to the Secretary-General within 90 days of the end of each calendar year covering its programme of activities in the exploration area.<sup>4</sup> The contractor is also required to submit such additional information to supplement the report as the Secretary-General may require.<sup>5</sup> The contractor and the Secretary-General are required to jointly undertake a periodic (five-year) review of the implementation of the plan of work for exploration and agree on a revised schedule.<sup>6</sup>

7. The annual review of contractors' annual reports allows the Secretary-General to monitor the execution of contractors' activities against the planned activities agreed under their respective programmes of activities. Every annual report is reviewed in detail by experts from the secretariat, followed by a review by the Commission to complement the analysis undertaken. At the end of its review, the Commission prepares an evaluation report for the Secretary-General to support the Secretary-General with the duty of reporting to the Council, including on any instances of alleged non-compliance. That report is also taken into consideration in the Secretary-General's individual feedback to each contractor. While specific comments are made in respect of each contractor, the Commission also makes general comments on the overall progress of exploration and the work of contractors, which are included in its report to the Council.

8. The comments made by the Commission on the reports of individual contractors are shared with each contractor by the Secretary-General. In general, these comments are of a legal and/or technical nature or involve suggestions by the Commission on the implementation of each contractor's programme of activities. Concerns identified by the Commission in the review of annual reports do not necessarily imply a contractor's non-compliance with its contractual obligations.

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<sup>3</sup> See [ISBA/24/C/4](#).

<sup>4</sup> See sect. 10.1 of the standard clauses.

<sup>5</sup> See sect. 10.3 of the standard clauses.

<sup>6</sup> See sect. 4.4 of the standard clauses.

### **III. Criteria for assessing the responses of contractors to concerns identified by the Commission in relation to their contractual obligations**

9. The identification of contractors by name, on the basis of their failure to respond to calls from the Council or their inadequate or incomplete responses to the Commission, short of non-compliance, in publicly available documents to be introduced under the agenda of the Council, does not have an express legal basis in the Convention, the Agreement relating to the Implementation of Part XI of the Convention or the regulations. A key concern relates to the issue of due process. It is an elementary due process requirement, as well as a requirement of legal certainty, that contractors are aware of the potential measures and penalties to which they may be subject, depending on their contractual performance, in advance.

10. In that context, the process for identifying contractors that may not have responded or may have responded inadequately shall be: (a) neutral and objective; (b) transparent, giving due regard to confidentiality obligations; (c) timely and efficient, bearing in mind the workload of the Commission and the timing of the reviews of annual reports; and (d) one that elicits positive responses and encourages contractors generally to carry out their plans of work effectively.

11. Following its consideration of the matter, the Commission decided to issue the criteria for assessing the responses of contractors to concerns identified by the Commission in relation to their contractual obligations as contained in the annex to the present document, with the aim of naming contractors that have responded inadequately, or failed to respond, in the next reporting period.

## Annex

### **General guidance on the use of the criteria for assessing the responses of contractors to concerns identified by the Legal and Technical Commission in relation to their contractual obligations**

#### **Purpose**

1. The present document is aimed at providing the Legal and Technical Commission with general guidance on the use of the criteria for assessing the responses of contractors to concerns identified by the Commission and communicated by the Secretary-General in relation to their contractual obligations. The results of such an assessment will be used as the basis for reporting to the Council the names of contractors that have responded inadequately, or failed to respond, to the identified concerns.

#### **Scope**

2. The assessment is undertaken for each contractor that received a notification from the Secretary-General of concerns identified by the Commission in relation to its contractual obligations arising from the review of its annual report. The Commission assesses only specific contractual obligations on which concerns were identified by the Commission and communicated by the Secretary-General.

#### **Methodology**

3. The process involves three steps (see appendix 1). First (step 1), during its meetings in July of year 1, the Commission supports the review of annual reports by the Secretary-General by making observations on the contractor's fulfilment of contractual obligations (see appendix 2) in the context of the execution of its plan of work. The assessment carried out by the Commission will be used as a tool to "map" the work of contractors generally while at the same time identifying issues of concern. This "checklist" approach would be neutral and objective, with due consideration for past performance. It will be for the internal use of the Commission only.

4. It is on that basis that the Commission would be able to make observations to be communicated by the Secretary-General upon conclusion of the review of the annual reports of contractors. In the case of specific concerns expressed in relation to contractors at risk of non-compliance, the expectation would be for the affected contractors to provide responses to the Secretary-General before the end of year 1. The responses received by the Secretary-General would then be compiled and shared with the Commission.

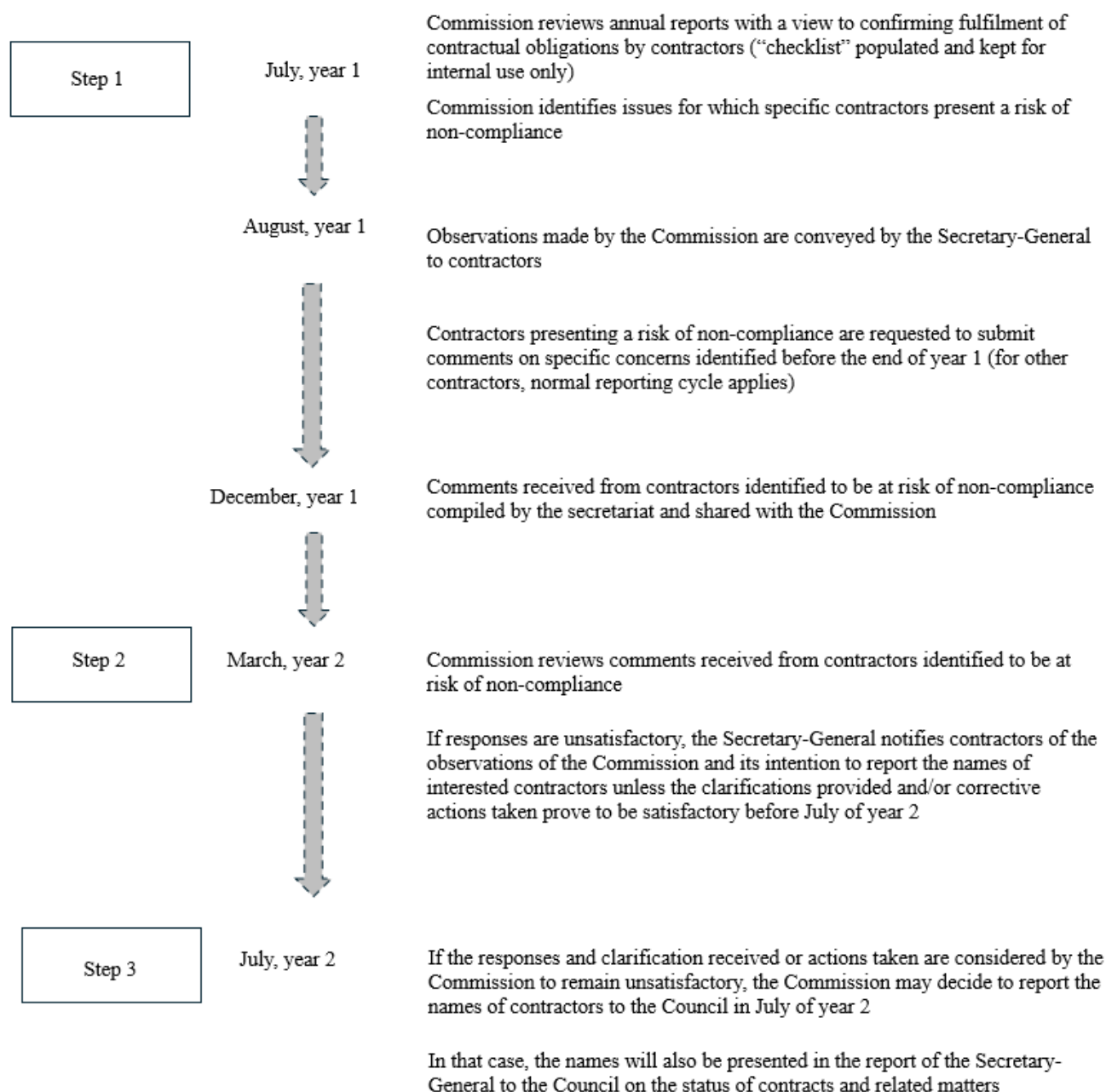
5. Second (step 2), during its meeting in March of year 2, the Commission will review the responses and comments received from the contractors identified during step 1 to be at risk of non-compliance. If the Commission considers that the responses received remain unsatisfactory, the Commission will provide observations to the Secretary-General, who will notify the affected contractors that they could be named in the Council at the session in July of year 2 unless they provide the required clarifications or take corrective action before that time. In that case, the responses received are to be assessed against three criteria, namely timeliness, completeness and effectiveness, taking into consideration the indicative definitions provided in appendix 3.

6. Third (step 3), during its meeting in July of year 2, the Commission will consider any further clarification provided by the contractors that remained unsatisfactory at

step 2. In the event that the clarification provided or actions taken are considered at this stage to remain unsatisfactory, the Commission and the Secretary-General in their respective reports to the Council may decide to report the names of the contractors and the specific deficiencies identified for the Council to decide on the potential case of non-compliance as reported.

## Appendix 1

The three-step process for the identification of contractors that have responded insufficiently or incompletely, or failed to respond, to the calls from the Council to address issues identified by the Legal and Technical Commission in relation to their contractual obligations is shown below.



## Appendix 2

The checklist below is to be used by the Legal and Technical Commission for its assessment of the general work of contractors following the review of annual reports. The issues may vary widely in severity and scale, but do not necessarily imply a contractor's non-compliance with the obligations.

<i>Category</i>	<i>Obligation</i>	<i>Reference</i>	<i>Yes</i>	<i>No</i>	<i>Not applicable</i>	<i>Partial (inadequate/unsatisfactory/incomplete)</i>	<i>Comments</i>
Reporting	Submission of an annual report for each contract by 31 March each year	Exploration regulation 32; sections 5.5 and 10 of the standard clauses					
Environmental assessment	Conduct of environmental baseline studies	Exploration regulation 32; section 5.3 of the standard clauses					
	Conduct of environmental impact assessment	<a href="#">ISBA/25/LTC/6/Rev.3</a>					
	Establishment and implementation of environmental monitoring programme	Exploration regulation 32; section 5.5 of the standard clauses					
Data and information	Submission of data and information on methods and equipment used	Sections 10 and 11 of the standard clauses; <a href="#">ISBA/25/LTC/6/Rev.3</a>					
	Submission of data and information on the geology of the mineral deposit and the resource assessments	Sections 10 and 11 of the standard clauses; <a href="#">ISBA/21/LTC/15</a>					
	Submission of environmental baseline data and information	Sections 10 and 11 of the standard clauses; <a href="#">ISBA/25/LTC/6/Rev.3</a>					
	Submission of other data and information, including navigation and bathymetric data	Sections 10 and 11 of the standard clauses; <a href="#">ISBA/21/LTC/15</a>					
Technology	Submission of information on progress towards mining technologies	<a href="#">ISBA/21/LTC/15</a>					

<i>Category</i>	<i>Obligation</i>	<i>Reference</i>	<i>Yes</i>	<i>No</i>	<i>Not applicable</i>	<i>Partial (inadequate/unsatisfactory/incomplete)</i>	<i>Comments</i>
	Submission of data and information on mining tests	<a href="#">ISBA/21/LTC/15</a>					
Training	Conduct of training programmes	Exploration regulation 27; section 8.3 of the standard clauses; <a href="#">ISBA/19/LTC/14</a>					
	Cooperation with the Authority in implementing training programmes	Exploration regulation 27; section 8.3 of the standard clauses; <a href="#">ISBA/19/LTC/14</a>					
Expenditure	Expenditure according to the committed budget of the approved workplan	Section 4.2 of the standard clauses; <a href="#">ISBA/21/LTC/11</a>					
Specific circumstances	Compliance with emergency orders	Section 6.3 of the standard clauses					
	Cooperation with the Authority regarding inspection	Section 14.1 of the standard clauses					
	Reporting of incidents related to serious environmental harm	Exploration regulation 33; section 6.2 of the standard clauses					
	Notification of human remains or object/site of an archaeological or historical nature	Exploration regulation 35; section 7 of the standard clauses					
	Relinquishment of the allocated area	Exploration regulation 25					
Other issues		Relevant provision of the exploration contract					



## Appendix 3

The assessment in step 2 (see appendix 1) is carried out against three criteria, namely timeliness, completeness and effectiveness, taking into consideration the indicative definitions below.

<i>Criteria</i>	<i>Indicative definition</i>
Timeliness	Assessment of whether the contractor has successfully responded to and/or reported the concerns identified within the required or agreed time frame
Completeness	Assessment of whether the contractor's response and/or report contains clear, well-organized and complete data and information
Effectiveness	Assessment of whether the contractor's response and/or report effectively address concerns identified and demonstrate the contractor's efforts to prevent reoccurrence of the concerns