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Agenda item 11

Draft regulations for exploitation of mineral resources in the Area

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Note by the Legal and Technical Commission

I. Introduction

1. In July 2018, the Legal and Technical Commission issued revised draft regulations on exploitation of mineral resources in the Area ([ISBA/24/LTC/WP.1/Rev.1](#)) for consideration by the Council of the International Seabed Authority, along with commentary setting out matters on which the Commission sought the Council's guidance and identifying key matters that remained under consideration by the Commission ([ISBA/24/C/20](#)). In response, the Council provided comments on the revised draft, which are annexed to the statement by the President of the Council on its work during the second part of the twenty-fourth session ([ISBA/24/C/8/Add.1](#), annex I), and invited members of the Council to provide written comments on the revised draft by 30 September 2018. An overview of those comments, including those received from other stakeholders, and a discussion of the common themes arising in the submissions was provided in document [ISBA/25/C/2](#). The secretariat, as part of its review of submissions from stakeholders, identified eight critical areas which benefited from a discussion in the Council during its meetings in the first part of the twenty-fifth session of the Authority (see [ISBA/25/C/17](#)). In order to help to advance the work of the Council and Commission in a number of areas, the discussion was supported by several discussion papers that had been prepared by the secretariat.¹

2. At its meetings in March 2019, the Commission advanced its consideration of the draft regulations as a matter of priority and based its discussion on the recent submissions regarding the draft regulations from members of the Authority and other stakeholders, as well as on matters arising in the discussion papers presented to the

¹ [ISBA/25/C/3](#), [ISBA/25/C/4](#), [ISBA/25/C/5](#), [ISBA/25/C/6](#), [ISBA/25/C/8](#), [ISBA/25/C/10](#) and [ISBA/25/C/11](#).



Council and the feedback from the Council. The discussion in the Commission was facilitated by the review of a revised version of the draft regulations prepared by the secretariat, which included the suggested revised text and comments on specific draft regulations from recent submissions, as well as a presentation by the secretariat to the Commission outlining comments from Council members in respect of the above-mentioned discussion papers.

3. The present note provides the Council with an overview of the key matters considered by the Commission as they relate to the fine-tuning of the regulatory text and highlights specific areas in which further work will be required with the support of the secretariat and external consultants. The Commission also took note of the view of the Council that the draft regulations should be adopted as a matter of urgency (see [ISBA/24/C/8/Add.1](#) and [ISBA/25/C/17](#)). To this end, the Commission has provided a revised regulatory text (ISBA/25/C/WP.1) for consideration by the Council.

II. General observations

4. The Commission welcomed the comprehensive submissions regarding the draft regulations from members of the Authority and other stakeholders, who noted that the overall content and structure of the draft regulations provides a workable solution that addresses the needs of users. During its discussions, the Commission was mindful not to overload the regulations with content that is more suited to standards and guidelines, including interpretative guidance for key terms and phrases, recognizing that the development of such standards and guidelines will become a primary focus of the Commission's work going forward.

5. A working group of the Commission finalized the terms of reference for the forthcoming workshop on standards and guidelines to be held in Pretoria in May 2019. The terms of reference include the objectives and desired output of the workshop, together with an indicative list of standards and guidelines presented to the Council in the annex to document [ISBA/25/C/3](#). The workshop will focus on the delivery of a prioritized list of documents, with suggested reference sources and an indicative time frame for individual development, and outline an inclusive process for the development of documentation for standards and guidelines. The output of the workshop will be invaluable in helping the Commission, in conjunction with the secretariat, to design an appropriate work programme for the delivery of standards and guidelines.

6. During its deliberations, the Commission was also conscious of the issue of timelines under the regulatory framework. The Commission noted a number of valid concerns across the stakeholder base that some timelines envisaged in the draft regulations may be too long or, given the potential complexity of documentation review processes, that certain prescribed periods might, in fact, be too short. Those concerns are particularly valid in the case of an application for the approval of a plan of work for exploitation, where a balance must be struck between certainty in the approval process and allowing the Authority, as the regulator, sufficient time to review potentially complex plans of work. This problem, together with a number of other regulatory consent requirements envisaged in the draft regulations, is compounded by the current scheduling of meetings of the Commission and the Council. The matter should be kept under review by the Council and the Commission.

7. The Commission is aware that the respective roles and responsibilities of the Council, the Commission and the Secretary-General of the International Seabed Authority as they relate to decision-making and the institutional functioning of the Authority within the framework of the United Nations Convention on the Law of the Sea remain under consideration by the Council (see [ISBA/25/C/6](#)). Following a

review of the comments contained in the annex to ISBA/25/C/6, the Commission has addressed some of the suggestions in the revised regulatory text. The Commission concurred that the development of an operational policy document by the Council outlining the Authority's risk-based approach to regulation, including guidance on delegated decision-making and a clearer understanding of the roles and responsibilities of sponsoring States and flag States, will provide further clarity in the regulatory text and implementation.

8. The present note does not address matters relating to the development of an economic model for mining activities in the Area and the associated financial terms of future exploitation contracts. Save for minor amendments to the regulatory text contained in part VII of the draft regulations, the Commission understands that the second meeting of the open-ended working group of the Council will advance the discussion on an economic model, the system of payments and the rates of payment under such a mechanism.

III. Comments of the Commission on the revised regulatory text

9. The Commission presents the following comments in support of the revised regulatory text presented to the Council in document ISBA/25/C/WP.1.

Part I

10. **Draft regulation 2 (formerly Fundamental principles, now Fundamental policies and principles).** The Commission revisited the structure and content of draft regulation 2, not least the reproduction of parts of article 150 of the Convention. In response to the concern voiced by stakeholders that reproducing only part of the text of article 150 could be misleading, the Commission now presents the text in full. Given that the draft regulation reflects a mix of policies and principles, its heading and text have been amended accordingly. In addition to other changes to mirror the language of the Convention accurately, the Commission has also modified the language of the final paragraph to indicate that the implementation of the regulations and associated decision-making are to be in conformity with the fundamental policies and principles. The Commission also reflected on the request by the Council that the distinction between the terms "conservation" and "preservation" be maintained in the regulations, noting that the Authority's mandate under article 145 is limited to the adoption of rules, regulations and procedures, including the protection and conservation of the natural resources of the Area. Additionally, the reference to "if any" in association with regional environmental management plans has been deleted in subparagraph (e).

11. **Draft regulation 4 (formerly Rights of coastal States, now Protection measures in respect of coastal States).** The Commission noted that the text of this draft regulation was drawn largely from an equivalent provision in the exploration regulations. In examining the text and the suggestion of including consultations with relevant coastal States in the application process, the Commission observed, in the context of article 142 of the Convention, that consultations, including a system of prior notification, are limited to resource deposits that lie across limits of national jurisdiction. The Commission noted that the procedural measures contained in the draft regulation do not flow from article 142 per se, as the draft regulation is without prejudice to the rights of coastal States under article 142, including the rights of coastal States to take measures consistent with the provisions of part XII of the Convention. The Commission also took note of comments from stakeholders in connection with the roles of the Commission and the Council in the implementation of the regulation and has modified the text accordingly. In addition, the Commission

noted that some stakeholders raised the issue of establishing an evidential standard for “clear grounds”. In this regard, the Commission recommended that guidelines be put in place to address this issue, as well as the question of any appropriate consultation and notification protocols.

Part II

12. **Draft regulation 10 (Preliminary review of application by the Secretary-General).** The Commission believes that, as a matter of process, the determination of whether an applicant has preference and priority in accordance with article 10 of annex III to the Convention is to be made by the Secretary-General as part of the preliminary review of an application, prior to the Commission’s consideration of an application.

13. **Draft regulation 11 (Publication and review of the Environmental Plans).** Considering the potential complexity of an application, draft regulation 11 has been modified to provide for a mechanism for the earlier review of environmental plans by the Commission, which will allow its comments to be presented to applicants earlier. Such timing will also provide an opportunity for the Commission to determine whether recourse to external expertise is required, prior to the consideration of the environmental plans. With regard to those plans, the content of the former draft regulation 14 has been moved to draft regulations 11, 12 and 13 as part of the information that the Commission shall take into account in considering the proposed plan of work. The annex to the present note contains a flow chart showing this revised step in the application approval process.²

14. As part of its discussions, and in the light of the links between draft regulations 11, 12 and former draft regulation 14, the Commission reflected on document [ISBA/25/C/10](#) relating to the consideration of a mechanism and process for the independent review of environmental plans and performance assessments (draft regulation 52). The Commission took note of the discussion in the Council on this matter, in particular that any such review mechanism should be aligned with the provisions of the Convention, and that it should neither replace nor undermine the roles and responsibilities of the Commission under article 165 of the Convention. The Commission recognized the merit of engaging with external experts in supplementing its work and expertise, but considered that such engagements should be discretionary and not mandatory. The Commission noted that such recourse would also be related to the composition of the Commission at the particular time and to its constituent expertise.

15. The Commission noted further that external expertise may be sought as and when required, in particular from specialized agencies and international organizations, as contemplated in article 163 (13) of the Convention. Such a mechanism is also reflected in rule 15 of the Commission’s rules of procedure. While the Commission sees merit in seeking input from external experts to complement its expertise, the Commission is conscious of the need to avoid establishing a mechanism that would be overly bureaucratic and formalistic. At the same time, the Commission noted the importance of ensuring equal treatment for all applicants in the consideration of their applications. The Commission also noted that draft regulation 11 provides for a public review and comment process.

Part III

16. **Draft regulation 18 (Rights and exclusivity under an exploitation contract).** The Commission reflected further on the regulation of exploration activities within

² The flow chart was originally presented in document [ISBA/24/LTC/6](#).

contract areas and considered, in the light of comments from stakeholders, that the relevant guidelines should establish clarity as to which components of the exploration regulations remain applicable.

17. **Draft regulation 20 (Term of exploitation contracts).** The Commission took note of comments from stakeholders on the need for a greater level of scrutiny at the time of a renewal application, including the submission of a revised plan of work. In draft regulation 20, it was originally proposed that guidelines, including documentation requirements, be put in place for the renewal process. The Commission has now strengthened the draft regulation by requiring that, where there is a material change, a revised plan of work and a review of contractor performance be considered, while recognizing that a plan of work may have been updated under a recent review process under draft regulation 58.

18. **Draft regulation 21 (Termination of sponsorship).** The Commission discussed further the rationale for extending the termination notice period for sponsoring States to 12 months (compared with 6 months under the exploration regulations), and the concerns of stakeholders about cases in which such termination was due to non-compliance by a contractor with its arrangements with a sponsoring State or States. The draft regulation has now been modified to provide for a maximum termination period of 12 months, with the possibility of reduction to 6 months in cases of non-compliance.

19. **Draft regulation 22 (Use of exploitation contract as security).** The Commission noted the comment of the secretariat that this matter remained under review. The Commission has requested that the secretariat deliver a paper with its findings on matters to be considered under this draft regulation to the Commission at its July 2019 meetings.

20. **Draft regulation 24 (Change of control).** Given the significance of a contractor's financial capability to meet its obligations under an exploitation contract, the Commission has modified this draft regulation to include a role for the Commission in providing appropriate recommendations to the Council.

21. **Draft regulation 26 (Environmental Performance Guarantee).** Noting the request of the Council to elaborate on the requirements under such guarantees, the Commission considers that further discussion with relevant stakeholders is required in order to advance the content of this draft regulation, in particular the objectives and requirements under a closure plan. Thereafter, the regulatory text can be updated and guidelines developed.

22. **Draft regulation 29 (Reduction or suspension in production due to market conditions).** In the light of comments from stakeholders, the Commission considered that it should not be possible to suspend production for an indefinite period. The draft regulation has been modified so that the Council may terminate an exploitation contract if production has been suspended for more than five years. What was previously paragraph 4 of draft regulation 29 has been moved to draft regulation 28, as the reduction or suspension described in that paragraph is not related to market conditions.

23. **Former draft regulation 31 (Optimal Exploitation under a Plan of Work).** The Commission discussed general concerns of stakeholders about both the content of this former draft regulation and challenges in its enforcement, including its possible impact on an approved plan of work, and discussed the possibility that the draft regulation might modify proper procedures for the review and modification of such a plan. At this stage, what would constitute "inefficient mining or processing practices" is not entirely clear. There is, however, a general contractual obligation to implement the plan of work according to good industry practice. The concept of good

industry practice could be extended to encompass good mining practices and waste minimization (subject to further discussion), and those elements of good industry practice might be included and expanded upon in the development of a relevant guideline. Nevertheless, a contractor should conduct mining operations under an approved plan of work (including the approved mining workplan), which should reflect good commercial mining practices. The Commission has deleted this regulatory provision.

24. **Draft regulation 30 (Safety, labour and health standards).** In reviewing this draft regulation and the comments from stakeholders, the Commission noted the possible inadequacy of its content, especially in connection with safety matters, such as the need for a safety management system, monitoring and continuous improvement. While the draft regulation has been modified slightly, further discussion with the International Maritime Organization is required, in particular to gain a better understanding of the supplementary rules, regulations and procedures envisaged under article 146 of the Convention and clarity on the “applicable international rules and standards” to be complied with under draft regulation 30 (2). The Commission has requested that the secretariat continue to explore these issues and report to the Commission in July 2019.

25. **Draft regulation 36 (Insurance).** While the Commission has made some changes to the text of the draft regulation, no further action can be taken until the secretariat completes its review of insurance requirements and availability in the marketplace. While international maritime practice should determine typical insurance policies relating to normal ship operations and loss, it is less clear what types of additional insurance will be required, that is, the causalities and contingencies that any insurance should cover. As with a number of issues under the draft regulations, there also needs to be a level playing field for insurance obligations. The Commission has requested that the secretariat conclude its findings on insurance as a matter of priority.

Part IV

26. **Draft regulation 44 (General obligations).** The Commission has modified this draft regulation by deleting paragraph (e), which was out of place under the draft regulation. In order to put the draft regulation into effect, a clearer picture of the roles and responsibilities of the Authority and sponsoring States is required.

27. **Draft regulation 45 (Development of environmental Standards).** This new draft regulation sets out the subject areas for the development of environmental standards. The Commission considers this a placeholder pending further discussion at the workshop to be held in Pretoria in May 2019.

28. **Draft regulation 46 (Environmental management system).** The Commission has included the requirement that an environmental management system be put in place. The details of such a system, together with relevant benchmarks and principles, should be set out in guidelines.

29. **Draft regulation 47 (Environmental Impact Statement):** In response to a number of requests from stakeholders, the Commission has reintroduced the requirement of an environmental scoping stage, although the need for a specific environmental risk assessment has been retained as part of the environmental impact assessment process in order to focus the environmental impact statement on important impacts. In response to submissions from stakeholders that indicated some confusion with regard to the various elements of the environmental impact assessment, the text has also been revised to further clarify the process. The detailed requirements for the scoping stage, including the associated processes, should be detailed under the exploration regime.

30. **Draft regulation 52 (Performance assessments of the Environmental Management and Monitoring Plan).** While the text of this draft regulation has largely been retained, changes have been made to reflect that the frequency of performance assessments will now be determined by reference to the period specified in the environmental management and monitoring plan. In addition, the draft regulation now contains a reporting obligation to the Council, including any recommendations by the Commission.

31. **Section 5 (formerly Environmental Liability Trust Fund, now Environmental Compensation Fund).** The Commission noted the general sentiment among stakeholders that the purpose of the fund should be restricted to that articulated in draft regulation 55 (a). The Commission believes that further discussion is warranted on the range of financial instruments that should be put in place to create incentives for environmental performance and to provide mechanisms for adequate compensation under article 235 (3) of the Convention. The Commission considered that, while the principal (i.e., capital) of a compensation fund could be ring-fenced and restricted to any environmental liability gap that may arise in the future, investment income could be directed towards other purposes listed in draft regulation 55. The Commission has asked the secretariat to reflect on the discussions relating to this topic, with a view to advancing the rationale, purpose and funding of such a fund, and on how to ensure the adequacy of funding.

Part VI

32. **Draft regulation 60 (Final Closure Plan: cessation of production).** This draft regulation has been modified by the Commission to reflect the role of the Council in the adoption of a final closure plan.

Part VIII

33. **Draft regulation 85 (Annual fixed fee).** The Commission continued its examination of the purpose, rationale and function of the annual fixed fee. The context of the fee under the 1994 Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982 suggests that the fee should be considered part of a transition phase to bridge the period of funding prior to the receipt of royalties from commercial production. The annual fixed fee forms part of the financial terms of contracts and is to be established by the Council. The Commission's preliminary view is that such fee should be a fixed fee, rather than an area-based fee as originally envisaged in the former draft regulation. The Commission considers that this matter would benefit from continued discussion in July 2019.

Part IX

34. **Draft regulation 89 (Confidentiality of information).** In the light of comments from stakeholders in respect of former draft regulation 87 (2) (e), as well as the possibility of differential treatment of contractors and the need to ensure a level playing field, the Commission has deleted this draft regulation.

Part X

35. **Draft regulations 94 (Adoption of Standards) and 95 (formerly Issue of guidance documents, now Issue of Guidelines).** The Commission, noting that the forthcoming workshop in Pretoria will advance thinking on the issue of standards and guidelines, considered that there should be a basic assumption that standards adopted by the Council are mandatory, whereas guidelines provide clarification and should be recommendatory in nature. Draft regulations 94 and 95 have been modified to reflect

that assumption. They now make provision for relevant involvement of stakeholders in the development of standards and guidelines, with the process for such involvement to be determined.

Part XI

36. In connection with part XI, the Commission took note of document [ISBA/25/C/5](#) on the implementation of an inspection mechanism in the Area and of the discussions in the Council. Owing to time constraints, the Commission did not have an opportunity to consider the matter in detail and will do so at its subsequent meetings, after which it will present recommendations to the Council. Draft regulations 96 and 97 have, however, been modified to include the establishment of an inspection mechanism and the appointment of inspectors. The Commission acknowledged the value and significance of remote monitoring technology and understands that the secretariat will conduct a study on this topic, including proposals on how the use of such technology will be reflected in the draft regulations and relevant guidelines.

37. **Draft regulation 103 (Compliance notice and termination of exploitation contract).** The Commission reflected on the questions presented in the annex to document [ISBA/25/C/6](#) relating to the roles of the Secretary-General, the Commission and the Council and the issuance of compliance notices. While the Commission noted that the issue of delegated authority remained under consideration by the Council, it is recognized that certain events will require urgent action and that the Secretary-General should be empowered to issue compliance notices in such circumstances. The Commission also noted that the nomenclature used in this draft regulation could be further revised. In the context of this draft regulation, the Commission considers that a clear distinction needs to be made between the issue of such notices by the Secretary-General requiring action to be taken by a contractor and the imposition of sanctions (monetary penalties) by the Council. The draft regulation has been reworded accordingly.

Part XIII

38. **Draft regulation 107 (Review of these Regulations).** A number of stakeholders have made reference to the issue of uncertainty and instability in connection with any amendment to the regulations (as well as in the adoption (and update) of standards and guidelines under draft regulations 94 and 95). Recognizing the importance of involving relevant stakeholders, and mirroring the approach taken in draft regulations 94 and 95, the Commission has made provision for the involvement of relevant stakeholders in any future amendments to the regulations. The process for such participation will need to be outlined in guidelines.

Annexes

39. Annexes IV, VII and VIII, which relate to the environmental impact statement, environmental management and monitoring plan and closure plan, respectively, drew many comments from stakeholders. Much of the commentary was editorial in nature, but it also pointed to a number of issues relating to content and clarity in the various plans. Guidelines will need to be prepared for those documents, and the Commission considers it more efficient to deal with the matters raised in those submissions when guidelines are developed. In that way, it can be ensured, in a single process, that the template, standards, and guidelines are consistent, coherent and integrated.

Schedule

40. The Commission discussed the use of key terms under the draft regulations on the basis of document [ISBA/25/C/11](#) and the discussion of the issue in the Council.

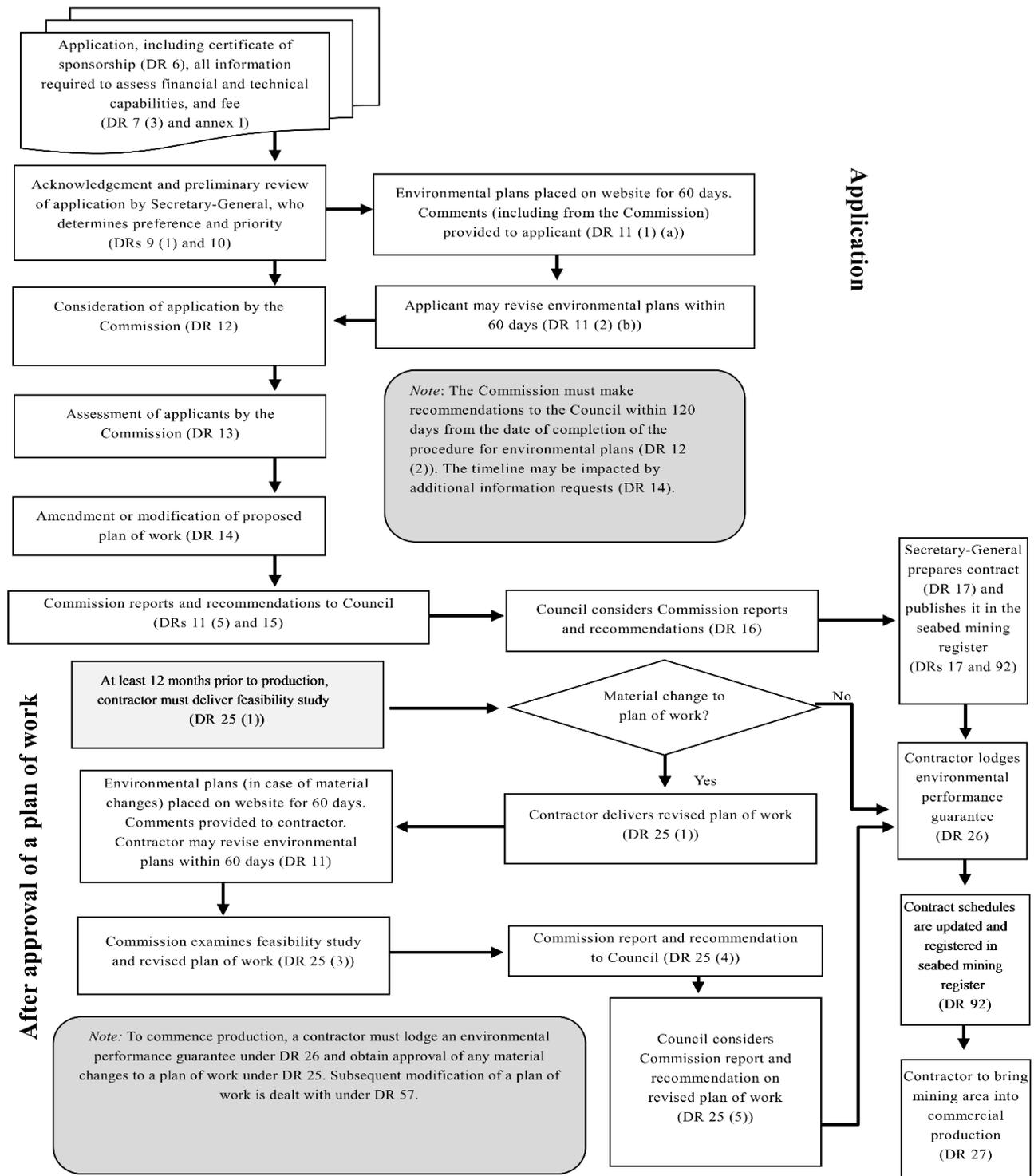
As for the incorporation of best environmental practices into the definition of good industry practice, the Commission saw some merit in that approach. However, the Commission decided that it would be better to develop the concepts of best environmental practices and good industry practice independently and for the Council to revisit the issue at a later stage. With regard to the concept of good industry practice, the Commission considers that a more conceptual approach is appropriate under the schedule, to be supported by relevant guidelines. The Commission also re-examined the definition of best environmental practices, reiterating the dynamic nature of the term.

IV. Other matters for consideration by the Council

41. As highlighted in document [ISBA/25/C/2](#), stakeholders suggested that the Commission might consider a more informal mechanism for certain categories of disputes or that the Authority explore with the International Tribunal for the Law of the Sea the possibility of establishing special rules of procedure to expedite hearings on specific categories of disputes or diverging views. While the Commission considers that this has some merit, it is also conscious that a previous draft regulation (draft regulation 92 in document ISBA/23/LTC/CRP.3) was deleted in view of member State comments, in particular that such a review mechanism could undermine the finely crafted dispute mechanism in the Convention. In the light of recent comments by members of the Authority and other stakeholders, the Council may wish to reflect on the efficacy of an expedited administrative review process.

Annex

Application and approval process for a plan of work for exploitation in the form of a contract



Note: The draft regulations are as found in document [ISBA/25/C/WP.1](#).
 Abbreviation: DR, draft regulation.