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Draft regulations for exploitation of mineral resources in the area

Consideration of a mechanism and process for the independent review of environmental plans and performance assessments under the regulations on exploitation of mineral resources in the Area

Note by the secretariat

I. Background

1. In order to enhance the procedural mechanisms necessary to ensure effective protection for the marine environment, some stakeholders advocate the adoption of an independent review mechanism by the Authority in connection with the environmental plans and performance assessments under the draft regulations on exploitation of mineral resources in the Area ([ISBA/24/LTC/WP.1/Rev.1](#)). During the second part of the twenty-fourth session of the Council, the delegation of Belgium submitted a non-paper entitled “Strengthening the environmental scientific capacity of the International Seabed Authority”. The non-paper included suggestions for the independent evaluation of the environmental plans at the application stage and of environmental reviews and monitoring during the exploitation phase, and addressed matters relating to enhancing the environmental expertise of the Legal and Technical Commission and the secretariat.

2. It is likely that, in practice, the opinion of independent experts will be sought during the application process and during the exploitation phase, where required by the secretariat or the Commission, as envisaged under the draft exploitation regulations ([ISBA/24/LTC/WP.1/Rev.1](#), draft regulations 12 (5) (b), 40 (2) (h), 50 (5) (c) and 50 (6)). Furthermore, an environmental management and monitoring plan must be verified and reported on by independent competent persons (*Ibid.*, annex VII).¹

* [ISBA/C/25/L.1](#).

¹ The term “independent competent persons” used in the draft regulations will require definitional criteria in due course.



3. The Convention also provides for the incorporation of international expertise. Under article 163 (13) of the United Nations Convention on the Law of the Sea, the Commission is empowered to, where appropriate, “consult another commission, any competent organ of the United Nations or of its specialized agencies or any international organizations with competence in the subject-matter of such consultation”. The Commission is also required to take into account the views of recognized experts in marine environmental protection when making recommendations to the Council on such protection.²

4. Consequently, both the Convention and the draft regulations support and already provide for a referral to relevant expertise, where appropriate and require the use of independent competent persons in specified circumstances. Nevertheless, given the comments submitted by members of the Authority and other stakeholders on the most recent set of draft regulations, and the response to previous stakeholder surveys, a more formalized and transparent approach to the use and engagement of independent experts merits consideration. Equally, the subject matters and areas or activities in respect of which independent reviews should be conducted or sought and the timing and frequency of such reviews will also require clarification.

5. The purpose of the present note is to assist the Council and the Commission in advancing their consideration of a possible mechanism for the involvement of, and possible process for the selection of, independent competent experts under the draft regulations, as well as the relevant matters that should be subject to independent scrutiny.

II. Observations by members of the Authority and other stakeholders

6. In addition to more general comments on the provision of independent scientific advice and review of the environmental plans, stakeholders highlighted specific draft regulations that could be strengthened by providing for an independent expert review. These include the review of environmental plans under draft regulation 11 and in the determination to be made by the Commission (against relevant criteria) that those environmental plans provide for the effective protection of the marine environment (see draft regulation 14 (2)), in conducting a performance assessment or in compiling a performance assessment report pursuant to draft regulation 50, and the independent assessment of post-closure monitoring and management under draft regulation 59. Under draft regulation 12 (5) (b), some stakeholders also commented that expert advice should be sourced through transparent procedures and that geographically and culturally diverse representation should be ensured in a pool of experts. Other stakeholders proposed the establishment of a roster of qualified experts that could be used to conduct independent reviews in respect of specific subject matters.

7. Furthermore, in connection with the determination by the Commission as to whether an applicant has or will have the necessary financial and technical capability and has demonstrated the economic viability of the mining project, and that the proposed plan of work is technically achievable and economically viable, one stakeholder noted the possible risk of subjective assessment and suggested that one option for the Commission was to engage independent experts to assess fulfilment against the necessary criteria (see draft regulations 13 (1) (e) and (f), and 13 (4) (a)).

8. It was also suggested that the draft regulations make appropriate reference to relevant international bodies from which independent expertise might be drawn, to assist in informing the Commission and other organs of the Authority in their

² Article 165 (2) (e) of the Convention.

decision-making. Whether the draft regulations are the appropriate reference instrument for such specifics is open to discussion. As noted in paragraph 3 above, the Commission is already empowered to seek advice from international bodies, and guidelines or policy guidance by the Council on how and whom the Commission should consult may be preferable. Such guidance could, in the light of the Authority being 1 of the 10 sponsoring organizations of Joint Group of Experts on the Scientific Aspects of Marine Environmental Protection,³ provide a role for recognized international bodies such as the Group, with its diverse group of experts, including representation from developing States, and extensive networks at the regional and global levels. The Commission, in submitting its recommendations to the Council, should disclose when the views of experts from such international bodies has been sought, as well as their contribution to the Commission's deliberations and recommendations. Equally, international organizations such as the International Maritime Organization should also be referenced in such guidance.

9. It is evident from stakeholder comments that, while there is some commonality of the benefits in drawing on independent expertise, including reference to expertise in international organizations, during the application phase and in performance assessment reviews during the exploitation phase, how this would be incorporated into or further strengthened under the draft regulations is less clear. That is, it is not clear in respect of which subject matters or regulatory provision there should be a requirement to call for an independent expert review (or matter that would trigger such a review), as opposed to giving the discretionary power to specific organs, such as the secretariat or the Commission, to seek independent expert advice when appropriate.

III. Consideration of matters for independent review under the draft regulations

10. As highlighted by paragraphs 2 and 6 above, a number of documents and processes under the draft regulations potentially lend themselves to independent examination. They may include examination of an environmental impact statement, an environmental management and monitoring plan, a closure plan, assessment criteria under draft regulations 13 and 14, together with the independent conduct or evaluation of environmental performance assessments.

11. That said, clear guidance will be required as to the specific nature and extent of any independent examination. In connection with the examination of an environmental impact statement, for example, the question would be whether such an examination is intended to verify whether the document has been prepared in accordance with good industry practice, best available scientific evidence and best available techniques (see draft regulation 46 bis (3) (b)) or whether underlying data are accurate and statistically reliable. Similarly, as regards an environmental management and monitoring plan, in addition to preparation requirements, should any

³ The Joint Group of Experts on the Scientific Aspects of Marine Environmental Protection is an advisory body, established in 1969, that advises the United Nations system on the scientific aspects of marine environmental protection. The Group's functions are to conduct and support marine environmental assessments, to undertake in-depth studies, analyses and reviews of specific topics and to identify emerging issues regarding the state of the marine environment. The Group itself today consists of 17 experts, drawn from a wide range of relevant disciplines, who act in an independent and individual capacity. Studies and assessments are usually carried out by dedicated working groups, most of whose members are not sitting members of the Group but part of the broader Group network.

review include an examination of the basis for, and effectiveness of, any proposed management and mitigation measures and responses?⁴

12. Consequently, further thought must be given as to the exact purpose and function of any proposed independent evaluations in relation to specific documentation and processes, together with the development of appropriate terms of reference in due course.

IV. Developing a roster of independent competent persons

13. Irrespective of whether recourse to independent expert review is required under specific draft regulations or at the request of the secretariat or the Commission when advice is needed, a roster should be established, and the procedures for the inclusion and selection of experts on such roster should be set out, preferably in guidelines.

14. In considering such a procedure for the selection of independent experts, members of the Council and the Commission may find it useful to refer to existing procedures in the field of the law of the sea.

15. In this regard, annex VIII to the Convention, which deals with special arbitration to solve a dispute relating to fisheries, protection and preservation of the marine environment, marine scientific research and navigation, including pollution from vessels and by dumping, refers to a list of experts in its article 2. The list must be established and maintained in those respective expert fields, and the establishment of an expert-led dispute resolution forum draws its origins from arrangements under the Convention on Fishing and Conservation of the Living Resources of High Seas of 1958. In the field of fisheries, the establishment and maintenance of the list falls under the competence of the Food and Agriculture Organization of the United Nations;⁵ in the field of marine scientific research, the Intergovernmental Oceanographic Commission has that responsibility; in the field of protection and preservation of the marine environment, the United Nations Environment Programme is the relevant organization; and the International Maritime Organization does the same for the experts in the field of navigation and related matters. Each State Party has the right to nominate two experts in each field who enjoy the reputation of having the highest level of fairness and integrity. The experts remain on that list until the State who nominated them withdraws their names.

16. Given that all States parties have equal opportunity to nominate experts to the lists maintained under annex VIII, one option may be for the regulations to allow for

⁴ Under paragraph 1(b) of annex VII to the draft regulations, it is required that an environmental management and monitoring plan be verified and reported on by independent competent persons. The question is whether such persons should be drawn from a preapproved list or roster of experts held by the Authority.

⁵ Food and Agriculture Organization of the United Nations, "List of experts for the purposes of article 2 of annex VIII (special arbitration) of the United Nations Convention on the Law of the Sea in the field of fisheries" (as at 12 January 2017) and available at http://www.fao.org/fileadmin/templates/legal/docs/fish_experts.pdf and at http://www.un.org/Depts/los/settlement_of_disputes/expertsunclosVIIIjan2017fao.pdf; International Maritime Organization, "List of experts nominated in the field of navigation, including pollution from vessels and by dumping" (as at 11 March 2016), available at http://www.un.org/Depts/los/settlement_of_disputes/expertsunclosVIIIimo2016.pdf; Intergovernmental Oceanographic Commission, "List of experts on marine scientific research for use in special arbitration under annex VIII of the United Nations Convention on the Law of the Sea" (as at 28 January 2016), available at http://ioc-unesco.org/index.php?option=com_content&view=article&id=365&Itemid=100048 and at http://www.un.org/Depts/los/settlement_of_disputes/expertsunclosVIII_iocunesco.pdf; United Nations Environment Programme, "List of experts in the field of protection and preservation of the marine environment" of 25 October 2013.

the selection of independent experts from those lists. The regulations could alternatively, or in addition, provide for a similar list of experts to be drawn up and maintained by the Secretary-General on the basis of nominations from States parties and on the same basis as annex VIII to the Convention.

V. Further remarks

17. To achieve the primary goal under article 145 of the Convention, a number of procedural safeguards must be implemented as necessary measures. Formalizing an independent expert review process can be seen as an important element of such safeguard measures. Nevertheless, such a review process must be meaningful and provide added value, and not simply be bureaucratic. The process must complement and support existing governance and decision-making structures under the Convention, in particular the role of the Commission as a body of experts, and not undermine them. Specifically, the views of independent experts should not be a substitute for decisions of the Commission.

18. Aside from the selection process and procedure for building a roster of experts, other considerations include fairness with due process and procedure. For example, would experts be selected from the roster solely by the secretariat or the Commission, or in consultation with an applicant or contractor? What weight would the Commission or the Council attach to independent expert advice when considering an application for a plan of work or performance assessment report? What opportunity would an applicant or contractor be afforded to dispute any findings by such advice where there is a material difference in opinion? Injecting sound and objective expert views and opinions to support informed decision-making is a necessary procedural safeguard, and arguably one component in the application of the precautionary approach. Furthermore, as noted by some stakeholders, the views of independent competent persons can serve to minimize subjectivity, help to foster a level playing field across the applicant and contractor base and promote the spreading of best practices in the light of new knowledge and experiences.

19. Nonetheless, an independent review could introduce additional complexities and levels of cost (in addition to the question of who would bear such costs) disproportionate to the benefits arising, unless a fair and efficient procedure is developed and adopted, and meaningful deliverables are achievable.

VI. Suggested items for consideration and discussion

20. The Council is invited to consider the points raised in the present note and, in particular:

(a) To provide further guidance to the Commission on matters under the draft regulations that should be subject to review by an independent competent person;

(b) To comment on the setting up of a roster of experts and the process and procedures for the nomination and selection of such experts.