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Draft regulations for exploitation of mineral resources in the Area

Key terms: distinguishing between good industry practice and best practices under the draft regulations on exploitation of mineral resources in the Area

Note by the secretariat

I. Background

1. The draft regulations on exploitation of mineral resources in the Area ([ISBA/24/LTC/WP.1/Rev.1](#)) make frequent references to the application of “good industry practice”, “best environmental practices” and “best available techniques” and the incorporation of “best available scientific evidence”.
2. The terms are not new to the Authority’s mining code. Under the regulations on exploration, contractors, the Authority and sponsoring States are required to apply best environmental practices. Furthermore, under such regulations, the Legal and Technical Commission is required to develop and implement certain procedures on the basis of best available scientific and technical information. Under section 4 of the standard clauses for contracts for exploration, a contractor is permitted, with the Authority’s consent, to change its programme of activities “as may be necessary and prudent in accordance with good mining industry practice”. In its recommendations for the guidance of contractors for the assessment of the possible environmental impacts arising from exploration for marine minerals in the Area ([ISBA/19/LTC/8](#)), the Legal and Technical Commission recommends the use of best available technology, best available methodology and a combination of both. The terms are not defined in the regulations on exploration or in the Commission’s recommendations. However, the terms identified in paragraph 1 above have been defined provisionally in schedule 1 to the draft regulations on exploitation.
3. These terms or their close variants can also be found in many international and regional instruments and international standards, as well as in national mining,

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



petroleum¹ and environmental laws, regulations and licences. They are typically included to provide for or promote particular practices, methods, measures or standards in respect of the efficient recovery of a resource and the level of protection afforded to health and safety and the environment. However, the particular legal requirements stemming from those terms may sometimes be seen by laypersons as vague, with the prospect of uncertainty and subjectivity in their implementation. As a result, relevant guidance must be given as to their ambit and purpose.

4. Besides the need for a clearer definition of these terms, it was brought to light during consultations with stakeholders that some members of the Authority and other stakeholders also seek a better understanding of the relationship among the terms. In drafting the regulations on exploitation, the Commission faces the task of ensuring that the terms are used in their proper context and that they lend themselves to implementation with a high degree of certainty in combination with the specific obligations set out in the draft regulations and contained in an approved plan of work.

5. In the present note, the secretariat provides the Council and the Commission with additional thoughts on these terms to advance the discussion on their placement in and relationship to one another under the draft regulations, as well as their interpretation in the context of activities in the Area and their practical implementation.

II. Good industry practice

6. Good industry practice is a key term under the draft regulations. Exploitation activities in the Area must meet the standard of good industry practice. Under draft regulation 13 (3) (a), the Commission must determine whether an applicant has the necessary technical and operational capability to carry out the proposed plan of work in accordance with good industry practice, and in section 3, paragraph 3.2, of the standard clauses for exploitation contracts (ISBA/24/LTC/WP.1/Rev.1, annex X), it is stipulated that the plan of work, if approved, must be carried out in accordance with such practice. Consequently, it is important that an applicant have a clear understanding of the information required to demonstrate to the Commission that it has the financial and technical capability to undertake mining operations under a plan of work in accordance with such practice² and that its operations are, in fact, carried out in such a manner. It is therefore paramount that the Authority, through guidelines, provide a clear explanation as to how it will view and apply good industry practice, as well as a clear definition of its operational scope.

7. Good industry practice is defined in schedule 1 to the draft regulations as follows:

“Good industry practice ” means the exercise of that degree of skill, diligence, prudence and foresight which would reasonably and ordinarily be expected to be applied by a skilled and experienced person engaged in the marine mining industry and other related extractive industries worldwide, including best environmental practice, the performance and process requirements under the rules, regulations and procedures of the Authority and applicable standards that may be adopted by the Authority from time to time.

¹ In the context of petroleum exploration and production, equivalent terms, such as “good oil field practices”, are used.

² At the application and pre-production phase, pre-feasibility and feasibility studies will be important sources for demonstrating that good industry practice has been and will continue to be applied throughout the mining life cycle.

8. The definition was based on a formulation in the Model Mining Development Agreement,³ and expanded to include best environmental practices, the performance and process requirements under the rules, regulations and procedures of the Authority, as well as applicable standards that may be adopted by the Authority from time to time. Similar to the draft regulations, the Model Mining Development Agreement contains references to the application of good industry practice in a number of subject areas, including environmental assessment; however, no reference is made in the Agreement to the term “best practices” in an environmental context.

9. Other formulations of good industry practice tend to be more conceptual and may be supported by interpretative guidance. For example, in section 2 of the Crown Minerals Act 1991 of New Zealand, good industry practice is defined in more general terms, and interpretative guidance⁴ is provided under the country’s minerals programme. In the Act, the term is defined as follows:

Good industry practice, in relation to an activity, means acting in a manner that is technically competent and at a level of diligence and prudence reasonably and ordinarily exercised by experienced operators engaged in a similar activity and under similar circumstances, but (for the purposes of this Act) does not include any aspect of the activity regulated under environmental legislation.

10. It is interesting to note that this definition includes the consideration of operational risks as well as health and safety risks, but does not extend to environmental risks. In addition, it is noted in the interpretative guidance on good industry practice that “good exploration or mining practice cannot be defined unequivocally”, and that, in considering whether an activity has been or will be carried out in accordance with such practice, professional judgment and advice is needed. It is suggested that the same approach be taken with regard to the Authority’s regulations.

11. A further example of good industry practice is contained in the Performance Standards on Environmental and Social Sustainability and associated guidelines of the International Finance Corporation. The standards provide that the process of identifying the environmental and social risks and impacts of a project must be consistent with good international industry practice, which is defined as “the exercise of professional skill, diligence, prudence, and foresight that would reasonably be expected from skilled and experienced professionals engaged in the same type of undertaking under the same or similar circumstances globally or regionally”.⁵ Again, the definition is more conceptual rather than containing any reference to specific standards.

12. One challenge for the Authority in providing guidance on the implementation of good industry practice is recognizing that mining operations in the Area will be a new endeavour. That said, while the definition of such practice in the draft regulations refers to skilled and experienced persons engaged in the marine mining industry, it also acknowledges that people may have developed similar skills and experience in other related extractive industries, including other offshore industries, such as oil and gas extraction.

13. Good industry practice does not replace clear and unambiguous obligations established under the regulations and in an approved plan of work. However, it does

³ Model Mining Development Agreement Project and International Bar Association, *MMDA 1.0: Model Mine Development Agreement – A Template for Negotiation and Drafting*, 4 April 2011.

⁴ See New Zealand, Ministry of Business, Innovation and Employment, New Zealand Petroleum and Minerals, “Guidance on good industry practice”, June 2017.

⁵ International Finance Corporation, *International Finance Corporation’s Guidance Notes: Performance Standards on Environmental and Social Sustainability*, 1 January 2012, p. 6.

set, within a regulatory context, a benchmark in terms of operational skills and technical capability, principally in connection with the management of operational risk, that will evolve over time. Good industry practice will also serve as a reference against which an assessment may be made as to whether a contractor is fulfilling its due diligence obligations under a contract for exploitation.

III. Best environmental practices and best available techniques

14. Under draft regulation 46 (b), the Authority, sponsoring States and contractors must ensure the application of best available techniques and best environmental practice in carrying out measures necessary for ensuring the effective protection of the marine environment. Both key terms are defined in schedule 1 to the draft regulations. “Best available techniques” is defined as “the latest stage of development, and state-of-the-art processes, of facilities or of methods of operation that indicate the practical suitability of a particular measure for the prevention, reduction and control of pollution and the protection of the marine environment from the harmful effects of exploitation activities, taking into account the criteria set out in the applicable guidelines”. “Best environmental practices” is defined as “the application of the most appropriate combination of environmental control measures and strategies, taking into account the criteria set out in the applicable guidelines”. In both definitions, the drafting of guidelines is envisaged for the application of such techniques and practices.

15. Both terms have dynamic definitions, meaning that their content will change as technology, scientific knowledge and understanding advance over time. Examples of other international and regional instruments that contain definitions for “best environmental practices” and “best available techniques” include the Stockholm Convention on Persistent Organic Pollutants and the Convention for the Protection of the Marine Environment of the North-East Atlantic.

16. Under article 2, paragraph 3 (b) (ii), of the Convention for the Protection of the Marine Environment of the North-East Atlantic, in implementing the Convention, contracting parties are required to ensure the application of best available techniques and best environmental practice in carrying out programmes and measures. In appendix 1 to the Convention, the two terms are defined on the basis of a set of criteria. In the case of best environmental practices, the appendix contains a list of a graduated range of nine measures, the second of which is the development and application of codes of good environmental practice; good environmental practice itself, however, is not defined.

17. Under article 5, paragraphs (d) to (g), of the Stockholm Convention, parties are required, where appropriate, to promote and apply best available techniques and best environmental practices.⁶ A number of factors and considerations for the application of best available techniques, in particular, are also outlined in the Convention.⁷

18. A forward-looking approach to environmental protection is adopted for both best available techniques and best environmental practices. Such techniques and practices must also be applied giving due consideration to the economic and technical viability of techniques and measures, respectively. In connection with best available techniques, in particular, and as highlighted in the Stockholm Convention,⁸ the

⁶ Guidelines have also been prepared under the Stockholm Convention, namely, the *Guidelines on Best Available Techniques and Provisional Guidance on Best Environmental Practices Relevant to Article 5 and Annex C of the Stockholm Convention on Persistent Organic Pollutants*, October 2008.

⁷ See Stockholm Convention, annex C, part V.

⁸ Ibid.

Authority's guidelines should not necessarily prescribe specific technology or techniques to be deployed, but provide a framework or reference for their application. These techniques will be important for the establishment of environmental performance thresholds.

19. The examples mentioned above demonstrate particular approaches taken to defining and outlining the scope of the two terms for circumstances specific to conventions. An examination of those approaches, together with an examination of other examples of best available techniques and best environmental practices, will help the Authority to develop its own approach to formulating specific guidelines on those two topics for activities in the Area.

20. As regards the term "best available scientific evidence", it is also proposed that guidelines be put in place to expand on the definition of this term (see [ISBA/25/C/3](#), annex). In keeping with the understanding of the term "best practice" outlined below, actions taken to provide best available scientific evidence should not simply be restricted to the peer-review of scientific work, but perhaps extended to the consideration of work that is in progress or of knowledge that has only been published in grey literature.⁹

IV. Distinguishing between good practice and best practice under the draft regulations

21. The concepts of good practice and best practice are commonly used in regulatory language and related discussions. While there is a clear distinction in their legal meaning and purpose, it is often overlooked.

22. From a regulator's perspective, good practice can be seen as the minimum legal yardstick in an operation to manage opportunity and risk. Good practice is judged against measures implemented in a similar manner by other operators to manage comparable risk. Sources of good practice can be found in laws and regulations, regulatory guidelines, international, regional and national standards, industry codes of practice and the procedures of individual operators. Good practice is the practice that is being applied at a particular moment, and it will evolve over time. Good practice may result from the wide adoption of best practices being implemented on a more routine basis.

23. Best practice is a continual process of improvement and innovation of practices, measures, technology and techniques. It can be defined as pushing beyond the legal minimum by finding new ways of managing opportunity and risk by building on new knowledge and experience.

V. Further discussion

24. It is important that the distinction between good industry practice and best practice (that is, best environmental practices and best available techniques) be maintained in the regulations, even though they are not mutually exclusive. While defining good industry practice in absolute terms is difficult at the current stage of industry development, it is not impossible, and conversations with the contractor base and experts in the field will advance the formulation of the definition. Equally, as the Authority's guidelines are further developed, a clearer picture of good industry practice will emerge.

⁹ See International Seabed Authority, *Towards an ISA Environmental Management Strategy for the Area*, ISA Technical Study No. 17 (Kingston, 2017), p. 29.

25. With regard to best practice, from a regulator's perspective, it is important that the overall regulatory framework promote and encourage the development of best practices by the contractor base and industry as a means to meet performance standards more effectively and efficiently. To that end, in draft regulation 46 (e), it is recognized that there is a need to build incentive structures, including market-based instruments, to support and enhance the development of technology and innovation.

26. The Commission has recognized that further work is required to develop the definition of good industry practice, best environmental practices and best available techniques, as well as to determine their proper placement in the regulatory text. Guidelines on how to interpret good industry practice and how to apply best environmental practices and best available techniques should be developed as a matter of priority (see [ISBA/25/C/3](#), annex).

27. The current definitions of good industry practice, best environmental practices and best available techniques will remain as placeholders until there is a general understanding of their scope and purpose. That said, in view of the elements developed above, the Commission may wish to revisit the definition of good industry practice. First, the incorporation of best environmental practices into the definition of good industry practice should be re-examined; as noted by one stakeholder, the application of best environmental practices is too important not to be included as an explicit and stand-alone obligation under the draft regulations. Equally, maintaining the distinction between key operational and safety aspects on the one hand and environmental aspects on the other hand may lead to less uncertainty in the implementation of such practices. Second, the Commission should consider whether the definition of good industry practice is overly complex and misleading and whether it should be more conceptual, with the support of appropriate guidelines.

28. In addition, the Commission may wish to revisit how the terms are used in its recommendations for the guidance of contractors mentioned in paragraph 2 above to ensure a consistent use and approach to terms adopted under both exploration and exploitation frameworks.

VI. Suggested items for consideration and discussion by the Council

29. The Council is invited to consider the matters raised in the present note, and, based on member's experiences with national, regional and international regulations governing the management of resources, provide any additional comments it wishes the Commission to take account of in advancing its thinking with regard to those key terms.
