



理事会

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第二十五届会议

理事会会议，第一部分

2019年2月25日至3月1日，金斯敦

临时议程* 项目 11

“区域”内矿物资源开发规章草案

理事会的职能下放和监管效率

秘书处的说明

一. 背景

1. 法律和技术委员会结合理事会 2018 年 3 月提出的请求([ISBA/24/C/8](#), 第 41 和 42 段), 重新审查了“区域”内矿物资源开发规章草案所反映的行政决策平衡([ISBA/24/C/20](#), 第 23-25 段), 特别是理事会与秘书长之间的平衡。
2. 海管局成员和其他利益攸关方在最近提交的对规章草案最新版([ISBA/24/LTC/WP.1/Rev.1](#))的评论意见中, 就根据规章分配给秘书长的某些权力和职能的合法性和适当性提出了各种意见([ISBA/25/C/2](#), 第 11 段)。另一方面, 也有人认为, 鉴于理事会和委员会会议之间的时间间隔, 应在某些规章草案中进一步向秘书长授权。还有人建议, 可酌情考虑作出一些临时性决定, 直至理事会予以核准或否决。
3. 随着监管框架的发展, 关于如何以最佳方式支持海管局机构运作的讨论也将持续进行。因此, 在《联合国海洋法公约》¹ 框架内, 哪些职能和哪些级别的权力可以且应当授予秘书长, 如何将这种授权转化为透明有效的行政和执行程序, 以及如何根据这种授权作出决定, 包括适当程序和问责制, 都是核心考虑因素。

* [ISBA/25/C/L.1](#)。

¹ 联合国, 《条约汇编》, 1833 卷, 第 31363 号。



4. 本说明提交理事会，作为进一步讨论职能授权问题的基础，包括供理事会审议的要点。本说明的附件²载列了提议某种形式授权的规章草案、此种授权的理由以及在审查利益攸关方意见后对规章草案内容提出的任何改进建议。

二. 权力下放的法律依据

5. ISBA/24/C/4 号文件第三节概述了海管局各机关在监测勘探工作计划遵守情况方面的作用。理事会的总监管职能是作为海管局的一个机关，对“区域”内的活动进行必要管制，以确保遵守海管局的规则，³包括设立机构来指导和监督视察工作人员。⁴海管局还有权随时采取《公约》第十一部分所规定的任何措施，以确保该部分条款得到遵守，并确保行使根据该部分或任何合同分配给海管局的管制和监管职能。⁵《公约》规定，海管局的各个主要机关(即大会、理事会和秘书处)负责行使对其授予的权力和职能，但必须避免采取可能对授予另一机关的特定权力和职能的行使有所减损或阻碍的任何行动。⁶第一六二条第2款(d)项要求理事会在妥为顾及节约和效率的情形下，设立认为按照第十一部分行使其职能所必要的附属机关。根据第一六六条第3款，秘书长应执行大会、理事会或任何附属机关向其交付的其他行政职能。

6. 《公约》附件三规定了探矿、勘探和开发的基本条件，第十七条规定了执行第十一部分所规定海管局职能的规则、规章和程序的核心要素，包括关于开发的行政程序、业务和财政事项的相关职能。然而，在整个第十一部分和附件三中，许多地方泛泛地提到“海管局”，但没有具体说明要求海管局的哪个机关采取行动。⁷

7. 在国家监管的情形中，议会法案或其他主要立法规定的权力和职能通常授予政府部长，包括制定执行该主要立法的条例。但是实践中，这些部长不可能亲自行使各自的所有职能。因此，可以推定部长可以将这些职能下放给其他人(一般是高级公务员)，尽管这些部长仍对这些公务员的行为负责。同样的概念适用于整个国际公务员制度，例如在联合国(或海管局)秘书长根据《工作人员条例和细则》行使权力方面。

8. 因此，不言而喻的是，理事会可将其职能下放，对海管局的提及必然包括秘书处这一由秘书长领导的海管局主要机关。同样，理事会和大会有权通过即将核准和通过的规章进行职能授权。问题是如何确保适当的问责和善政。

² 附件仅以来件所用语文分发。

³ 同上，第十五三条第(4)款和第一六二条第(2)款(1)项。

⁴ 同上，第一六二条第(2)款(z)项。

⁵ 同上，第一五三条第(5)款。

⁶ 同上，第一五八条第(4)款。

⁷ 例如，第十八条第(2)款规定，“……海管局可以对承包者课以罚款……”。

三. 海管局成员和其他利益攸关方对规章草案的评论意见

9. 对于根据规章草案应给予秘书长的授权级别，各方提出了不同的意见。可以使用关于遵行通知和终止开发合同的规章草案第 101 条为例，重点加以说明。一个成员国表示关切的是，在没有委员会建议或理事会决定的情况下发出遵行通知不属于秘书长的行政职能范围。而另一个成员国支持规章草案第 101 条的内容，建议进一步扩大或下放权力，允许秘书长暂停或终止合同(或进行罚款)，因为可能需要立即采取行动，防止意外损害或损失。

10. 对于关于权利和义务转让的规章草案第 24 条，虽然普遍支持理事会加以任何形式的核准，但也有人警告指出，要进行核准可能会导致延迟。其他评论意见包括：是否可以通过远程会议的形式部署理事会和委员会用以确定此类核准的另一机制，或者是否更宜由秘书长根据指导方针进行必要确定。对于关于使用开发合同作为担保的规章草案第 23 条，也有人表达了对时间安排的类似关切。一些利益攸关方指出，海管局作为监管机构，必须能够对规章下产生的问题作出实时回应。还有人认为，考虑到委员会和理事会每年只举行两次会议的现实情况，应及时作出必要的监管决定。⁸

11. 理事会其他成员就有待解决的问题以及就澄清作用和责任以及加强规章草案的潜在未来途径提出了建议。这些建议包括考虑到海管局尚待形成的机关，特别是经济规划委员会及其各种作用和责任；确保决策的明显对称，以澄清《公约》允许授权的决定类型及向谁授权，作出决定的条件或指导；就决策责任下放时要考虑的因素提供明确的指导。

12. 此外，一名成员认为，海管局宜制定可能由理事会以决定的方式予以通过的一项或多项政策，规定秘书长将采取的决策办法，并认为如要求秘书长向理事会报告前一年作出的监管决定，决策的透明度则将进一步提高。

13. 其他成员还支持决策中实行善政的一般原则，包括对决策、根据规章草案设立的机构和程序以及受监管的实体实行透明度和问责制原则，并支持向更广泛的群体提供根据海管局规章作出决定的理由。另一利益攸关方指出，明确作用和责任将使海管局能够更好地受其利益攸关方问责，而且海管局应考虑如何以最佳方式将决策和监管行动与任何实际利益冲突或被认为的利益冲突隔离开来，并将公布的合理决策要求纳入监管程序。

四. 监管政策指导和授权办法

14. 根据上文第 11 和 12 段所建议的办法，理事会不妨考虑一项具体政策，⁹ 反映监管作用、理事会对此种监管采取的办法以及将职能下放给包括秘书长在内的

⁸ 根据《公约》第一六一条第(5)款，理事会应视海管局业务需要随时召开会议，但每年不得少于三次，而根据第一六三条第(12)款，委员会应按有效执行其职能的需要，经常召开会议。

⁹ 根据第一六二条第(1)款，理事会有权根据《公约》和大会所制订的一般政策，制订海管局对其权限范围以内的任何问题或事项所应遵循的具体政策。

海管局其他机关的办法。这样一份文件应明确有关作用和责任，并明确关于海管局监管“区域”内活动的内容、时间和方式问题的政策方针。

15. 当代政府资源所有者常常在可持续发展背景下阐述其矿产监管的政策方针，包括相关职能机构的作用和责任。这种政策可以包括有效和高效决策的原则和参数，包括秘书长经理事会授权作出任何决定的原则和依据(包括证据基础)。该政策可支持和加强开发规章，并弥补《公约》与规章之间的任何程序性差距。该政策文件还应述及担保国的作用以及与其他监管者的互动。

五. 建议审议和讨论的项目

16. 邀请理事会审议以下项目：

(a) 关于本说明的附件，应授权海管局秘书长或其他机关的决定类型；

(b) 秘书处结合利益攸关方的评论意见，在本说明的附件中提出的关于加强具体监管规定透明度和问责制的建议；

(c) 就海管局的监管办法，特别是在决策下放所必须具备的条件或指导方面需考虑的因素，制订一份政策文件的好处。

Annex**Draft regulations on exploitation of mineral resources in the Area assigning functional responsibilities to the Secretary-General**

<i>Draft regulation</i>	<i>Title</i>	<i>Content of draft regulation</i>	<i>Rationale</i>	<i>Comments or suggestions</i>
DR4 (3)	Rights of coastal States	If there are clear grounds for believing that serious harm to the marine environment is likely to occur, the Secretary-General shall issue a compliance notice in accordance with regulation 101	Critical importance of timely action	Under the regulations on exploration, the Secretary-General is required to “take immediate measures of a temporary nature” in accordance with the emergency order provisions. ^a In addition to the specific comments regarding draft regulation 101 (see below), guidance should be considered to support the implementation of DR4, paragraphs 2 and 3
DR10	Preliminary review of application by the Secretary-General	The Secretary-General shall determine whether an application is complete for further processing	Administrative efficiency	The Legal and Technical Commission shall determine if applications are in conformity with the rules of the International Seabed Authority (DR13 (1) (a))
DR25 (2)*	Change of control	The Secretary-General is to make a determination in respect of financial capability following a change of control	Management of the contract	DR25 (2) (a) does not envisage explicitly a situation in which the Secretary-General would determine that, following a change of control, the contractor could no longer meet its obligations. The Commission should consider including in the text the possibility of such a determination by the Secretary-General as well as its consequences, together with relevant guidelines. Given the general significance of financial capability,

^a See [ISBA/19/C/17](#), annex, regulation 34 (3).

<i>Draft regulation</i>	<i>Title</i>	<i>Content of draft regulation</i>	<i>Rationale</i>	<i>Comments or suggestions</i>
				the review of such capability, following a change of control, by other organs, such as the Commission, and reporting to the Council should also be considered
DR26 (1)*	Documents to be submitted before production	A determination is to be made by the Secretary-General as to whether a material change needs to be made to a plan of work in the light of a feasibility study	Administrative efficiency	Guidelines setting out what constitutes a material change will form the basis of any determination
DR30 (6)*	Reduction or suspension in production due to market conditions	In cases where activities have been reduced or suspended, information is to be provided to the Secretary-General to demonstrate that the issue triggering a reduction or suspension has been addressed	Administrative efficiency in reporting	The Commission should consider any reporting mechanism, for example to the Council, in the regulatory text
DR31 (3)	Optimal exploitation under a plan of work	The Secretary-General and contractor shall agree modifications to the mining workplan where the resources are not being mined optimally	Review mechanism	In general, stakeholders have expressed concern over the appropriateness and enforceability of this regulation. The Commission can consider any reporting protocols, Council approval, etc., or other, as part of its review of the draft regulation in its entirety
DR35 (2) (c)	Preventing and responding to incidents	The contractor is required to undertake promptly any instructions received from the Secretary-General	Critical importance of timely action	Under the exploration regulations, and in connection with emergency orders, the Secretary-General shall take “such immediate measures of a temporary nature as are practical and reasonable”. pending action by the Council. ^b The draft regulation provides for appropriate consultation by the Secretary-General and

^b Ibid, regulation 33 (3).

<i>Draft regulation</i>	<i>Title</i>	<i>Content of draft regulation</i>	<i>Rationale</i>	<i>Comments or suggestions</i>
				reporting protocols. The Commission should consider the reporting of incidents and instructions given, actions taken by the Secretary-General to the Council on an annual basis
DR38 (3)	Insurance	Should a contractor fail to maintain the insurance required under the regulations, the Secretary-General shall issue a compliance order under regulation 101	Critical importance of timely action	As maintaining adequate insurance is a fundamental term of the contract, reporting to the Council should be considered. See also comments on DR101 below
DR38 (4)*	Insurance	A contractor shall not materially modify or terminate any insurance policy without the prior consent of the Secretary-General	Management of the contract	Given the specificity of insurance contracts, the Secretary-General may be obliged to consult relevant experts in the insurance field
DR45 (4)*	Compliance with other laws and regulations	Contractors shall notify the Secretary-General promptly when a permit, licence, approval, certificate or clearance connected with its activities in the Area is withdrawn or suspended	Management of the contract	The content of this draft regulation is under review
DR55 (2)	Modification of a plan of work by a contractor	The Secretary-General shall, in consultation with the Contractor, consider whether a proposed modification to the plan of work constitutes a material change in accordance with the guidelines	Management of the contract	Any determination under this draft regulation shall reference the relevant guidelines
DR55 (4)*	Modification of a plan of work by a contractor	The Secretary-General may propose to the contractor a change to the plan of work which is not a material change	Management of the contract	Concern has been raised that, under this draft regulation, the Secretary-General would have the authority to make changes to a contract even when a contractor is not outside the contract terms. The Commission should consider the types of changes that could be

<i>Draft regulation</i>	<i>Title</i>	<i>Content of draft regulation</i>	<i>Rationale</i>	<i>Comments or suggestions</i>
				proposed, including in relation to the environmental plans. Transparency in the reporting of a change to the plan of work may be required
DR56 (1)*	Review of activities under a plan of work	The Secretary-General has the discretion to review contractor activities under a plan of work outside the prescribed time frame	Management of the contract	The nature of the review process is similar to that under the exploration regulations, except that proposed material changes to a plan of work require Council approval. Guidelines for the review process are needed
DR63*	Secretary-General may issue guidelines	The Secretary-General may issue guidelines in respect of the calculation and payment of royalties	Empowered to issue guidelines	Under DR93, guidelines will be subject to oversight by the Council
DR74 (3)*	Assessment by the Authority	The Secretary-General may make an assessment of any royalty liability	Administration of royalty returns and payment	The Commission should consider due process under this draft regulation, and the ability of the contractor to make representations to the Secretary-General. See DR76 (3)
DR75*	General anti-avoidance rule	The Secretary-General shall determine the liability for a royalty as if the avoidance, postponement or reduction of such liability had not been carried out by the Contractor and in accordance with part III of the draft regulations	Administration of royalty returns and payment	Same comments as for DR74 (3). The text of the text of DR75 is also under review
DR76 (2)*	Arm's-length adjustments	The Secretary-General may adjust the value of costs, prices and revenues to reflect an arm's-length value in accordance with internationally accepted principles	Administration of royalty returns and payment	The Secretariat will need to be staffed by appropriately qualified royalty administrators to assist in such determinations
DR78*	Monetary penalties	The Secretary-General may impose monetary penalties (subject to DR101 (6))	Administration of royalty returns and payment	The monetary penalties will be specified under the regulations in appendix III, supported by guidelines

<i>Draft regulation</i>	<i>Title</i>	<i>Content of draft regulation</i>	<i>Rationale</i>	<i>Comments or suggestions</i>
DR87 (2) (d)*	Confidentiality of information	Data and information designated by the Contractor as Confidential Information at the time it was disclosed to the Authority, provided that such designation is deemed to be well-founded by the Secretary General on the basis that there would be substantial risk of serious and unfair economic prejudice if the data and information were to be released (DR87 (5))	Administration of policy	Under the exploration regulations, the contractor may designate information as confidential, in consultation with the Secretary-General ^c In compliance with DR87 (5), the Secretary-General shall take into account any relevant policy guidance from the Council to make a determination
DR93 (1)*	Issuance of guidance documents	The Commission or the Secretary-General shall, from time to time, issue guidance documents (guidelines) of a technical or administrative nature for the guidance of contractors in order to assist in the implementation of the draft regulations	Administrative guidance	It has been suggested that the Secretary-General should not issue guidelines, especially when he or she responsible for providing advice on their implementation (such as the material change guidelines under DR55) and there is a delay between the issuance of the guidelines and the reporting of those guidelines to the Council. The issuance of guidelines is to be discussed separately by the Council
DR94 (4) (f)	Inspections: general	Where required by the Secretary-General, the deployment of monitoring and surveillance equipment shall be accepted by the contractor.	Not applicable	It is proposed that guidelines on the use of remote electronic monitoring and vessel positioning systems be issued. Any specific requirements should be incorporated into the plan of work
DR97 (3)	Inspectors' power to issue instructions	The Secretary-General has the discretion to issue a compliance notice under DR101	Critical importance of timely action	No comment
DR99 (2)	Complaints	The Secretary-General may take	Administrative efficiency	Consideration by the Commission on

^c Ibid, regulation 36 (1).

<i>Draft regulation</i>	<i>Title</i>	<i>Content of draft regulation</i>	<i>Rationale</i>	<i>Comments or suggestions</i>
		“reasonable action” in response to a complaint		what constitutes “reasonable action” may be required
DR100 (3)	Electronic monitoring system	The Secretary-General shall issue a compliance notice under regulation 101, where he or she determines from the data transmitted to the Authority that unapproved mining activities have occurred or are occurring	Critical importance of timely action	Factual determination will be made according to data submitted
DR101 (1)*	Compliance notice and termination of exploitation contract	If it appears to the Secretary-General on reasonable grounds that a contractor is in breach of the terms and conditions of its exploitation contract, the Secretary-General shall issue a compliance notice to the Contractor requiring the contractor to take such action as may be specified in the compliance notice	Critical importance of timely action	<p>DR101 has drawn a number of comments. Questions for consideration include the following:</p> <ul style="list-style-type: none"> – Is the issuance of a compliance notice without a recommendation of the Commission or decision of the Council within the remit of the Secretary-General’s administrative functions? – What obligations should be placed on the Secretary-General to report to the Council in respect of any compliance notices issued, and what should the method and frequency of such reporting be? – What of any administrative review in respect of compliance notices issued by the Secretary-General? Given that a compliance notice constitutes a warning by the Authority, should the Council be given the opportunity to withdraw a compliance notice issued by the Secretary-General? – Should the Secretary-General’s

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				function under this regulation be extended to include the suspension or termination of the contract, or monetary penalties in lieu thereof, in specific circumstances?
<i>The following draft regulations have already been the subject of comments by the Council and review by the Commission. However, in the light of recent stakeholder comments on these specific items, the Council may wish to reflect on an appropriate delegated authority or expedited process</i>				
DR23*	Use of exploitation contract as security	Sponsoring State and Council consent required (based on the recommendations of the Commission)	Not applicable	It has been suggested that the Secretary-General should be in a position to provide the necessary consent or for a mechanism outside the normal meetings of the Council be considered
DR24*	Transfer of rights and obligations	Council consent required (based on the recommendations of the Commission)	Not applicable	As above