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Draft regulations for exploitation of mineral resources in the Area

Delegation of functions by the Council and regulatory efficiency

Note by the secretariat

I. Background

1. In the light of requests made by the Council in March 2018 ([ISBA/24/C/8](#), paras. 41 and 42), the Legal and Technical Commission re-examined the balance of administrative decision-making reflected in the draft regulations on exploitation of mineral resources in the Area ([ISBA/24/C/20](#), paras. 23–25), and in particular the balance between the Council and the Secretary-General.

2. In recent comments on the latest version of the draft regulations ([ISBA/24/LTC/WP.1/Rev.1](#)), members of the Authority and other stakeholders presented a range of views on the legality and appropriateness of assigning certain powers and functions to the Secretary-General under the regulations ([ISBA/25/C/2](#), para. 11). On the other hand, some also presented the view that further authority should be delegated to the Secretary-General in certain draft regulations, given the time lag between meetings of the Council and of the Commission. It was also suggested that consideration could be given, where appropriate, to some decisions that would remain provisional until approved or rejected by the Council.

3. How the institutional functioning of the Authority is best supported will be an ongoing discussion as the regulatory framework evolves. Consequently, within the framework of the United Nations Convention on the Law of the Sea,¹ what functions and levels of authority may and should be delegated to the Secretary-General, how such delegation will be translated into an effective and transparent administrative and enforcement process, and how decisions under such delegation will be made, including due process and accountability, are core considerations.

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

¹ United Nations, *Treaty Series*, vol. 1833, No. 31363.



4. The present note is presented to the Council as the basis for further discussion on the issue of the delegation of functional authority, including points for the Council's consideration. The annex to the present note² sets out those draft regulations where a form of delegation is proposed, the rationale for such delegation and any suggested improvements to the content of the draft regulation following a review of stakeholder observations.

II. Legal basis for the delegation of powers

5. An overview of the role of the organs of the Authority in relation to monitoring compliance with plans of work for exploration is provided in section III of document ISBA/24/C/4. The overarching regulatory function of the Council is, as an organ of the Authority, to exercise such control over activities in the Area as is necessary for the purpose of securing compliance with the rules of the Authority,³ including the mechanisms for directing and supervising a staff of inspectors.⁴ The Authority also has the right to take at any time any measures provided for under part XI of the Convention to ensure compliance with its provisions and the exercise of the functions of control and regulation assigned to it thereunder or under any contract.⁵ The Convention provides that each principal organ of the Authority (i.e. the Assembly, the Council and the secretariat) is responsible for exercising those powers and functions that are conferred upon it, but must avoid taking any action that may derogate from or impede the exercise of specific powers and functions conferred upon another organ.⁶ Under article 162 (2) (d), the Council is to establish such subsidiary organs as it finds necessary for the exercise of its functions in accordance with part XI, subject to due regard to economy and efficiency. Under article 166 (3), the Secretary-General is to perform such other administrative functions as are entrusted to him or her by the Assembly, Council or any subsidiary organ.

6. Annex III to the Convention provides the basic conditions of prospecting, exploration and exploitation, and its article 17 sets out the core elements of rules, regulations and procedures for the exercise of the Authority's functions under part XI, including those relating to administrative procedures relating to exploitation, operations and financial matters. However, throughout part XI and annex III, there are many generic references to "the Authority" that do not specify which organ of the Authority is required to act.⁷

7. In a national regulatory scenario, powers and functions under an act of parliament or other primary legislation are typically conferred upon government ministers, including the making of regulations to implement that primary legislation. In practice, however, it would be impossible for such ministers to exercise all their respective functions personally. Consequently, there is a presumption that ministers may delegate such functions to others (generally senior civil servants), even though the ministers remain responsible for the acts of those civil servants. The same concept applies throughout the international civil service, for example in relation to the exercise of the powers of the Secretary-General of the United Nations (or of the Authority) under the Staff Regulations and Rules.

² The annex is being circulated in the language of submission only.

³ Ibid., arts. 153 (4) and 162 (2) (1).

⁴ Ibid. art. 162 (2) (z).

⁵ Ibid., art. 153 (5).

⁶ Ibid., art. 158 (4).

⁷ For example, under article 18 (2), "... the Authority may impose upon the contractor monetary penalties...".

8. It is therefore self-evident that the Council may delegate its functions, and that references to the Authority necessarily include the secretariat, as a principal organ of the Authority headed by the Secretary-General. Equally, it is within the power of the Council and the Assembly to authorize the functional delegation of authority through the regulations that they will approve and adopt. The question is how to ensure appropriate accountability and good governance.

III. Comments by members of the Authority and other stakeholders on the draft regulations

9. Diverging views were presented as to the level of delegated authority that should be afforded to the Secretary-General under the draft regulations. An example may be highlighted in connection with draft regulation 101 on compliance notices and the termination of exploitation contracts. A member State expressed concern that the issuance of a compliance notice without a recommendation of the Commission or a decision of the Council was not within the remit of the Secretary-General's administrative functions. On the other hand, another member State, supporting the content of draft regulation 101, suggested a further extension or delegation of powers to allow the Secretary-General to suspend or terminate a contract (or impose monetary penalties), as there might be a need to take immediate action to prevent unanticipated damage or loss.

10. In connection with draft regulation 24 on the transfer of rights and obligations, while there was general support for any approval by the Council, there was also a note of caution as to possible time delays for the approval to be given. Other comments included whether another mechanism for the Council and the Commission to determine such approval could be deployed through remote meetings or whether it would be more appropriate for the Secretary-General to make the necessary determination in accordance with guidelines. Similar concerns relating to timing were expressed in connection with draft regulation 23 on the use of exploitation contracts as security. A number of stakeholders noted a need for the Authority, as a regulator, to be able to respond in real time to matters arising under the regulations. It was also argued that the necessary regulatory decisions should be made in a timely manner, taking into account the fact that the Commission and the Council only meet twice a year.⁸

11. Other members of the Council offered suggestions on the issues to be addressed and potential ways forward to clarify roles and responsibilities and to strengthen the draft regulations. Those suggestions included factoring in organs of the Authority that are yet to evolve, in particular the Economic Planning Commission and its various roles and responsibilities; ensuring a clear symmetry of decision-making to clarify the types of decisions that may be delegated, and to whom, as permitted under the Convention, and the conditions or guidance upon which a decision will be made; and providing clear guidance on considerations to be taken into account when decision-making responsibilities are delegated.

12. In addition, one member considered it appropriate for the Authority to develop a policy, or policies, potentially adopted by decision of the Council, setting out the approach to decision-making to be taken by the Secretary-General, and was of the opinion that transparency in decision-making would be further enhanced by a

⁸ Pursuant to article 161 (5) of the Convention, the Council is to meet as often as the business of the Authority may require, but not less than three times a year, while pursuant to article 163 (12), the Commission is to meet as often as is required for the efficient exercise of its functions.

requirement that the Secretary-General report to the Council on regulatory decisions made during the previous year.

13. Other member also supported general principles of good governance in decision-making, including the principles of transparency and accountability of decision-making and of the bodies and processes established under the draft regulations, down to the entities that were being regulated, and the idea of providing to the wider community the rationale for decisions made under the Authority's regulations. Another stakeholder noted that clarity in roles and responsibilities would enable greater accountability of the Authority to its stakeholders, and that the Authority should consider how best to insulate decision-making and regulatory actions from any actual or perceived conflicts of interest and incorporating published reasoned decision-making requirements into the regulatory process.

IV. Regulatory policy guidance and the approach to delegated authority

14. Based on the approaches suggested in paragraphs 11 and 12 above, the Council may wish to consider a specific policy⁹ reflecting the role of regulation, the approach that the Council will take toward such regulation and the approach to be taken in connection with the delegation of functions to other organs of the Authority, including the Secretary-General. Such a document would provide clarity on roles and responsibilities, as well as on the policy approach to the questions of what, when and how the Authority will regulate activities in the Area.

15. It is not untypical of contemporary government resource owners to set out their policy approach towards mineral regulation in a sustainable development context, including the roles and responsibilities of relevant functional organs. Such a policy could include the principles and parameters for effective and efficient decision-making, including the principles and basis (including the evidence base) for any decisions to be taken by the Secretary-General under delegated authority from the Council. The policy could support and strengthen the exploitation regulations and bridge any procedural gaps between the Convention and the regulations. The policy document should also address the role of sponsoring States and interaction with other regulators.

V. Suggested items for consideration and discussion

16. The Council is invited to consider the following:

(a) With reference to the annex to the present note, the types of decisions that should be delegated to the Secretary-General or other organs of the Authority;

(b) The suggestions made by the secretariat in the annex to the present note for enhancing transparency and accountability for specific regulatory provisions in the light of stakeholders' comments;

(c) The merits in developing a policy document on the Authority's approach to regulation, and in particular the considerations to be given to the conditions or guidance to be put in place for delegated decision-making.

⁹ Under article 162 (1), the Council is empowered to establish, in conformity with the Convention and the general policies established by the Assembly, the specific policies to be pursued by the Authority on any question or matter within the competence of the Authority.

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, the review of such capability, following a change

^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>
				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 reporting protocols. The Commission should consider the reporting of incidents and instructions given,

^b Ibid, regulation 33 (3).

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				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 proposed, including in relation to the environmental plans. Transparency in the reporting of a change to the

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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	plan of work may be required 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
DR87 (2) (d)*	Confidentiality of information	Data and information designated by the Contractor as Confidential Information at the time it was	Administration of policy	Under the exploration regulations, the contractor may designate information as confidential, in

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		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))		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 "reasonable action" in response to a complaint	Administrative efficiency	Consideration by the Commission on what constitutes "reasonable action" may be required
DR100 (3)	Electronic monitoring	The Secretary-General shall issue a	Critical importance of timely	Factual determination will be made

^c Ibid, regulation 36 (1).

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	system	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	action	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 function under this regulation be extended to include the suspension or termination of the contract, or monetary penalties in

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				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

Note: Items marked with an asterisk drew specific comments from stakeholders.

Abbreviations: DR, draft regulation.