



## Council

Distr.: General  
4 December 2018

Original: English

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### Twenty-fifth session

Council session, part I

Kingston, 25 February–1 March 2019

Item 11 of the provisional agenda\*

### Draft regulations for exploitation of mineral resources in the Area

## Comments on the draft regulations on the exploitation of mineral resources in the Area

### Note by the Secretariat

#### I. Introduction

1. During the second part of the twenty-fourth session, in July 2018, the Council of the International Seabed Authority considered a revised version of the draft regulations on exploitation of mineral resources in the Area prepared by the Legal and Technical Commission ([ISBA/24/LTC/WP.1/Rev.1](#)), together with a note from the Commission in which matters requiring the Council's attention were highlighted ([ISBA/24/C/20](#)). In his statement on the work of the Council during the second part of the twenty-fourth session ([ISBA/24/C/8/Add.1](#)), the President of the Council provided a summary of the Council's comments on the draft regulatory text and indicated that the members of the Council had agreed to submit specific comments on the revised draft regulations to the secretariat by 30 September 2018.

2. At the time of reporting, the secretariat has received 42 submissions of comments on the draft regulations.<sup>1</sup> The breakdown of stakeholder submissions by category is as follows: regional groups (1); member States (21); International Seabed Authority contractors (6); relevant international organizations (1); industry and other associations (3); environmental non-governmental organizations (1); intergovernmental organizations (1); academic and scientific bodies (3); and private persons (5).

3. The present note supplements the comments made by the Council in July 2018 (see [ISBA/24/C/8/Add.1](#), annex I) by providing a broad overview of the main thematic issues raised in the written submissions. Following an analysis of the submissions, the secretariat has also identified eight critical areas for discussion by the Council during the first part of the 2019 session (see section III below), with a

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

<sup>1</sup> A list of the stakeholders that submitted comments, together with links to individual submissions, is available at <http://bit.ly/isba-coms>.



view to providing clear policy direction to the Legal and Technical Commission as it works on the revision of the regulatory text.

4. Many of the written submissions contain suggestions for drafting changes, as well as requests for clarification of the content and purpose of a number of regulatory provisions. Detailed comments were also made on the content of the environmental plans in the annexes to the draft regulations. As requested by the Council, the secretariat will compile a summary report to capture the suggested changes, including the accompanying rationale and other points raised by stakeholders, for review by the Commission during the first part of the 2019 session. The objective will be for the Commission to produce a further revised text, taking into account all submissions received, together with any additional input from the Council provided during the first part of the 2019 session on the items listed under section III below. The Council will begin its consideration of the revised text as proposed by the Commission during part II of present session, in July 2019.

5. The present note does not address points raised by stakeholders in connection with the development of the economic model and the financial terms of contracts. Following the request made by the Council in 2018, the Massachusetts Institute of Technology has been tasked to produce a comparative analysis of the reports and studies listed in annex II to document [ISBA/24/C/8/Add.1](#). It is expected that a final report on this matter will be made available before the end of 2018.

## **II. Common issues identified in the stakeholders' submissions**

6. Overall, stakeholders welcomed the continuous improvement in the structure of the draft regulations and in the regulatory text and generally acknowledged the importance of the matters raised by the Council (see [ISBA/24/C/8/Add.1](#), annex I). Stakeholders requested that the structure of the regulations be kept under review, in particular the balance between the text in the body of the regulations, the annexes and the appendices, as well as what should be more appropriately contained in guidelines. Several stakeholders indicated that they would welcome more flow charts to aid understanding of the various processes laid out in the draft regulations.

7. On the basis of the submissions received, the following issues have been identified as the priority areas for consideration as matters relating to the overall regulatory framework. An overview of general points arising from specific regulatory provisions is provided in the annex to the present note.

### **1. Advancing the development of standards and guidelines as a priority area**

8. Many stakeholders agreed that standards and guidelines must be developed in parallel with the regulatory text. Some stakeholders also advocated putting in place critical standards and guidelines before the draft regulations are adopted and approved. Stakeholders also wished to see clear definitions for objectives, standards, guidelines and thresholds, the relationship among them and their role in defining good industry practices and in the development of best practices.

9. Key to the development of standards and guidelines will be agreement on a transparent and inclusive process for determining their content and clarity in terms of their legal status. As highlighted by the Council, standards and guidelines must be prioritized and dealt with sequentially ([ISBA/24/C/8/Add.1](#), annex I, para. 2. (h)). In view of the importance of this matter, a separate discussion paper will be prepared for consideration by the Council during the first part of the 2019 session. The paper will include proposals for a flexible and participatory process for the development and adoption of technical standards and guidelines, building on established structures

within other international organizations and the comments made by stakeholders in connection with draft regulations 92 and 93. In addition, the secretariat will prepare a list of indicative standards and guidelines by subject area and regulatory provision.

## **2. Common heritage of mankind**

10. Stakeholders highlighted the importance of recognizing the common heritage of mankind throughout the regulations and the need for its clearer operationalization in the regulatory provisions. Stakeholders acknowledged that some progress had been made in strengthening the regulatory framework ([ISBA/24/C/20](#), para. 6). There remained calls for continued examination, as well as a note of caution that the regulatory text must be precise and specific to facilitate its practical implementation and enforcement (see, for example, the comments on draft regulation 12 (4) in paragraph (5) of the annex to the present note).

## **3. Efficiency in decision-making and institutional functioning: respective roles and responsibilities of the Council, the Commission and the Secretary-General in the regulatory processes**

11. Effective regulatory compliance and enforcement will require the delegation of certain tasks and duties under appropriate guidance and supervision by the Council. In their submissions, stakeholders expressed a range of views with regard to the legality and appropriateness of certain powers assigned to the Secretary-General and, in some cases, the Commission under the draft regulations, in particular where no recourse to the Council was prescribed. On the other hand, some stakeholders considered that additional approval mechanisms should be delegated to the Secretary-General, given the time interval between meetings of the various organs of the Authority.

12. This is an area that will benefit from more detailed discussion of the role, structure and funding of the secretariat. As noted by one stakeholder, there needs to be an assessment of the types of decisions that can (or should) be delegated, and to whom, and parameters for decision-making need to be set out in a guidance document issued by the Council on the basis of which delegated decisions will be taken. In addition, it was noted that the fact that no specific tasks had been allocated to the Economic Planning Commission under the draft regulations should be reviewed. The secretariat will prepare a short discussion paper for the Council to share its thinking in this area.

## **4. Status of regional environmental management plans**

13. The Council had invited the Commission to review the use of the words “if any” in relation to regional environmental management plans in draft regulation 2 (5) and to consider making such plans mandatory ([ISBA/24/C/8/Add.1](#), annex I, paras. 2 (d) and 5 (c)). In the written submissions, there was consensus among stakeholders commenting on this point that a such a plan should be in place prior to the granting of an exploitation contract. However, it was also noted that this should not be used as an opportunity to prevent the approval of a plan of work, either through stalling the development or blocking the adoption of a relevant regional environmental management plan.

14. As previously indicated, the development and implementation of regional environmental management plans are part of the Authority’s policy framework for environmental management ([ISBA/24/C/3](#), para. 7). Questions remain as to the extent to which an environmental policy framework should be reflected in draft regulations, which are designed principally to implement annex III to the United Nations Convention on the Law of the Sea, regulate the process for applying for plans of work and establish the rights and obligations of contractors vis-a-vis the Authority (see [ISBA/24/C/CRP.1](#), annex V). The Council needs to consider whether it wishes to create

a legally binding obligation on itself to establish regional environmental management plans, which are not in themselves legal instruments. The Council also needs to consider whether legal obligations flow from such plans and, if so, the nature and extent of those legal obligations in relation to States parties, sponsoring States and contractors. The secretariat will outline the legal issues raised in connection with those plans in a short discussion paper highlighting the issues for consideration by the Council.

#### **5. Examination of timelines**

15. Stakeholders stressed the need for certainty in the decision-making process, but questions were raised as to whether the time periods envisaged were workable to accommodate the review of complex documentation. Conversely, there was also concern, in particular in relation to the application process, that the total envisaged timeline was too long, and uncertainty in the meeting schedule of decision-making organs. This is a matter that the Commission will keep under review ([ISBA/24/C/20](#), para. 10) and that is linked to the institutional functioning of the Authority addressed in paragraph 11 above.

#### **6. Application of the precautionary approach**

16. Stakeholders commented on the use and application of the precautionary approach in the regulatory text. In this regard, the key question to be addressed is how the precautionary approach is to be applied to activities in the Area by an applicant, a contractor, the Authority and the sponsoring State or States. To facilitate further discussion of this matter, the secretariat will provide an updated analysis of how the precautionary approach is being applied in the context of the regulations.

#### **7. Use and definition of good and best practices and related terms**

17. Stakeholders sought greater clarity in the content, use and purpose of the following terms defined in schedule 1 to the draft regulations: “best available scientific evidence”, “best available techniques”, “best environmental practice” and “good industry practice”. The secretariat will prepare a short discussion paper for consideration by the Council and the Commission on the use of those terms in national regulatory environments, drawing on comments made by stakeholders.

#### **8. Strengthening the process and mechanism for independent expert verification of environmental plans**

18. A number of stakeholders supported the incorporation of independent advice to strengthen transparent decision-making processes, which was a matter initially raised in a non-paper submitted by Belgium during the twenty-fourth session. As highlighted by one stakeholder, any such review mechanism should be consistent with the Convention framework. The secretariat proposes to draft a short discussion note for consideration by the Council, which will include a suggested mechanism for the selection of experts and related processes.

#### **9. Clarification of roles and responsibilities of the respective regulators**

19. Stakeholders continued to express concerns over how the responsibilities of the respective regulators, namely, the Authority, sponsoring States, flag States and relevant international organizations, dovetailed. The secretariat notes that it is in the process of preparing two matrices of responsibilities to show the interfaces between the Authority and sponsoring States and between the Authority and flag States. These matrices and a related narrative will be made available to the Council and the Commission before they meet in July 2019.

## 10. Inspection and inspectors

20. Stakeholders expressed some concern about the regulatory provisions of part XI of the draft regulations. This included matters relating to the jurisdictional competence of the Authority, the fact that the scope of the inspections provided for were too broad in scope and the fact that further guidance specifying the criteria for when an inspection should take place should be provided. It was also suggested that a risk assessment be undertaken to help the Authority to determine which activities are to be inspected, and support was expressed for the Council's invitation to the Commission to explore appropriate remote monitoring technology (ISBA/24/C/8/Add.1, annex I, para. 12). The Commission has requested that the secretariat outline possible inspection mechanisms, interactions with sponsoring States mechanisms and the development of a code of conduct for inspectors (ISBA/24/C/20, para. 29). The secretariat plans to make this outline available to the Council before it meets in February 2019.

## III. Next steps

21. It is suggested that the following critical areas would benefit from further discussion in the Council in order to provide clear guidance to the Commission. To this end, and as indicated above, the secretariat will submit a number of short discussion papers on the following matters:

(a) Financial models: consideration of the comparative report by the Massachusetts Institute of Technology on the respective financial models and variations;

(b) Standards and guidelines: review of a possible operating framework for the review, development and integration of standards and guidelines, including an indicative and prioritized list of such standards and guidelines;

(c) Decision-making: matters to be considered in connection with the delegation of approval and decision-making authority under the draft regulations;

(d) Regional environmental management plans: consideration of the legal background to the development and implementation of such plans under a regulatory framework;

(e) Precautionary approach: examination of the application of the precautionary approach to activities in the Area;

(f) Key concepts: reflection on key concepts (good industry practice and best practices) incorporated into the draft regulations, making reference to international regulatory practice;

(g) Independent assessment of environmental plans: consideration of a mechanism for the involvement and the selection of independent competent experts under the draft regulations;

(h) Inspection mechanism: examination of an outline inspection mechanism, including for the appointment of inspectors.

22. In line with the request made by delegations during the twenty-fourth session, the secretariat will propose a road map for the future development of the regulations during 2019, as well as a road map for advancing the development of regional environmental management plans, on the basis of the outcomes of and proposals resulting from the scientific workshops held in 2018.

## Annex

### Matters arising from specific regulatory text

#### Part I

1. **Draft regulation 2 (fundamental principles).** This draft regulation has drawn both positive comments and constructive criticism from stakeholders. There were concerns that the language of article 150 of the United Nations Convention on the Law of the Sea was not reproduced in full, which could be misleading, and that article 150 related to “policies” and not to “principles”. Equally, the broad formulation of those principles could have a negative impact on clarity and uniformity in the application of the operative regulatory provisions. Clarity was also sought with regard to how draft regulation 2 (2) (d) relating to land-based producers would be implemented and whether this was appropriately referenced in the draft regulations. Furthermore, some text (e.g. in draft regulation 2 (7)) does not mirror accurately the language used in the Convention and should be corrected.

2. **Draft regulation 4 (rights of coastal States).** Stakeholders were supportive of the Council’s observations ([ISBA/24/C/8/Add.1](#), annex I, para. 2. (e)) and wished to see a strengthening in the procedural (i.e. notification and consultation) mechanisms under the draft regulations, consistent with article 142 of the Convention, with clear roles and responsibilities assigned. This included: a proper procedure to notify coastal States on an ongoing basis of unexpected effects; an examination of the threshold to be applied in relation to “clear grounds” and related appeal mechanisms for a coastal State; and consideration of due process, given that the issue of a compliance notice could have serious repercussions. It was also suggested that this area could be considered by the Commission as part of a capacity-building initiative to develop skills in environmental assessment.

#### Part II

3. **Draft regulation 5 (qualified applicants).** Some stakeholders advocated the idea that applicants for a plan of work for exploitation should be the holders of exploration contracts currently in effect. This matter was partially addressed in a prior regulation ([ISBA/23/LTC/CRP.3\\*](#), draft regulation 2, para. 6). The paragraph was however later deleted in the light of previous stakeholders’ submissions, in which they had questioned the legal basis for such a restriction under the Convention. It was recommended that the Commission reconsider this issue in the light of further stakeholders’ comments and analyse the relevant provisions of the Convention and the Agreement relating to the implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982. These provisions contemplate — arguably — the submission of an application for a plan of work for exploitation only (see, for example, article 3 (4) (c) of annex III to the Convention).

4. **Draft regulation 6 (certificate of sponsorship).** A number of questions were raised in connection with this draft regulation (and draft regulation 22 relating to the termination of sponsorship), in particular in relation to the case of sponsorship by more than one State, as in the case of a consortium of States. The application of the requirement of effective control was also raised by stakeholders in connection with draft regulation 25 (change of control). This is an area that requires further and final examination by the Commission.

5. **Draft regulation 12 (general).** While there was general support for the intent of the additional text in paragraph 4 relating to the extent to which the proposed plan

of work contributes to realizing benefits for mankind as a whole, there was also concern that its formulation was neither precise nor specific, which could lead to problems in implementation and enforcement. Equally, paragraph 4 contains a reference to the principles, policies and objectives relating to activities in the Area as provided for in part XI of and annex III to the Convention and in the Agreement, and a question arose as to how those will be considered in assessing a plan of work.

6. **Draft regulation 14 (consideration of the environmental plans by the Commission).** The Commission was asked to consider setting out the basic criteria that should be taken into account (similar to the approach taken in draft regulation 13) to determine whether a plan of work provides for the effective protection of the marine environment in accordance with article 145 of the Convention.

### Part III

7. **Draft regulation 20 (joint arrangements).** This draft regulation prompted the request to consider the need for including operative provisions for the role and functioning of the Enterprise. The secretariat notes that it is conducting a study on issues relating to the operation of the Enterprise, in accordance with the terms of reference endorsed by the Commission in March 2018 ([ISBA/24/C/9](#), para. 19).

8. **Draft regulation 21 (term of exploitation contracts).** This regulation drew a number of comments in connection with the renewal process and procedure. Stakeholders proposed a greater level of scrutiny of any renewal application, including through the submission of a revised plan of work, a review of the contractor's environmental and regulatory performance to date and a consultation requirement. The Authority was also asked to revisit the criteria for the approval of a renewal application under paragraph 4.

9. **Draft regulation 31 (optimal exploitation under a plan of work).** Similar to observations made by the Council ([ISBA/24/C/8/Add.1](#), annex I, paras. 4 (c) and (d)), stakeholders raised a number of concerns relating to the intent and purpose of this draft regulation, the lack of any intervention by the Commission or Council, the Authority's role in potentially second-guessing what was seen as a commercial issue, the jurisdiction of the Authority and relevance of the data and information requirement under paragraph 4 and the ramifications in case a contractor did not agree to any modification to the plan of work.

10. **Draft regulation 33 (reasonable regard for other activities in the marine environment).** Comments focused on the interpretation of the "reasonable regard" obligation in relation to specific activities, including the laying of submarine cables and pipelines and the conduct of marine scientific research in the Area. Some stakeholders suggested that the Authority formulate guidelines, including procedures, in respect of such activities. On the other hand, others noted that reasonable regard obligations were obligations among States Parties to the Convention and that it was not within the power of the Authority to regulate such matters. As regards practical measures for avoiding and minimizing interactions between deep-sea mining and submarine cables, a workshop was held on 29 and 30 October 2018 by the Government of Thailand, the Authority and members of the International Cable Protection Committee, the outcome and report of which will be made available in due course.

11. **Draft regulation 38 (insurance).** Several stakeholders wished to introduce greater clarity in the contractor's insurance obligations, even though the Commission had noted that this draft regulation was a placeholder and subject to further technical and legal review (see [ISBA/24/C/20](#), annex). Some stakeholders recommended, in connection with draft regulation 13 (2) (b) (iv), that the Commission assess the

adequacy of insurance policies. The secretariat is currently in discussion with the insurance industry with a view to providing further technical information to the Commission on this matter.

## Part IV

12. **General comments.** Stakeholders generally endorsed the Council's nine points for consideration by the Commission in respect of part IV of the draft regulations (ISBA/24/C/8/Add.1, annex I, para. 5).

13. **Draft regulation 46 (general obligations).** Stakeholders wished to see greater clarity in how this draft regulation would be implemented. One stakeholder observed that the regulation might be increasing, and perhaps even duplicating, the regulatory burden, without enhancing the overall protection of the marine environment.

14. **Environmental scoping report.** Some stakeholders requested that a scoping requirement be reintroduced under part IV. While stakeholders acknowledged that a scoping process would be provided for and detailed in the Commission's recommendations issued under the exploration regulations, there was a preference for a scoping requirement to be reflected in part IV.

15. **Environmental management system.** Even though the details of an environmental management system must be outlined in the environmental impact statement and the environmental management and monitoring plan, it was noted that there was no specific requirement in the regulatory text for the adoption of such a system (or of a safety management system). An environmental management system is key to meeting environmental goals and for continued improvement in environmental performance. It was recommended to reinsert an earlier definition of an environmental management system, as well as an appropriate regulation that the system must be compatible with a recognized standard, as set out in guidelines, and that such system may be subject to independent verification.<sup>1</sup>

16. **Draft regulation 50 (performance assessments of the environmental management and monitoring plan).** The secretariat notes a need to reassess the content of this draft regulation in the light of stakeholders' comments. The comments related to the frequency of reviews, the fact that the performance assessment should be carried out by an independent competent person drawn from a roster of qualified experts, the absence of any role for the Council under this regulation and the grounds for further action if a performance assessment cannot be undertaken satisfactorily. With regard to continuous improvement, stakeholders asked that consideration be given to an appropriate mechanism, at the level of the Authority, for spreading best practices as a result of improvements in knowledge.

17. **Section 4 (environmental liability trust fund).** There was a general sentiment that the purpose of this fund should be restricted to that put forward by the Seabed Disputes Chamber of the International Tribunal for the Law of the Sea in its advisory opinion of 1 February 2011 in relation to an environmental liability gap that may arise. It was recommended that guidelines be put in place in due course for the operation of the fund that would specify, inter alia, who may seek compensation from the fund.

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<sup>1</sup> See draft regulation 28 in "A discussion paper on the development and drafting of regulations on exploitation for mineral resources in the Area (environmental matters)" (International Seabed Authority, January 2017). Available at <http://bit.ly/2Sj5yVX>.

## Part V

18. **Draft regulation 55 (modification of a plan of work by a contractor).** Many stakeholders saw an urgent need for guidance on the parameters established for “material change” and as to whether the threshold set in the definition of that term in schedule 1 was too low.

## Part VI

19. **Closure plans.** The Council has invited the Commission to consider several aspects of closure plans ([ISBA/24/C/8/Add.1](#), annex I, para. 7). The Authority has been asked to consider the level of detail prescribed in annex III to the draft regulations, compared with the data and information that will realistically be available at the time of application.

## Part VII

20. **Draft regulation 61 (incentives).** While this regulation was welcomed by stakeholders, greater clarity was required on a mechanism by which the Council was to consider and endorse such incentives.

## Part VIII

21. **Annual, administrative and other applicable fees.** Stakeholders made a number of comments in connection with part VIII, in particular the purpose of the annual fixed fee (draft regulation 83). This matter is being evaluated by the Commission (see [ISBA/24/C/20](#), annex).

## Part IX

22. **Draft regulation 87 (confidentiality of information).** While the approach taken in this regulation was generally endorsed, further work was required to fine-tune the definition of confidential information, the expected review mechanisms and possible conflicts with the exploration regulations. With regard to draft regulation 87 (2) (e), stakeholders noted that this was an example of where a differential treatment of contractors might occur and that, to ensure a level playing field, this subparagraph should be deleted (see also [ISBA/24/C/8/Add.1](#), annex I, para. 11).

## Part XII

23. **Settlement of disputes.** The Commission noted that the administrative review mechanism provided for in an earlier draft had been deleted (see [ISBA/24/C/20](#), annex) following, in particular, comments by member States, as the administrative review mechanism could undermine the finely crafted dispute mechanism under the Convention. It was 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 dispute.