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Agenda item 11

Draft regulations for exploitation of mineral resources in the Area

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

Submitted by the delegation of Germany

I. Introduction

1. Germany has taken note of the third draft of the regulations on exploitation of mineral resources in the Area ([ISBA/25/C/WP.1](#)) and acknowledges the significant progress made by the secretariat of the International Seabed Authority and the Legal and Technical Commission in further developing the draft regulations.
2. However, a number of substantial issues still require clarification and would benefit from further discussion, as their resolution is, in our view, essential for achieving a balanced regulatory approach.

II. Main issues

3. We have identified five comprehensive issues that we consider critical going forward.

A. Standards and guidelines

4. The present section touches primarily upon draft regulations 11, 45, 94 and 95, as well as annexes IV, VII and VIII.

Legal nature of standards and guidelines

5. Germany firmly believes that standards must be legally binding, while guidelines may be recommendatory. We favour a legal interpretation that would permit the Authority to employ guidelines as a compliance-inducing instrument so



that the outcome may be presumed legally sound in cases where a contractor can demonstrate compliance with those guidelines.

No exploitation prior to the adoption of relevant standards

6. Germany considers it critically important that the Authority not permit any exploitation activities unless the relevant standards, whether environmental or other, have been adopted. Deciding upon applications for exploitation before the finalization of relevant standards would introduce a risk of non-compliance with article 145 of the United Nations Convention on the Law of the Sea and impose an unfair regulatory risk on the applicant or contractor, and could cast doubt on the overall legitimacy of the licence.

Need for a structured, transparent, inclusive and comprehensive road map for the prioritized development of specific standards

7. At the time of writing, the workshop on the development of standards and guidelines for the mining code held in Pretoria from 13 to 15 May 2019 had resulted in a list of 14 standards, with the suggestion that they be developed before the draft regulations are adopted. In view of the road map of the secretariat for the adoption of the regulations, as well as the usual capacity, resources and time needed for the development of standards by international standard-setting institutions, a joint effort is required. The prioritized standards must also be developed in a structured manner, since there may be interferences between certain standards. On the other hand, however, the order in which the standards are discussed may also create synergies. The importance of coordination among the various actors is highlighted by the fact that different bodies may be responsible for developing different standards or groups of standards. Lastly, in order to ensure the scientific quality and legitimacy of the standards, the process of developing standards and guidelines should in general be transparent and open to all stakeholders, including industry representatives and environmental non-governmental organizations.

Continuing lack of specific environmental standards in the current draft regulations on the environmental impact assessment, the environmental management and monitoring plan and the closure plan

8. Currently, the environmental impact assessment requirements are those to be addressed descriptively by the contractor and lack specific assessment criteria with quantitative environmental thresholds, such as for harmful effects, or, alternatively, methodologies to develop thresholds. Clear and measurable requirements are recommended in the periodic review undertaken pursuant to article 154 of the Convention and the related reports, not least because agreed thresholds ensure a level playing field for contractors. Thresholds are needed, for example, for seabed habitats that have been affected and for sediment plumes, whether operational plumes at the seafloor level or discharge plumes at mid-water depths or deeper.

Need for clear differentiation of types and categories of standards

9. Germany supports the distinction between process and performance standards, as proposed to the Council in the first part of its session, in February/March 2019. However, both terms are inadequate to describe criteria and thresholds for environmental quality status, which represent a third category of standards. Examples of such criteria include the rates of bioturbation of surface sediments, an index of benthic meiofauna biodiversity and the oxygen concentrations at certain sediment depths.

Interplay between environmental standards, guidelines and technology

10. Germany considers that environmental standards and guidelines should include requirements and references regarding the technology to be used. These requirements should also be flexible where contractors can demonstrate to the satisfaction of the Authority that other kinds of technology are equally well equipped to ensure the same outcome.

B. Regional environmental management plans

11. The present section touches primarily upon draft regulations 2, 15, 20, 31, 38, 47, 48, 49, 52, 58, 60 and 76, as well as annexes IV, VII and VIII.

Legal nature of regional environmental management plans

12. Germany considers that the provisions of a regional environmental management plan should be binding and implemented both through explicit decisions of the Council when adopting the plan and through an obligation in the regulations on exploitation that the environmental impact statement, the environmental management and monitoring plan and the closure plan comply with the regional environmental management plan.

No exploitation without regional environmental management plans

13. Germany believes that it is necessary to establish a regional environmental management plan to ensure the effective protection of the marine environment from harmful effects that may arise from activities in the Area. Germany therefore suggests that the granting of exploitation licences be contingent upon the existence of fully developed and agreed regional environmental management plans. However, it should also be ensured that the granting of exploitation licenses cannot be prevented by simply blocking the further development and adoption of the related plans.

Implications of plans

14. Germany believes that it should be clarified that regional environmental management plans will entail requirements mandatory for the approval of plans of work. For example, vulnerable ecosystems in the regions concerned need to be identified and protected as part of such plans before mining contracts are granted, ideally before specific areas are designated for exploration.

Regional environmental management plans and the precautionary approach

15. Germany believes that it must be ensured that the development of regional environmental management plans and the designation of areas of particular environmental interest are science-driven. Given the limited scientific knowledge available for most deep-sea habitats, the precautionary approach must be the starting point and basic principle for the development of any such plan.

Development and approval of regional environmental management plans

16. Germany holds the view that the Authority currently lacks a general strategy for the development and approval of regional environmental management plans. Before further analysing resource- and region-specific needs for environmental planning, it is necessary to agree on the basic requirements and procedures for the plans. This step includes defining the legal status of the plans and their provisions, the role of relevant regional organizations and other competent international bodies, the requirements and criteria for developing networks of protected areas and the regionalization of

environmental standards and thresholds. As announced to the Council during the first part of its session, Germany is scheduled to host an international workshop on the development of a standardized approach to these plans in Hamburg, Germany, from 11 to 13 November 2019.

C. Adaptive management

17. The present section touches primarily upon draft regulation 48 and annex VII.

Concept of adaptive management

18. Germany considers that an in-depth discussion of the concept of “adaptive management” is urgently needed. Contractors have a vested interest under the contract with the Authority. A legal challenge may arise if contracts are amended as a result of recommendations, decisions or guidelines issued by the Authority and additional obligations for the contractors are introduced. In principle, exploitation contracts should only be amended by agreement and with the consensus of the contracting parties. In cases where unilateral amendments are necessary, such amendments should be binding but undertaken in a balanced manner. An effective concept of adaptive management should be developed and established to balance the various interests. Criteria and procedures for adaptive management to modify approved plans of work according to emerging scientific knowledge and technology should be defined precisely in the draft regulations. Currently, however, adaptive management is required only in very general terms under the provisions for the environmental management and monitoring plan (see annex VII to the regulations), and only as an obligation for the contractor. Germany takes a much broader view of the concept of adaptive management and would specifically like to discuss giving an active regulatory role to the Authority and specific procedures for implementing the precautionary approach in this respect.

D. Test mining

19. The present section touches upon draft regulations 7 and 92, among others. Germany proposes the establishment of a new set of regulations.

No exploitation prior to successful test mining

20. Germany reiterates that licensed and successfully conducted test mining should be made a legal prerequisite for any application for exploitation in the geographical area concerned, as well as a mandatory requirement for the approval of a plan of work. Provisions to this effect should be included explicitly in the draft regulations. The conditions, requirements and procedures under which test mining is to be conducted, such as the environmental impact assessment requirement, monitoring requirements, disclosure of scientific results and certification of equipment, should be regulated under a separate set of regulations, for example, in a dedicated part of the regulations on exploitation.

E. Monitoring

21. The present section touches primarily upon the draft provisions of sections 2 and 4 of part IV, as well as annexes IV, VII and VIII.

Monitoring during the initial phase of exploitation

22. Germany considers that the draft regulations should include a provision requiring independent monitoring for a set period of time, such as the first seven years of operations.

Monitoring and provisions for environmental impact assessments

23. The draft provisions relating to environmental impact assessments lack specific and measurable requirements to be met by the contractor. Germany recommends the development of a separate manual for monitoring and assessment activities before, during and after the exploitation phase. The manual could include detailed methodologies for establishing environmental baselines. Only on the basis of standardized data collection can any changes, including the loss of biodiversity, be appropriately detected and reasonable mitigating efforts initiated.

Monitoring of test mining operations

24. Germany recommends the establishment of an independent and legally binding scientific monitoring strategy to validate the environmental impact of test mining operations, with monitoring conducted partly or completely by third parties.

III. Specific issues

25. In addition to the main issues mentioned above, we wish to raise the following points in relation to specific regulations. Most of these issues were already mentioned in our submission of 4 October 2018¹ regarding document [ISBA/24/LTC/WP.1/Rev.1](#):

(a) The Sustainable Development Goals adopted by the United Nations General Assembly with the 2030 Agenda for Sustainable Development should be mentioned as a leading principle for mining operations in the Area (see draft regulation 2);

(b) In accordance with draft regulation 11, only the environmental plans should be placed on the Authority's website. However, it must be ensured that general information on the projects, in particular with regard to the exploitation techniques, is made accessible, so that the public may be able to comment on the environmental plans. In this connection, it is important that the requirements pertaining to the environmental impact statements regarding the provision of information on such aspects as project viability, mineral resource and mining technology be sufficiently clear (see annex IV, paras. 1 and 3, to the regulations);

(c) It should be clarified in the relevant provision that the right to conduct marine scientific research is not curtailed by the exclusivity rights under an exploitation contract (see draft regulation 18);

(d) Before the commencement of commercial production, contractors should be required to revise the environmental plans in particular. Thereafter, only the revised parts should be considered by the Commission and finally approved by the Council. In the case of substantial changes, the public must be involved in this approval procedure (see draft regulation 25, para. 1);

(e) Concerning the modification of a plan of work, we believe that the Commission and the Council need to be involved in the decision as to whether there is a "material change" (see draft regulations 25, para. 1, and 57, para. 2);

¹ Available at www.isa.org.jm/files/documents/EN/Regs/2018/Comments/Germany.pdf.

(f) Any incentives for contractors (see draft regulation 63) should only be provided if fully in line with the principles under draft regulation 2;

(g) Concerning the confidentiality of information, we consider it necessary to establish unambiguous definitions of the information that should be considered confidential or public. Maximum transparency must be ensured in the proposed designation procedures. It should be possible to trace an entity in possession of information designated as confidential in order to enable access to that information where authorization is granted at a later date (see draft regulation 89);

(h) The question remains as to whether the distinction between obligations of the Authority and complementary or residual obligations of national authorities is clear and consistent in draft regulations 32, 37 and 53, among others. There are also open questions relating to the resources, personnel and finances of the Authority in this regard;

(i) Germany strongly recommends that at least the Council have an opt-in possibility for stimulating and influencing the scope, establishment and/or issuance of guidance documents (see draft regulation 95);

(j) As suggested in our submission of 2018, the financial plan should include a cost-benefit analysis demonstrating that the plan of work will allow for a net benefit and should take account of costs to mitigate any impacts on the marine environment (see annex III to the regulations). Germany proposes that an initial discussion on potential approaches be held in the Finance Committee;

(k) The Federal Institute for Geosciences and Natural Resources of Germany, a contractor, based its environmental impact assessment for the collector vehicle test in the German licensed area on the structure of the environmental impact statement template in annex IV. We found the subdivision into sections according to methodology, that is, geological setting, physical oceanographic setting and chemical oceanographic setting, adequate for describing the existing environment in sections 4 and 5, but impractical for describing potential impacts in the different parts of the water column and on the seafloor. For example, the spread and impact of an operational discharge plume and its subsequent deposition includes sedimentological, chemical and oceanographic components that have a combined effect on the environment. In our view, it would be better to work with categories of potential impacts, which would include the operational sediment plumes mentioned in paragraph 8, in order to provide detailed descriptions of the scale of the impacts and the mitigation measures required to minimize them (see annex IV to the regulations);

(l) Certain terms also need to be clearly defined, including “best environmental practices”, “best available scientific evidence” and “best available techniques”. With regard to the last term, we recommend replacing the current

definition (see schedule 1 to the regulations) with the definition established in the European Union industrial emissions directive;²

(m) On a general note, we question the use of the phrase “use their best endeavours” in various sections of the draft regulations, as it does not strike us as the clearest and most practically feasible level of care.

² See Directive 2010/75/EU of the European Parliament and of the Council of 24 November 2010 on industrial emissions (integrated pollution prevention and control), article 3, paragraph 10, namely:

“‘best available techniques’ means the most effective and advanced stage in the development of activities and their methods of operation which indicates the practical suitability of particular techniques for providing the basis for emission limit values and other permit conditions designed to prevent and, where that is not practicable, to reduce emissions and the impact on the environment as a whole:

(a) ‘techniques’ includes both the technology used and the way in which the installation is designed, built, maintained, operated and decommissioned;

(b) ‘available techniques’ means those developed on a scale which allows implementation in the relevant industrial sector, under economically and technically viable conditions, taking into consideration the costs and advantages, whether or not the techniques are used or produced inside the Member State in question, as long as they are reasonably accessible to the operator;

(c) ‘best’ means most effective in achieving a high general level of protection of the environment as a whole.”