



Council

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Draft regulations on exploitation of mineral resources in the Area

Note by the Secretariat

1. At its meeting in August 2017, the Legal and Technical Commission considered a document entitled “Draft regulations on exploitation of mineral resources in the Area”.¹ The Secretariat had prepared the document for the Commission by following the Commission’s previous meeting in February/March 2017, taking into account the Commission’s response to stakeholder comments on the working draft exploitation regulations issued in July 2016 and the outcomes of a number of technical workshops and seminars held from March to July 2017.
2. In the interest of transparency, the draft regulations are being made publicly available in the form in which they were presented to the Commission, as document ISBA/23/LTC/CRP.3*. No attempt has been made to reflect the views of the Commission on the draft, which remains a work in progress.
3. Compared to the working draft exploitation regulations contained in previous reports of the Commission, the draft regulations contained in ISBA/23/LTC/CRP.3* are more streamlined and concise. In this regard, many stakeholders have suggested that technical and administrative detail would be dealt with more appropriately in the respective annexes (as these evolve) and relevant guidance and standards. This approach would facilitate flexibility in amending future guidance in the light of improved knowledge or technology, together with the development of more prescriptive regulations, as time and knowledge advance.
4. The Commission will continue its work on the draft regulations at its next meeting, in 2018. In his report to the Council at the twenty-third session (ISBA/23/C/13), the Chairman of the Commission provides a summary of progress made during 2017, together with a suggested road map and timeline for the further development, adoption and approval of the draft regulations.
5. Stakeholders are invited to provide comments on the draft regulations contained in ISBA/23/LTC/CRP.3*. Such comments will help the Secretariat and the

¹ Available from: <http://bit.ly/2wIr9MT>.



Commission to determine whether the structure and content of the regulations are moving in the right direction, bearing in mind that the provisions will be supported by technical and administrative guidance where necessary. Stakeholders should be aware that what is sought at this point is not a regulation-by-regulation analysis or a redrafting of regulatory language. Some of the questions that could usefully be addressed at this stage by the Council and by other stakeholders are contained in the annex to the present document (see annex).

6. Stakeholders are also invited to familiarize themselves with document [ISBA/23/LTC/6](#), in addition to document ISBA/23/LTC/CRP.3*. Part VII of the draft regulations, relating to financial terms, and specifically section 3, concerning a payment mechanism and royalty liability, remain very much a work in progress at this stage and subject to the validation of, and further discussion on, a financial model and payment scenarios. It is intended for part VII to be the subject of a separate consultation exercise in 2018.

7. The deadline for stakeholder responses is 17 November 2017. Responses will be consolidated and provided to the Commission at its meeting to be held in March 2018. Responses can be sent to consultation@isa.org.jm, including details regarding stakeholders' organizations and their direct and/or indirect interest in activities in the Area. In the interest of transparency and to promote and encourage further discussion, the Authority may publish all submissions in a dedicated area of its website. Should stakeholders wish for comments and personal details to be kept confidential, they should be expressly state it in any submission. The default position is that stakeholders' comments and personal details may be made publicly available by the Authority.

Annex

Questions relating to the draft regulations on exploitation of mineral resources in the Area

General questions

1. Do the draft regulations follow a logical structure and flow?
2. Are the intended purpose and requirements of the regulatory provisions presented in a clear, concise and unambiguous manner?
3. Is the content and terminology used and adopted in the draft regulations consistent and compatible with the provisions of the United Nations Convention on the Law of the Sea and the 1994 Agreement relating to the implementation of Part XI of the Convention?
4. Do the draft regulations provide for a stable, coherent and time-bound framework to facilitate regulatory certainty for contractors to make the necessary commercial decisions in relation to exploitation activities?
5. Is an appropriate balance achieved between the content of the regulations and that of the contract?
6. *Exploration regulations and regime*: are there any specific observations or comments that the Council or other stakeholders wish to make in connection with their experiences, or best practices under the exploration regulations and process that would be helpful for the Authority to consider in advancing the exploitation framework?

Specific questions

1. *Role of sponsoring States*: draft regulation 91 provides for a number of instances in which such States are required to secure the compliance of a contractor. What additional obligations, if any, should be placed on sponsoring States to secure compliance by contractors that they have sponsored?
2. *Contract area*: for areas within a contract area not identified as mining areas, what due diligence obligations should be placed on a contractor as regards continued exploration activities? Such obligations could include a programme of activities covering environmental, technical, economic studies or reporting obligations (that is, activities and undertakings similar to those under an exploration contract). Are the concepts and definitions of “contract area” and “mining area(s)” clearly presented in the draft regulations?
3. *Plan of work*: there appears to be confusion over the nature of a “plan of work” and its relevant content. To some degree, this is the result of the use of terminology from the 1970s and 1980s in the Convention. Some guidance is needed as to what information should be contained in the plan of work, what should be considered supplementary plans and what should be annexed to an exploitation contract, as opposed to what documentation should be treated as informational only for the purposes of an application for a plan of work.

Similarly, the application for the approval of a plan of work anticipates the delivery of a pre-feasibility study: have contractors planned for this? Is there a clear understanding of the transition from pre-feasibility to feasibility?
4. *Confidential information*: this has been defined under draft regulation 75. There continue to be diverging views among stakeholders as to the nature of “confidential information”, with some stakeholders considering the provisions

too broad, and others too narrow. It is proposed that a list that is as exhaustive as possible be drawn up identifying non-confidential information. Do the Council and other stakeholders have any other observations or comments in connection with confidential information or confidentiality under the regulations?

5. *Administrative review mechanism*: as highlighted in Authority discussion paper No. 1,² there may be circumstances in which, in the interests of cost and speed, an administrative review mechanism could be preferable before proceeding to dispute settlement under Part XI, section 5, of the Convention. This could be of particular relevance for technical disputes and determination by an expert or panel of experts. What categories of disputes (in terms of subject matter) should be subject to such a mechanism? How should experts be appointed? Should any expert determination be final and binding? Should any expert determination be subject to review by, for example, the Seabed Disputes Chamber?
6. *Use of exploitation contract as security*: draft regulation 15 provides that an interest under an exploitation contract may be pledged or mortgaged for the purpose of obtaining financing for exploitation activities with the prior written consent of the Secretary-General. While this regulation has generally been welcomed by investors, what additional safeguards or issues, if any, should the Commission consider?
7. *Interested persons and public comment*: for the purposes of any public comment process under the draft regulations, the definition of “interested persons” has been questioned as being too narrow. How should the Authority interpret the term “interested persons”? What is the role and responsibility of sponsoring States in relation to public involvement? To what degree and extent should the Authority be engaged in a public consultation process?

² International Seabed Authority, “Dispute resolution considerations arising under the proposed new exploitation regulations”, discussion paper No. 1. Available from: www.isa.org.jm/files/documents/EN/Pubs/DPs/DP1.pdf.