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Stakeholder Submission to ISA 1

October 05, 2018

Submission in Response to the Stakeholder Survey Initiated by the International Seabed Authority (ISA) Related to the revised draft regulations on exploitation of mineral resources in the Area (ISBA/24/LTC/WP.1/Rev.1 (hereafter: "Draft") and the accompanying Note by ISA's Legal and Technical Commission ISBA/24/C/20 ("LTC Note")

Preface:

1. The personal details of the author are attached in a separate document as **Enclosure 2** for easier reference
2. **Express consent is hereby given to ISA to (a) publish the contents of this submission, wholly or in part, on the area of its website dedicated for such publications, and (b) include the author's name and organization in such publication**.

Both in the interest of time and because the undersigned is of the opinion that regarding contents, the Draft has meanwhile reached a high degree of maturity, this submission largely concentrates on the **format** of the Draft. Admittedly, the remarks to be made take the viewpoint of a practitioner who would later be supposed to handle the finished Regulations in daily practice. Yet, in drafting regulations to be observed and lived up to, it may help to take this perspective additional to any more legal, scientific or political considerations. Moreover, the maturity of the Draft on the merits allows to make these more formal suggestions at this point in time. If some of the comments may take the shape of criticism, this is rather attributable to the limited capabilities of the undersigned to express himself otherwise, and shall in no way be deemed to detract from his appreciation of the skilful and ambitious work hence undertaken by the drafters.

1. Consistency

Notably, the structure of the Draft has substantially changed from the 2017 predecessor version[1]. Although this provides for a somewhat better readability as compared to such predecessor, it apparently could not be avoided to place provisions on related topics in diverse, unrelated sections. As an example, in Part III ("Rights and Obligations of Contractor") one will find, amongst a variety of other topics, a number of obligations related to the preservation of the environment (e.g. in Sections 3 and 4). On the other hand, there is Part IV "Protection and perservation of the Marine Environment", beginning about ten regulation numbers further down, holding the lion's share

[1] published as ISBA/23/LTC/CRP3

of remaining obligations on this matter. Both from a drafter's point of view (increased risk of duplication of rules) and for a later implementer (be it an applicant/contractor, or an ISA organ, or court) this distribution of rules may create obstacles which might be considered to avoid by bringing topically related rules under one heading. This suggestion does not apply as far as the provisions belong e.g. to clearly distinct procedural steps (e.g. application – performance – enforcement) or different addressees (e.g. Authority – applicant), yet is recommended to follow if the addressee is the same and observance is required throughout.

2. Systematic approach

Like its predecessor versions, the Draft still leaves open the question whether it could not be condensed somewhat, without losing ist gist, but allowing to find rules applicable to one topic in one spot only. The comment appears as a variation of the theme discussed sub 1 above, yet goes somewhat further in its intent to condense the instrument and avoid duplicate provisions. The purpose of this exercise would be to facilitate the application of the Regulations on Exploitation once they are in force, both for the applicant/contractor, but also for the other actors in the system (Commission, Council, Sponsoring State).

2.1 Contractual rights and obligations

2.1.1 Conceptual view

Clearly, the main object of Regulations on Exploitation is the description of how an entity interested in exploitation of marine minerals has to operate in order to obtain, and then implement, a permission to exploit. The contract being the chosen model to describe the relationship between such entity and the authority granting such permission, it follows that the contractual rights and obligations should form the core piece of the regulatory body to be created. To allow the contractor to know its obligations and act

accordingly, it further follows that the contractual rules laid down in the Regulations on Exploitation should both be as comprehensive as possible regarding coverage of the subject, and – looking at the Regulations in total - complete in the sense that they are either spelled out in the contract, or clearly incorporated by numerical reference to a provision elsewhere in the Regulations.

For the drafter of the Regulations on Exploitation, this allows basically the following ways (which, in the opinion of the undersigned, appear to have been applied in a sort of mixed manner in the Draft):

(a) attach a contract template which incorporates the bulk of applicable rights and obligations, with no parallel or additional regulations creating obligations appearing anywhere in the main body, or other annexes, of the Regulations; in exceptional cases, incorporation of such an "external" regulation by numerical or terminological reference. A case where this will make sense are those contract parts which require substantial individualization by the respective contractor, such as description of company, mining area, or technical systems, in which case an instruction rather than a pre-worded provision is what could be expected from the Regulations; or

(b) attach a "skeleton" contract template providing mainly headlines to the contractual topics, with references under each headline to the exact location of the relevant provision or instruction to be found in the main body, or other Annexes, of the Regulations.

2.1.2 Example in the Draft: Contract Schedules

The Draft, appreciably, has followed the reference method as far as the Schedules to the contract template are concerned. The contract template itself forming Annex IX to the Draft (with standard clauses to be contained therein forming an own Annex, namely Annex X), seven of the planned contractual Schedules are just enumerated by headline and a keyword signifying what they have to contain (e.g. "Schedule 6: The Environmental Management and Monitoring Plan").

The contract drafter will then find in the Draft an Annex each dedicated to these keywords (e.g. Annex VII for the Environmental Management and Monitoring Plan), providing more or less detailed instructions about what the applicant/contractor would have to enter into the respective Schedule. Somewhat inconsistently though, the main body of the Regulations also contains provisions directly dealing with the subject of the Schedule: to remain in the example, draft regulations 46 bis/ter, 49 and 50 contain both descriptive elements of an Environmental Management and Monitoring Plan and related obligations of the contractor. Would it not have been appropriate to move the contractor obligations into the contract template/standard clauses (Annexes IX/X), and the descriptive part into Annex VII?

2.1.3 Areas showing potential

In other areas, the Draft does follow neither method (a) nor (b) with the consequence, that it is up to the contractor (or other implementer of the Regulations of Exploitation) to find its way through the instrument in search of e.g. the specific obligations of the contractor regarding one and the same topic, making finds both in the contract template and the main body of the Draft. With a "catch all clause" in place in the form of the undertaking in Section 3 of Annex X, item 3.3 "the Contractor shall, in addition: (a) Comply with the Regulations….", the system chosen in the Draft is of course not faulty, but may turn burdensome for the implementer.

The undersigned acknowledges that in the present state of drafting it might be premature to weave a tight network of numerical references which would have to be re-vamped with every new revision of the Draft. However, either a placeholder for such a reference, or sometimes even better, a direct removal of the clause into its proper place, may be a viable solution.

To give two further examples:

(a): Contractor obligations regarding the Sponsoring State

The Sponsoring Certificate, constituting one of the cornerstones of the

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Draft's system to ensure compliance by the contractor, is rightfully placed as a necessary element already of the application for the approval of a Plan of Work (draft regulation 6). As far as the contract – and contractor's obligations emanating therefrom - is concerned, there is thus only the need to oblige the contractor to maintain a valid Sponsoring Certificate troughout the contract period, and to take action once a Sponsoring State should withdraw its sponsoring commitment. Looking at the Draft, there is a specific contractor obligation in Section 11 of the standard contract clauses (Annex X to the Draft) to take action in case of a termination of a sponsorship, and a consequence of contract termination if no other sponsorship is obtained. Section 11 generally references "the Regulations" i.a. for the deadline, and contents, of a new Sponsorship Certificate to be submitted. A provision on termination of sponsorship is then to be found in draft regulation 22. Among other matters, this regulation in its para (1) creates a distinct obligation of the contractor to ensure its being sponsored during the exploitation term, and in para (6) provides that the Council may require the contractor to suspend mining operations pending issuance of a new sponsoring certificate. In para (3), the regulations partly duplicate – with slightly deviating wording - Section 11 of the standard contract clauses in obligating the contractor to procure a new sponsor compliant with the qualification requirements, and in providing that the contract shall terminate if a new Sponsoring State is not timely found. A suggestion might be to (a) move the contents of paras (1) and (6) – and (7) for that matter - into Section 11 of Annex X, (b) remove para 3 while making sure that Section 11 has the complete obligation in this respect, and (c), if deemed necessary, just leave a short remark in draft regulation 22 (whose other provisions should remain as they do not directly affect the contractor) that the contractor related rules are to be found in Section 11 of Annex X.

(b) Enforcement, termination

Section 12 of the standard contract clauses (Annex X) contains a quite elaborate and well crafted set of provisions dealing with means and remedies which the Council may use against a non-compliant contractor, complete with prerequisites for the employment of

such means. Unless prompted by the "catch all clause" referred earlier above, the contractor however will not be directed to find out that, in the form of draft regulations 101 and 102, there is, in the main body of the Draft, an additional set of enforcement measures at the disposal of the Authority, namely both a compliance notice (with specified requirements to be fulfilled) to be issued by the Secretary General (draft regulation 101) and the possibility by the Authority to take remedial action in the form of any measure "it considers reasonably necessary to prevent or Mitigate the effects or potential effects of a Contractor's failure to comply…." (draft regulation 102, para 1), with cost for those measures being due by the contractor and to be recovered by the Environmental Performance Guarantee to be lodged by the same (*ibid*., para 2). In the opinion of the undersigned, it would be preferrable to have all elements of such an essential contract element as the remedy of breaches clearly spelled out in the contract itself, all the more so, if – as is the case here – the different sets of rules in the standard contract clauses on the one hand and the main body of the Draft on the other seem to be interrelated, in that (a) the compliance notice by the Secretary General (draft regulation 101) appears to be a prerequisite for the Council's suspension/termination right (Section 12.1 (a) of the standard contract clauses, provided that "written warnings of the Authority" in said provision are to be understood to be identical with the "compliance notices"), and (b) the consequences of one and the same action (here: the compliance notice) are different in both parts of the Draft (draft regulation 102: remedial measures by Authority; Section 12.1.(a): suspension or termination of contract by Council).

The above examples may show that at this stage of drafting it might already be helpful to perform some structural "housekeeping" on the Draft, with the side effect of avoiding consistency problems e.g between the contract template and the rules in the main body of the draft.

2.2 Other parts of the Draft

The observations and suggestions made with respect to the

contractor rights and obligations are in principle also applicable to some other parts of the Draft. For example, Annex I to the Draft describes the "Application for approval of a Plan of Work to obtain an exploitation contract", the second substantial document to be prepared and submitted by the contractor candidate. The Annex is constructed as a set of instructions of what the applicant has to provide (rather than a template with preformulated text). However, while this set begins with some detailed instructions, it remains rather vague when it comes to one of the presumably most decisive parts in the eyes of the Authority once called to examine it, namely the Attachments. Section VII (No. 26) of Annex I only provides: "List all the attachments and annexes to this application…" without specifying what they are supposed to be. Instead, these are to be found in the Draft under Part II Section I "Applications", listing the types of attachments in reasonable detail in draft regulation 7 subsection 3 lits a) though j. Additionally, draft regulations 5 et seq. provide either identical or more elaborate versions of the instructions already given in Annex I. The risk inherent in repetitious wording in different places materializes in provisions like draft regulation 7 subsection 2 (a), as compared to Annex I, Section V "Undertakings", ad No. 24 (a): while the former provision was changed by recent drafting in that the applicant is no longer held to "accept as enforceable….obligations created by the provisions of the Convention…" [1] , the omission is implemented in draft regulation 7, yet not in Annex I Section V where the reference still remains in its original wording. The undersigned approves of the omission, as the link to the Convention would otherwise create a somewhat questionable construction of directly obligating a non-state entity (e.g. a company applying for a Plan of Work approval) to comply with rules of an instrument of public international law primarily addressing states; however, he suggests that this omission should then be maintained throughout the Regulations on Exploitations including its Annexes. Moving all (or most) of draft regulations 5 through 8 into Annex I, respectively eliminating them altogether to the extent already formulated in the latter place, would suppress possible ambiguities and exonerate the applicant from examining whether a second, distinct set of rules contains additional obligations for him when filling out the application.

[1] compare ISBA/23/LTC/CRP3, draft regulation 4 No. 2. (a)

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3. Attempt of a General Suggestion on Format

3.1 In the opinion of the undersigned, a possible re-formatting of the Regulations on Exploitation should, in the light of the observations made above, be guided by two main principles:

(a) avoidance of duplication of provisions;

(b) to the extent possible, concentration of all provisions on the same topic with the same addressee in one place.

3.2 In the context of the complete Regulations, the distribution of regulations between main body and Annexes could be handled as shown in the table enclosed hereto as **Enclosure 1**. In the course of review and re-formatting suggested in this table, the two principles of duplication avoidance and concentration should be applied in parallel. In the table,

- regulation and Annex numbering correspond to those used in the actual Draft;
- no change from the existing numbering of Parts (in the main body) and Annexes is suggested. Numbering of draft regulations, or of any subdivisions in the Annexes, may be subject to change as a consequence of the moving/condensation of provisions suggested here, but no specific proposal for such possible re-numbering is made at this time
- the abbreviation "DR" means "Draft Regulation"
- "main body" means the part of the Draft preceding the Annexes
- "→" means "move to"

3.3 upon completion of the operation suggested in Exclosure 1, it may, even after some text has been eliminated to remove duplication/overlap, appear that the overall distribution of text in the Regulations leans somewhat towards Annex X. However this seems justified on account of the fact that the core intention of the Regulations is the codification of rules of conduct of the contractor. At the same time, this opens the possibility to enter into the main body, under the respective Parts, any commentaries which the Authority may find useful to help the contractor (and the other actors in the DSM system) to better understand the purpose and application of the contractual provisions.

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The above plus Enclosures 1 and 2 respectfully submitted

Gerlingen, October 05, 2018

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Enclosure 1

Main body of Regulations	Removal to Annexes	Comments
Part I: Preamble and DRs 1 through 4 to remain in main body, however	DR4 No. 4 → Annex X	
Part II: Sections 2 through 4: retain in main body	Section 1 → Annex I	Include reference in Part II for Section 1 to be found in Annex I; eliminate duplications and possible inconsistencies in (new) Annex I Include reference in Annex I stating that further processing of applications is to be found in Part II of main body
Part III: retain in main body: DR 18; 20; DR 22 sec. 2, 4, 5. Consider moving DR 103 to DR22	Remainder of Part III → Annex X	eliminate duplications and possible inconsistencies in (new) Annex X; include reference in beginning of Part III that contractor obligations in detail are set out in Annex X
Part IV: retain in main body: DRs 46, 51 No. 2; Section 4	Section 1bis "surviving alternative" → Annex VII Sections 2 and remainder of 3: →Annex X	Include reference in Part IV introducing Annex VII and advising that specific contractor obligations are set out in Annex X
Part V:	→ Annex X	Reference in Part V
Part VI: retain in main body: DR57 No.1	DR57 No. 2 and 3 → Annex VIII DR57 Nos 4,5, DR58, 59 → Annex X	Include reference in Part VI to Annexes VIII and X;
Part VII: retain in main body: DRs 60, 61, 63, 79	Remainder of Part VII → Annex X	Include reference in Part VII to Annex X. Check DR80: in view of Section 16 of Annex X an "automatic" adjustment (even if "in consultation with contractor") may be question-able. DR 79 No. 2 is stricter.
Part VIII: retain in main body: DR 86	Remainder of Part VIII → Annex X	

Main body of Regulations	Removal to Annexes	Comments
Part IX: retain in main body: DR90	Remainder of Part IX → Annex X (yet, see comment)	Presently the confidentiality provisions are drafted to mainly cover the relationship between the contractor and the organs and bodies of ISA. This would advocate a removal into the contract clauses as suggested here. Yet, to be considered whether they shall not also apply to relationship with any other involved entity or individual (applicants, advisers, subcontractors to ISA, etc). If so desired, one method would be to let Part IX have a general provision firstly referencing to the pertinent part in Annex X, and secondly ruling that the same provisions shall be made applicable to those other entities/individuals (e.g. by NDA)
Part X: retain in main body: DRs 92, 93	DR91 → Annex X	
Part XI: retain in main body: DR 100 (=Section 2); Consider moving DR103 to DR 22	Sections 1 and 3→ Annex X	Re DRs 95 through 97: it is presently assumed, that these provisions are primarily intended for application vs contractors. If inspectors shall also operate as provided vs. other entitites, a procedure like recommendet for Part IX above may be considered.
Part XII: retain in main body a version eliminating the term "exploitation contract" and "and of the Contractor"	Replace Section 18 with a version of DR104 holding the terms suggested to eliminate in left column	
Part XIII: retain in main body		
Annex IX:		In the listing „the Schedules" at the end of the template, a (bracketed) reference behind each schedule to the Annex explaining its contents may be helpful

Enclosure 2

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Andreas Kaede is a German lawyer (Rechtsanwalt), based in Gerlingen near Stuttgart, Germany. Born 1956, he studied law in Bonn and received his degrees in 1982 and 1985. After postgraduate assignments at the institutes of international law at the Bonn and Kiel universities (which latter first brought ihm in touch with the law of the sea) he started a career as corporate lawyer in a large Stuttgart based multinational company. For 27 years he worked predominantly in the field of intellectual property contract drafting, negotiation, and litigation, be it licensing, technical co-operation, or mergers and acquisitions. Since 2008, Andreas Kaede was head of the corporate licensing department of the company, managing and overseeing its IP contract practice on a world wide basis, yet always keeping an eye on UNCLOS and the regimes codified by it. Retiring from the industry function in 2015 he has established private practice in co-operation with the Stuttgart based law firm of Haver & Mailaender Partnerschaft mbB. His present main fields of activity include IP contracts and related strategic consulting, as well as the law of the sea, more specifically deepsea mining, where for the last years he has been closely following the process toward regulation of the exploitation of minerals from the ocean floor, e.g. by participation in the Stakeholder Consultation process initiated by the International Seabed Authority (ISA) in conjunction with the drafting works on the planned "Draft Regulations on Exploitation of Mineral Resources in the Area". Moreover, in several presentations held over the last years at conventions of i.a. the International Marine Minerals Society and the World Ocean Council, as well as at events of the "Deepsea Mining Summit" series, he has put a focus on the identification and assessment of technology transfer obligations under deep sea mining regimes such as the ISA rules. Andreas Kaede is a member of the Stuttgart bar association, the Licensing Executives Society (LES), and the German-American Lawyers' Association (DAJV).