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Draft Regulations on Exploitation of Mineral Resources in the Area

The Norwegian Ministry of Foreign Affairs refers to document ISBA/23/C/12 regarding the draft regulations on exploitation of mineral resources and the invitation to provide comments on the draft regulations contained in ISBA/23/LTC/CRP.3. On behalf of the Norwegian Government, the Ministry hereby submits comments to the draft regulations.

Due to the complex and comprehensive nature of the draft regulations, the Ministry has, in preparing Norway's comments, benefited from inputs from the Norwegian Petroleum Safety Authority, in addition to remarks made by the Ministry of Justice and Public Security, the Ministry of Trade, Industry and Fisheries and the Norwegian Institute of Marine Research.

As a Member State of the Authority, and a member of the Council during the years 2018-2020, Norway looks forward to take an active part in the process of developing regulations on exploitation of mineral resources. The Ministry believes that Norway's extensive experiences related to off-shore petroleum activities as well as a strong tradition for combining combining sustainable commercial exploitation of the oceans with environmental protection, may be useful in this regard.

Part II Applications for approval of Plans of Work for Exploitation in the form of Contracts

Experience from off-shore petroleum activities indicates that the quality, capacity and competence of the contractor as well as the contractor taking responsibility for and closely monitoring their activities are key elements for achieving prudent operations. The contractor must be capable of ensuring that all activities comply with the health-, safety- and environmental standards applicable.

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The Draft Regulations appear to grant comprehensive rights to contractors. In order to ensure prudent activities, and respect for health- safety and environmental standards, the Commission's assessments of applicants' capability in these fields will therefore be important.

With regard to Draft Regulation 7 (3c) it should be noted that probabilities in risk assessment are notoriously difficult to specify. It is therefore important to carefully describe the interlink between environmental impact assessment and environmental risk assessment.

Moreover, it is unclear if the performance guarantee in Draft Regulation 9 may cover damage to the environment.

Part IV Environmental matters

Norway supports the inclusion of a number of core environmental principles in Part IV. They include the reference to the precautionary approach in Draft Regulation 17 (c) and the obligation to prepare an Environmental Scoping Report and an Environmental Impact Statement. Draft Regulation 23 (6), in which it is stated that "*no Mining Discharges may be made unless expressly permitted under the exploitation contract or these Regulations*", should also be mentioned.

According to Draft Regulation 18 (2) "*interested persons*" may respond to environmental impact assessments or environmental risk assessments. To ensure objective evaluations and processes it should be considered to reach out to qualified governmental and private institutions for responses.

In Draft Regulation 24 it may be considered to specify a higher degree of details in the reporting, and to indicate what deviations from the reporting requirements are unacceptable. It may also be considered if the Regulation should specify how an independent assessment should be carried out and what requirements the one carrying out the assessment should meet.

Part V Obligations of the Contractor

Under the present draft, contractors shall ensure that ships, platforms and installations used for extraction have the necessary class approval. In this context, the draft refers to the flag state regulations and to international conventions such as SOLAS, MARPOL and the International Convention on Standards of Training, Certification and Watchkeeping for Seafarers (STCW), see Draft Regulation 34 1 (b) and 3 (a). However, the class requirements have largely been developed for and adapted to maritime activities. The exploitation of resources on the seabed may also be viewed as an industrial activity. The need for overarching requirements to ensure identical regulation of safety and risk factors linked to the industrial extraction of minerals should be assessed.

In general, the handling of the interfaces between maritime activities and industrial extraction activities is a factor that may be examined more closely, since maritime requirements are not necessarily suited in all respects to covering matters of a more industrial character.

Part VIII Information gathering and handling

The scope of protection for confidential information under part VIII should be further clarified in relation to the transfer, termination or expiration of exploitation contracts.

It follows from Regulation 75(4) that “[n]othing in these Regulations shall affect the rights of a holder of intellectual property”.

Undisclosed information enjoys a significant degree of protection as an intellectual property right pursuant to Article 39 (2) of the TRIPS agreement, which constitutes Annex 1C of the WTO agreement, as long as such information:

- a) is secret in the sense that it is not, as a body or in the precise configuration and assembly of its components, generally known among or readily accessible to persons within the circles that normally deal with the kind of information in question;*
- b) has commercial value because it is secret; and*
- c) has been subject to reasonable steps under the circumstances, by the person lawfully in control of the information, to keep it secret.*

It is possible that data and information gathered by the Contractor during the contract period, which have been designated by the Contractor as confidential information in accordance with Draft Regulation 75 (1), may meet the requirements in Article 39 (2) of the TRIPS agreement. Furthermore, it is possible that some of this data and information, meeting the requirement in Article 39 (2) of the TRIPS agreement, may fall under Draft Regulation 77 (1) as data and information “*that are required for the effective exercise of the powers and functions of the Authority in respect of the Contract Area in accordance with the provision of this regulation*”.

However, as the protection of intellectual property rights in Draft Regulation 75 (4) seems to take precedence over Draft Regulation 77, it may be difficult for the Authority to fully exploit the data and information transferred under Draft Regulation 77 without the consent of the Contractor. For instance, the Authority may be prohibited from sharing such data and information with new Contractors in order to facilitate smooth transfers of exploitation contracts.

While undisclosed data and information concerning the technology or commercial strategies of the Contractor should enjoy a significant degree of protection under the Regulations, it is not evident that the same degree of protection should apply to data and information concerning the Contract Area, such as detailed information about its geological characteristics, which the contractor has gathered during performance of the contract.

Part XI Inspections

Further considerations is necessary with regard to the Inspectors to clarify their role and the control and monitoring responsibility that is conferred to them.

Part XII Enforcement and Penalties

Significant responsibilities lie with the Sponsoring State. Although this solution may prove effective and satisfactory under normal circumstances, Part XII does not seem to address situations where a sponsorship is terminated, and the Contractor fails to obtain a new sponsoring State within the time limit set in Draft Regulation 14 (3). Although such failure from the Contractor would lead to the automatic termination of the exploitation contract, this does not necessarily exclude the need for enforcement pursuant to Draft Regulation 91.

Annex V

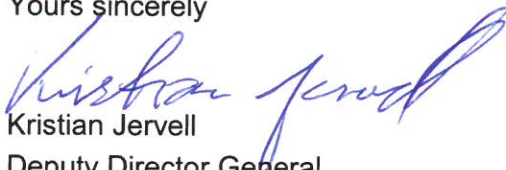
In paragraph 2.3, a reference to the United Nations Fish Stock Agreement (UNFSA) and to Regional Fisheries Management Organizations (RFMOs) could be included.

In addition to the proposed stipulation in paragraph 6.2.1, it should be a requirement that relevant RFMOs are informed about any plans for mineral exploitation.

In paragraph 8.7 it may be included that RFMOs should be informed about any cumulative effects considered to be the result of mineral exploitation.

The Ministry respectfully regrets that this submission arrives after expiration of the deadline. Norway looks forward to continue working with the Authority and other interested States and partners in developing the Regulations on Exploitation of Mineral Resources in the Area.

Yours sincerely



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