

Intersessional WG on Test Mining (DR 48 (bis)) - co-hosts: Belgium and Germany

Comments by the Advisory Committee on Protection of the Sea (ACOPS)

With regard to the definition of ‘test mining’, ACOPS suggests a way forward for consideration by this Working Group, as follows.

1. In drafting rules, regulations and procedures (RRP) to implement a legally binding governing instrument, employing terms not found in the governing instrument must be done with great caution. This caution is even more necessary when that governing instrument and the implementing (RRP) must be translated into the six official UN languages, all of which have equal legal validity.
2. ‘Test mining’ as a term for the activity addressed by the Working Group is not found in the Law of the Sea Convention (the Convention) or in the Part XI Implementing Agreement (IA).¹
3. The Convention takes a different approach,² as follows:
 - 3.1 It refers to ‘testing mining and processing *systems*’ [emphasis supplied] for regulation (Annex III Article 17 (2)(b)(ii)), with an additional nuance for testing “equipment.” (See Annex III Article 17 (2)(g).)
 - 3.2 It specifically sets this ‘systems approach’ to testing in the context of:
 - a) the *exploration* phase;³ and
 - b) as an element relevant to setting the *duration* of that phase by the regulator. (Annex III Article 17 (2)(b)(ii).)
 - 3.3 It adopts *production*-centered and quantifiable *scale* criteria to distinguish between:
 - (a) production (i.e., “recovery operations”⁴ [of nodules] sufficient for, but not exceeding what is needed to supply “small and medium-sized processing plants for the purpose of testing mining and processing⁵ systems” (Annex III Article 17 (2)(b)(ii)); and
 - (b) “large-scale mining and processing⁶ systems” (Annex III Article 17 (2) (c)) and/or “sustained large-scale recovery operations” and/or “large-scale production.” The latter three are assigned to the *exploitation* phase (Annex III Article 17 (2) (c) and (g)).

¹ The present author has commented before on the absence of ‘test mining’ in the Convention, e.g., when the topic arose as an agenda item at the UBA/BGR/ISA International Workshop (Towards an ISA Environmental Management Strategy for the Area), Berlin, 19-24 March 2017; at the time ‘pilot mining’, also not in the Convention or the IA, was also being used.

² Note that this approach is also applicable, *mutatis mutandis*, to seafloor massive sulphides and Co-rich Fe-Mn crusts.

³ However, for a nuance re the potential for testing in the *exploitation* phase, see note 5 *infra*.

⁴ Annex III Article 17 (2) (g); given its use in the Convention in this specific context, “recovery operations” would be a legally acceptable substitute for “mining” in drafting RRP.

⁵ “Processing” in this context would also include “shipboard processing” as per Annex III Article 17 (2) (f).

⁶ *Ibid*.

4. The Convention provides further assistance in making the above distinction by linking the *quantity* of [nodules] recovered to the purpose of the “recovery operations”:

“Commercial production shall be deemed to have begun if an operator engages in sustained large-scale recovery operations which yield a quantity of materials sufficient to indicate clearly that the principal purpose is large-scale production *rather than production intended for information gathering, analysis or the testing of equipment or plant.*” (Annex III Article 17 (2) (g).) [Emphasis supplied.]

5. Therefore, ACOPS suggests that ‘test mining’ be clearly designated as a ‘term of art’ referring to the *collective* set of activities, including “recovery operations,” required to test *mining systems* and *equipment* in the exploration⁷ phase under specified operational conditions and for specified purposes as set out in the Convention. To avoid confusion in the RRP, ‘test mining’ should always appear with single quotation marks, as is done here. This approach should enable the focus of the work of the present working group to shift to defining the *production-centered scale* criteria envisaged by the Convention for ‘test mining’, for which the technical input of the contractors is essential.

6. Finally, this approach, together with the additional defined *production-centered scale* criteria, should also facilitate development of RRP for the environmental impact assessment (EIA) process to be associated with ‘test mining’, pursuant to Article 17(2)(f).

7. ACOPS appreciates the opportunity to participate in this Working Group.

Submitted on behalf of ACOPS, with best wishes,
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⁷ Note that the phrasing of Annex III Article 17 (2) (g) arguably suggests that the Convention envisages some testing in the exploitation phase.