

Draft regulations on exploitation of mineral resources in the Area (ISBA/25/C/WP.1)

Comments of the Kingdom of the Netherlands

General comments

- Matters pertaining to the institutional functioning under the draft regulations need to be further clarified. This relates in particular to the appropriate allocation of powers and functions to the different organs of the Authority.
- The issue of effective control requires clarification enabling the sponsoring State to carry out its obligations and assume responsibility under articles 139 and 153 of the Convention and article 4(4) of Annex III to the Convention.
- The term “monopolize” used in the draft regulations needs to be clarified.
- Where applicable, the required ‘Guidelines’ for operationalizing many of the draft regulations would need to be in place (cf. e.g. Draft regulations 7(4), 11(1)(a) and 13(1)(a). We have counted over 50 references to ‘Guidelines’.
- Where applicable, the required ‘Standards and Guidelines’ for operationalizing the draft regulations need to be in place (cf. e.g. Draft regulations 49 and 53).
- Finance Committee: the role of the Finance Committee under the draft regulations is limited to matters dealing with the Environmental Compensation Fund (Regulations 54, 56, 84 and 86). In view of AGXI/A/S7(1)(a) and AGXI/A/S9(7)(f), there seems to be an omission in the draft regulations as to the specific role of the Finance Committee to make recommendations to the Assembly and the Council regarding financial and other economics benefits derived from activities in the Area.
- Good Industry Practice is a vital component for the production phase. How will this concept - described under the “Use of terms” (Schedule) - be operationalized?

Specific comments on the draft regulations

PART I INTRODUCTION

➤ Regulation 4 Protection measures in respect of coastal States

Paragraph 3

- While the Secretary-General shall immediately inform the LTC, the contractor and the sponsoring State, after having being notified by the coastal State, the follow up is based on reasonable opportunity and reasonable time.

Question: what is reasonable?

Paragraph 4

4. *If the Commission determines, taking account of the relevant Guidelines, that there are clear grounds for believing that Serious Harm to the Marine Environment is likely to occur, it shall recommend that the Council issue an emergency order, **which may include an order for the suspension or adjustment of operations**, pursuant to article 165(2)(k) of the Convention .*

Comment: Paragraph 4 addresses the situation of the LTC determining that there are clear grounds for believing that serious harm is likely to occur, based on Guidelines (to be developed). Accordingly, the LTC shall recommend that the Council issue emergency orders to prevent serious harm to the marine environment. In accordance with article 165 (2)(k), the emergency order may include orders of suspension or adjustment of operations.

Suggestion: include “**which may include an order for the suspension or adjustment of operations**” to the sentence.

Paragraph 5

Paragraph 5 addresses the situation where the LTC determines that serious harm or threat of serious harm is likely to occur or has occurred and has determined that this is attributable to a breach of contract. The actions to be undertaken after this determination by the LTC refer to draft regulation 103 (*Compliance notice and termination of exploitation contract*) as well as article 165 (2) (m) of the Convention.

Comment: Under Regulation 4 (5), following determination by the Commission of a possible breach of contract, the Secretary-General shall issue a compliance notice or direct an inspection of the contractor’s activities. We would suggest adding a paragraph that requires the Secretary-General to inform the Council of the actions taken under paragraph 5 (cf. draft regulation 33 (4)).

PART II

APPLICATIONS FOR APPROVAL OF PLANS OF WORK IN THE FORM OF CONTRACTS

SECTION 1

APPLICATIONS

➤ Regulation 5 Qualified applicants

Comment: The issue of effective control requires clarification enabling the sponsoring State to carry out its obligations and assume responsibility under articles 139 and 153 of the Convention and article 4(4) of Annex III to the Convention.

SECTION 3

CONSIDERATION OF APPLICATIONS BY THE COMMISSION

➤ Regulation 13 Assessment of applicants

Paragraph 1

1. The Commission shall determine if the applicant:

..... ;

(d) Has satisfactorily discharged its obligations to the Authority;

.....

Comment: With respect to draft regulation 13 (1)(d), we suggest specifying/clarifying what is meant by “the obligations of the applicant”. Are these the obligations of the contractor under the exploration contract or any other obligations? Since the Commission will be assessing the capability of the applicant, having clarity on what exactly is meant by “its obligations to the Authority” under paragraph 1(d) is necessary. This comment is also related to the fact that under Regulation 12 (4)(c), the Commission shall consider “the previous operating record of responsibility of the applicant”.

➤ Regulation 15 Commission’s recommendation for the approval of a Plan of Work

Paragraph 3

3. The Commission shall not recommend the approval of a proposed Plan of Work if it determines that:

- (a) Such approval would permit a State party or entities sponsored by it to monopolize the conduct of activities in the Area with regard to the Resource category in the proposed Plan of Work; or

Comment: The term “monopolize” needs to be clarified (cf. also Regulation 23 (5)(b)).

PART III

RIGHTS AND OBLIGATIONS OF CONTRACTORS

SECTION 1

EXPLOITATION CONTRACTS

➤ Regulation 18

Rights and exclusivity under an exploitation contract

Paragraph 1

1. An exploitation contract shall confer on a Contractor the exclusive right to:

- (a) Explore for the specified Resource category in accordance with paragraph 7 below; and
(b)

7. In relation to Exploration activities in the Contract Area conducted under an exploitation contract, the applicable Exploration Regulations shall continue to apply **and as set out in the relevant Guidelines**. In particular, the Contractor shall be expected to continue to show due diligence in conducting Exploration activities in the Contract Area, together with the payment of applicable fees and the reporting of such activities and its results to the Authority in accordance with the applicable Exploration Regulations, including under regulation 38(2)(k).

Comment: The Netherlands seeks clarification as to the content of “the relevant Guidelines”. In accordance with e.g. Regulation 26 of the Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area and related matters, the contractor can apply for a plan of work for exploitation upon expiration of a plan of work for exploration. Regulation 7 (3) (a) of these draft regulations states that an application for a plan of work for exploitation “.... shall be accompanied by the data and information to be provided pursuant to section 11.2 of the standard clauses for Exploration contracts, as annexed to the relevant Exploration Regulations”. This section 11.2 refers to data to be submitted upon expiration or termination of an exploration contract. Draft regulation 18(7) further stipulates that the contractor be required to pay an applicable fee and report on the exploration activities *in accordance with the applicable Exploration Regulations*. Therefore, in the event that a contractor carries out exploration activities under the exploitation contract, these exploration activities must be governed by the relevant exploration regulations. Unless clarified, the reference to the relevant Guidelines should be deleted.

➤ Regulation 22

Use of exploitation contract as security

Paragraph 1

1. The Contractor may, with the prior consent of the sponsoring State or States and of the Council, based on the recommendations of the Commission, mortgage, pledge, lien, charge or otherwise encumber all or part of its interest under an exploitation contract for the purpose of raising financing to effect its obligations under an exploitation contract.

Comment: With the current formulation of this paragraph there seems to be a risk that the exploitation contract could be used as a security for a purpose other than the financing of the exploitation obligations. In order to avoid what seems to be a loophole, the Netherlands would suggest the following amendment (**in bold**):

The Contractor may, **solely** for the purpose of raising financing to effect its obligations under an exploitation contract and **only** with the prior consent of the sponsoring State or States and of the Council, based on the recommendations of the Commission, mortgage, pledge, lien, charge or otherwise encumber all or part of its interest under an exploitation contract.

➤ Regulation 24
Change of control

Paragraph 3

3. After consulting the Contractor or entity providing the Environmental Performance Guarantee, as the case may be, the Secretary-General may:

- (a) Determine that, following a change of control of the Contractor or the entity providing the Environmental Performance Guarantee, the Contractor will continue to be able, and in particular will have the financial capability, to meet its obligations under the exploitation contract or Environmental Performance Guarantee, in which case the contract shall continue to have full force and effect;
- (b) In the case of a Contractor, treat a change of control as a transfer of rights and obligations in accordance with the requirements of these regulations, in which case regulation 23 shall apply; or

Comment: Matters pertaining to the institutional functioning under the draft regulations need to be further clarified. This relates in particular to the appropriate allocation of powers and functions to the different organs of the Authority (cf. paragraph 3).

SECTION 2

MATTERS RELATING TO PRODUCTION

➤ Regulation 25
Documents to be submitted prior to production

Paragraph 1

1. At least 12 months prior to the proposed commencement of production in a Mining Area, the Contractor shall provide to the Secretary-General a Feasibility Study prepared in accordance with Good Industry Practice, taking into account the Guidelines. In the light of the Feasibility Study, the Secretary-General shall consider whether any Material Change needs to be made to the Plan of Work in accordance with regulation 57 (2). If he or she determines that any such Material Change needs to be made, the Contractor shall prepare and submit to the Secretary-General a revised Plan of Work accordingly.

Comment: Paragraph 1 addresses the Material Change to a Plan of Work based on a Feasibility Study.

"Feasibility Study" means a comprehensive study of a mineral deposit in which all geological, engineering, legal, operating, economic, social, environmental and other relevant factors are considered.

Based on such a Feasibility Study, the Secretary-General can determine whether any Material Change needs to be made to the Plan of Work. If the Secretary-General, on the basis of the Feasibility Study, determines that a Material Change is needed to Plan of Work, Regulation 57(2) applies.

"Material Change" means a change to the basis on which the original report, document or plan, including a Plan of Work, was accepted or approved by the Authority, and includes changes such as physical modifications, the availability of new knowledge or technology and changes to operational management that are to be considered in the light of the Guidelines.

Questions:

- How can/will the Secretary-General assess the comprehensiveness of the Feasibility Study?
- How can/will the Secretary-General make the determination that would address the actual content of a Material change?

Paragraph 2

2. Where, as part of a revised Plan of Work, the Contractor delivers a revised Environmental Impact Statement, Environmental Management and Monitoring Plan and Closure Plan under paragraph 1 above, regulation 57(2) shall apply mutatis mutandis to such Environmental Plans ~~if the modification to the Environmental Plans constitute a Material Change~~, and such Environmental Plans shall be dealt with in accordance with the procedure set out in regulation 11.

Comment: Paragraph 2 follows on from paragraph 1 where the Feasibility Study has been the basis for the Material Change to the Plan of Work: *the contractor is required to prepare and submit to the Secretary-General a revised Plan of Work* (last sentence of paragraph 1). In paragraph 2,

this revised Plan of Work also includes a revision of the Environmental Plans. We suggest the deletion of the text in yellow since this seems circular. The Feasibility Study that led to the decision for a Material Change of the Plan of Work should necessarily have covered a modification of the Environmental Plans (".... a comprehensive study of a mineral deposit in which all, environmental and other relevant factors are considered" cf. definition above).

Paragraph 3

3. Provided that, ~~where applicable,~~ the procedure under regulation 11 has been completed, the Commission shall, at its next meeting, provided that the documentation has been circulated at least 30 Days before the meeting, examine the ~~Feasibility Study and any~~ revised Plan of Work supplied by the Contractor under paragraph 1 above, and in the light of any comments made by members of the Authority, Stakeholders and the Secretary-General on the Environmental Plans.

Comment:

- Use of the words "where applicable" in paragraph 3, seems superfluous since revision of the Environmental Plans shall be dealt with in accordance with regulation 11 (cf. paragraph 2 above).
- What is the purpose of having the Commission examine the Feasibility Study? According to the process described in paragraphs 1 and 2, the Feasibility Study is the basis for considering a Material change to the Plan of Work and a subsequent revised Plan of Work. If anything, the Commission should be involved in the examination of the Feasibility Study at the very beginning of the process under paragraph 1.
- We suggest adding a role for the Commission to examine the Feasibility Study, under paragraph 1.
- We suggest the deletion of the text marked in yellow.

Paragraph 6

6. The Contractor may not commence production in any part of the Area covered by the Plan of Work until either:

(a) The Secretary-General has determined that no Material Change to the Plan of Work needs to be made in accordance with regulation 57 (2); or

Comment: The questions posed in relation to paragraph 1 above, are equally relevant to this paragraph 6 (a):

Questions:

- How can the Secretary-General make the determination that would address the content of a Material Change?

PART IV

PROTECTION AND PRESERVATION OF THE MARINE ENVIRONMENT

SECTION 5

ENVIRONMENTAL COMPENSATION FUND

➤ Regulation 54

Establishment of an Environmental Compensation Fund

Paragraph 2

2. The rules and procedures of the Fund will be established by the Council on the recommendation of the Finance Committee.

Comment: In paragraph 2, the suggestion is to include a deadline for the establishment of the rules and procedures of the Fund. In view of the purpose of the Fund, (cf. Regulation 55) it is relevant to have the Fund up and running at the commencement of exploitation activities. This timeline would also help clarify to all stakeholders where the Authority stands on the issue of the Fund.

PART VII

FINANCIAL TERMS OF AN EXPLOITATION CONTRACT

➤ Regulation 65
Secretary-General may issue Guidelines

Comment: Considering the fact that no definitive decision has been taken on the financial terms of an exploitation contract and considering the perceived omission of the role of the Finance Committee (as noted under General Comments above), the task given to the Secretary-General under this draft regulation requires further consideration.