

## **Code Project Response to Questions Posed by the ISA Secretary-General Regarding Draft Exploitation Regulations – August 2017**

**(ISBA/23/C/12)**

**Background:** On 10 August 2017, the Secretary-General of the International Seabed Authority presented the ISA Council with a draft of regulations that would govern exploitation contracts ([ISBA/23/CRP3-REV](#)). The distinctive feature of the draft was its combination of environmental, financial, and administrative regulations that had previously been kept separate. In his official statement conveying the draft document to the Members of the ISA Council ([ISBA/23/C/12](#)), the Secretary-General also invited comments from ISA member States, contractors, and stakeholders. The Secretary-General asked that comments be restricted to answers to specific questions posed in the conveyance document. The deadline for submission was set at 17 November 2017. This paper attempts to answer the Secretary-General's questions. It is submitted by the Code Project, a joint endeavor of 10 expert contributors from 5 countries. We look forward to future opportunities to comment on the substance and details of the draft regulations.

### **General questions:**

#### **1. Do the draft regulations follow a logical structure and flow?**

The structure and flow of the draft regulations is logical, but could be improved in several key respects.

First, the draft regulations do not reference strategic or regional environmental management plans (REMPs), neither to explain the process for their development nor to describe their relationship with exploitation applications and contracts. To date, a series of Areas of Particular Environmental Interest (APEIs) have been approved for the Clarion Clipperton Zone (CCZ), which go some way towards a REMP for this area; these are overdue for review. The Code Project believes that this *ad hoc* approach to REMPs should be replaced by ISA rules requiring REMP adoption as a prerequisite for exploitation contract approval in a region and integrating REMPs into the exploitation regulations. REMPs should provide for both: i) representative and well-connected areas

set aside from mining; and ii) any additional regulations that may be necessary for the effective protection of the region's marine environment. If the process for creating these plans is not established in the exploitation regulations, as would be preferred, the Authority will need to elaborate such a process elsewhere in binding regulations that are issued at the earliest opportunity and effective immediately upon issuance.

Second, the environmental objectives, standards, and thresholds to be met by contractors should be made clear and explicitly binding to ensure effective protection of the marine environment and regulatory certainty for contractors and other stakeholders. If such objectives, standards, and thresholds are to be developed later through REMPs, annexes, recommendations, or other forms of official guidance, transparent procedures and specific timelines for developing these criteria and applying them to Plans of Work immediately upon issuance need to be adopted. This is key to ensuring a level playing field for contractors and promoting transparency.

Third, it is important that the regulations not only require contractors to comply with all aspects of the annexes and Appendices, but that they mandate the Legal and Technical Commission (Commission) to review submissions made pursuant to these annexes and appendices for completeness and quality. Although Draft Regulation (DR) 7(4) makes the Commission responsible for ensuring that proposed Plans of Work provide for the effective protection of the marine environment, it does not currently include an explicit mandate to ensure applicants' materials are complete and of sufficient quality. That mandate should be expressly stated in DR 7(4). The Commission should also be given the express option at DR 22(8) of withholding approval of a Plan of Work if it does not meet the requirements of the Regulations and other Rules of the Authority.

Finally, we note that there appear to be different standards regarding compliance requirements and penalties for non-compliance, across different clusters of contractor obligations. Standards for inspections, disputes, and financial matters, for example, differ from those for environmental and health and safety matters. For example DR 89 establishes monetary penalties relating to a narrow set of financial matters and submission of annual reports; monetary penalties may also be appropriate for non-compliance with obligations relating to the environment, human health and safety, maintenance of insurance coverage, or other issues. At a minimum, it would be helpful to understand the rationale for establishing different standards for different types of obligations.

**2. Are the intended purpose and requirements of the regulatory provisions presented in a clear, concise, and unambiguous manner?**

The purpose of the regulations as stated in the Preamble (“to provide for the Exploitation of the Resources of the Area”) is clear and concise, but insufficient. The statement of purpose should affirm that the Area and its resources are the common heritage of mankind and should reflect the Authority’s explicit mandate under Article 145 of the United Nations Convention on the Law of the Sea to ensure effective protection of the marine environment.

In addition, the draft regulations could further clarify the role envisioned for the Secretariat. In particular, DR 20(2) provides that the Secretary-General *may* provide comments on the Environmental Impact Statement (EIS), Environmental Management and Monitoring Plan (EMMP), and Closure Plan (CP) of an applicant. Might it not be better if the Secretary-General *were expected* to provide comments on the application’s compliance with the regulations? The expertise and experience within the Secretariat should – as a routine matter – be made available to the Commission.

Finally, the roles of bonds, which are to ensure compliance, and of liability mechanisms, which are to insure against events, must not be confused. A liability regime needs to be developed. The regulations should, but do not yet, include provisions for a Liability Trust Fund or a Sustainability Fund. Performance Guarantees established under DR 9 need to be of a sufficient size to ensure compliance.

**3. Is the content and terminology used and adopted in the draft regulations consistent and compatible with the provisions of UNCLOS and the 1994 Agreement?**

Several terms used in the draft regulations need clarification.

*Rules of the Authority*

UNCLOS and the 1994 Agreement refer to “rules, regulations, and procedures of the Authority” whereas the current draft regulations use the term “Rules of the Authority”. The latter is defined as “the Convention, the Agreement, the contract, these Regulations, the Recommendations and other rules, regulations and procedures of the Authority as may be adopted from time to time” (p. 107). Importantly, while some provisions declare all “Rules of the Authority” as binding (e.g., Annex X para 3.3), others suggest Commission Recommendations are non-binding (e.g., DR 17(b) states “...Recommendations for the guidance of contractors and Good Industry Practice should

be followed by Contractors”). We recommend harmonizing the draft regulations and standard contract terms to ensure Recommendations are unambiguously binding and developed with Council and expert input and review, particularly in light of the intention to set out particular environmental thresholds and standards in subsequent Recommendations. While we recognize the value of establishing such standards through Recommendations, which should be easier to update in the light of new information than the regulations themselves, it is important to ensure Recommendations are applied equally to all contractors.

#### *Effective protection/serious harm*

The draft regulations reflect the fundamental distinction between “effective protection of the marine environment” as a regulatory standard to be applied and “serious harm” as a threshold to be avoided. This is consistent with the provisions of UNCLOS and the 1994 Agreement.

However, the definition of “serious harm” provided in the draft regulations is in need of amendment, as it appears to no longer be a science-based standard. A definition of serious harm that is based on a level of harm beyond what is “acceptable” is circular and provides too little certainty for contractors and stakeholders or the Authority. The current definition risks that a decision may be taken to define what is “acceptable” in a way that reflects neither the best available science nor the precautionary principle. Such a result could be incompatible with the requirements of Article 192, the obligation to protect and preserve the marine environment; Article 194.5, the obligation to protect and preserve rare or fragile ecosystems as well as the habitat of depleted, threatened or endangered species and other forms of marine life; and the Sustainable Development Goal (SDG) 14.2 commitment to avoid significant adverse effects. A better approach would be to integrate into the regulations a multi-part test setting forth those environmental effects that would constitute “serious harm,” based on and updated according to best available science.

In addition, DR 7 needs to be expanded to include the full range of environmental obligations established under UNCLOS, which include but are not limited to effective protection of the marine environment. For instance, the current wording does not reflect the entirety of the obligations established under Articles 145, 192 and 194.5, such as the obligation to protect and preserve the marine environment and the obligation to protect and preserve rare or fragile ecosystems and the habitat of depleted, threatened or endangered species and other forms of marine life. This broader inquiry should guide the Commission’s review under DR 21 and should extend not only to the EIS, EMMP and CP, but to all the documents that should comprise the

Plan of Work, including, for example, the Financing Plan and Emergency Response and Contingency Plan as well as liability and bond (performance guarantee) matters.

#### *Reserved Areas and other areas set-aside*

A definition of Reserved Area(s) (DR 10) needs to be added.

Paragraph DR 10(2)(c) should be expanded and include any area disapproved by Council for mining. UNCLOS Article 162(2)(x) refers to areas disapproved for exploitation by contractors or the Enterprise in cases where substantial evidence indicates the risk of serious harm to the marine environment. However, the Council may also disapprove areas for exploitation through regional management. These areas may include APEIs, but may also include other areas set aside to ensure effective protection of the marine environment, avoid serious harm, and/or protect biologically, culturally, historically, or other significant areas, particularly vulnerable species or ecosystems.

#### *Other Rules of International Law*

DR 1.6, which states that the draft regulations are subject to other rules of international law not incompatible with the Convention, may create uncertainty as to which rules the regulations are subject. This may need to be redrafted to better reflect the language of UNCLOS, which provides at Article 22 of Annex that contracts shall be governed by other rules of international law.

#### *Archaeological and Historical Objects*

Article 149 of the Convention defines this term to include “all objects of an archaeological and historical nature found in the Area” whereas in the draft regulations (DR 38) this term is focused on human remains and related sites. The regulations should be revised to reflect the scope set forth in 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?**

The regulations provide clear timelines for Commission review, public consultation, and applicant revision of key documents. They provide important certainty for both contractors and stakeholders. However, given the importance of ensuring Plans of Work and their component and supporting documents fully meet the Authority’s standards, and that public comment periods are retained, we recommend that:

- a) DR 5(2) is reviewed. It may not be feasible for the Commission to consider the application at its next meeting as described in the draft regulations. Depending on when materials were submitted, Commission members may not have had sufficient time to review them and the public consultation envisioned in DR 20 may not have concluded.
- b) the Secretary-General be empowered to extend both the periods for public review and for applicant revisions for an additional 60 days.

The draft regulations place the full weight of responsibility for application review on the members of the Commission – charging them with assessing the many detailed and highly technical documents that comprise and support a Plan of Work. While Commission members are highly qualified experts, they may face constraints on their time and many of the documents they are tasked with reviewing will necessarily fall outside their specific area of expertise. The regulations could improve the Commission's review by standardizing procedures for soliciting and considering external advice on applications and/or contractor-submitted data.

The point at which the Environmental Scoping Report is required needs clarity. It would be helpful to include this in the list of materials that shall accompany an application provided in DR 4.

**5. Is an appropriate balance achieved between the content of the regulations and that of the contract?**

Key to the balance between regulations and contracts is the requirement that contractors will be required to comply with the Rules of the Authority including any Recommendations made by the Commission, as they may be amended from time to time (as detailed in the Standard Contract Clauses of Annex X). These provisions should help ensure a level playing field for all contractors and that environmental and other standards can be updated periodically as knowledge of deep sea mining and the marine environment improve. Safeguards should be established, however, to ensure that amendments to Recommendations do not erode existing environmental protections or allow increased levels of environmental harm. To this end, the regulations should state explicitly that levels of environmental harm shall not be allowed to increase.

**6. Are there any specific observations relating to the exploration regulations or regime that would be helpful for the Authority to consider in advancing the exploitation framework?**

Reviews of information generated during the course of exploration contracts reveal a need for better baseline data to inform regional planning, environmental impact assessments, and regulatory decision-making. To help address this information shortfall, the draft regulations mandate an Environmental Scoping Report, including an environmental baseline report, subject to public comment by “Interested Persons” and independent expert review. This represents a major step. But experience gained under the exploration regime underlines the need to go further and provide public access to environmental data, metadata collected during exploration and exploitation, and Commission comments on all Environmental Scoping Reports and other elements of a Plan of Work. This will allow Interested Persons/Stakeholders to provide more informed comments on proposed Plans of Work and improve public confidence in both the ISA and the industry as a whole.

There is now a broad ISA consensus in favor of greater transparency of contractor-generated data. The draft regulations reflect this consensus. More can be done, however, to improve transparency in ISA decision-making. For example, in addition to soliciting and considering stakeholder and member State comments on various elements of a Plan of Work, the Commission should address these comments in its report and describe the rationale for its decisions.

The regulations may also need to better specify decision-making processes, particularly within the Commission. Will recommendations and decisions on Plans of Work and their component and supporting documents be taken by consensus or majority vote? In which cases must there be quorum, and should quorum requirements be higher in the Commission to ensure all elements of Commission expertise are represented?

**Specific Questions:**

- 1. Role of sponsoring States: DR 91 provides 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?**

DR 91's series of cross-referenced obligations may be overly complex and under-inclusive. DR 91(a) appears sufficiently broad to encompass all of the obligations listed in DR 91. If there are specific obligations deserving of special attention or emphasis, these should be described substantively in addition to being cross-referenced. The regulations should make clear that any such list is illustrative, but not exhaustive.

To meet their oversight obligations, sponsoring States may need to carry out independent inspections and audits. Alternatively, the regulations may need to provide sponsoring States with access to ISA inspections or other avenues through which sponsoring States can secure compliance.

Given sponsoring States' obligations to secure compliance, there may be a legal question as to whether the performance guarantee (bond) should be between the Contractor and Sponsoring State, or between the Contractor and the Authority as DR 9 suggests.

The draft regulations allow for the possibility of multiple sponsoring States and for the termination of sponsorship (DR 14). However, they are silent on the legal implications of a situation where one of multiple sponsoring States terminates its sponsorship. These implications should be made clear.

- 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 (activities and undertakings similar to those under an exploration contract). Are the concepts and definitions of "contract area" and "mining area" clearly presented in the draft regulations?**

Under the draft regulations, contractors are required to monitor and manage environmental effects across their entire impact area, not just those within their "mining area". The Impact Area is the appropriate frame of reference in such matters and should encompass all areas affected, or potentially affected, by mining operations. However, contractors must also ensure that the Impact Area has been appropriately identified and that environmental effects are contained as predicted. This will require them to monitor multiple sites both within and outside of the Impact Area.

In addition, when defining and managing contract areas, it is important that the ISA retain the ability to identify protected areas within claims, through REMPs or other mechanisms. Depending on scientific recommendations and information and advice

received during the EIA process, it may be necessary and desirable to ensure that certain areas, such as those containing particularly vulnerable or rare species or ecosystems or long term scientific research or monitoring sites, are not subject to either mining or effects from mining and are monitored to ensure their continued protection.

- 3. Plan of Work: there appears to be confusion over the nature of the “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?**

Defining the Plan of Work and its annexes is very important. It would therefore be helpful to clarify the status of various documents referenced in the draft regulations as they relate to the Plan of Work. Specifically, the documents listed in DR 4(3) should be annexed to the Plan of Work or otherwise included: EIS, Financing Plan, Emergency Response and Contingency Plan, Health, Safety and Maritime Security Plan, Training Plan, Feasibility Study or Mining Plan, EMMP, and CP. The insurance policies (DR 27), and Performance Guarantee (DR 9), should also be included, whether as part of a Financing Plan or in an additional document. The list in Annex X (Contract) may need to be updated accordingly. The regulations should also clearly articulate the methods and criteria by which each of these documents will be assessed.

- 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?**

Requiring an exhaustive list of non-confidential information would seem to invert a basic expectation of multilateral regulation – that information submitted to an

international body would be deemed non-confidential except in exceptional circumstances where its disclosure would harm the interests of the information's source.

Also, the Convention in Article 14 of Annex III provides that data necessary for the formulation by the Authority of rules, regulations and procedures concerning protection of the marine environment and safety, other than equipment design data, shall not be deemed proprietary. An applicant seeking a confidentiality determination should justify the rationale behind its proposed confidentiality designation and describe publicly the general nature of any information it seeks to be so designated. This will give stakeholders an opportunity to review the designations and allow the Council to evaluate whether confidentiality designations are being appropriately applied, fulfilling its oversight function. The proposed procedure in DR 75(3) would be cumbersome and can only be initiated through an objection by the Secretary-General within 30 days and does not adequately safeguard access to data. The inclusion of confidential information under the dispute resolution procedure of DR 92 is helpful, but would be unwieldy for assessing large numbers of documents on an ongoing basis.

- 5. Administrative review mechanism: as highlighted in Discussion Paper No. 1, 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?**

We agree that an administrative review mechanism should provide for effective and accessible dispute resolution in the interests of all stakeholders. Such a process, if accessible to stakeholders and the Authority, as well as Contractors, would be a useful mechanism to improve governance and compliance. Whether it is binding depends on the process and its application. From the point of view of efficiency, as a principle, decisions should be binding, and if necessary reviewable, at last resort, by the Seabed Disputes Chamber.

- 6. Use of exploitation contract as security: DR 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?**

If a contract is pledged or mortgaged, that may carry the implication that its obligations as well as rights are assigned. This has implications for enforcement, liability and obligations from mine operation through to mine closure and post-closure monitoring. It is important that in case of assignment of rights and duties, there is the possibility for prior review and, if necessary, modification of the contract. For instance, DR 7 properly requires an assurance of financial and technical capability: such assurance must also apply to assignees.

- 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?**

The Area and its resources are the common heritage of mankind. Hence all persons have an interest in their sustainable development. To classify “interested persons” narrowly is to erode this principle. It is also unnecessary: there are a range of administrative measures available to manage engagement from a broader spectrum of parties. If, for example, the Secretary-General were to receive a large number of comments on a particular contract proposal or administrative procedure, neither the Secretary-General nor the Commission should be under an obligation to reply to each individually. Comments and responses on a specific application for approval of a Plan of Work could be summarized by the Secretary-General or the Chair of the Commission for review (with expert assistance as needed) so long as the original comments were available to public scrutiny.

We therefore propose the use of the term Stakeholder instead of Interested Persons. Stakeholders should be defined simply as “persons having an interest of any kind in the Area”. Stakeholders should be open-ended due to the Area being both beyond national jurisdictions and due to its status as the common heritage of mankind.

But these definitional concerns are only one part of the broader issue of public engagement. The regulations could be further strengthened by providing more rigorous public and scientific review, both in terms of the review and approval of Plans of Work and review of Contractors' ongoing operations. In the approval phase, the EIS review (DR 20) should include a publicly available independent expert review. There should also be opportunity for public and scientific review of revisions to a Plan of Work pursuant to DR 22. The provisions on environmental performance (DR 24) and review of activities (DR 47) should incorporate requirements for independent scientific review. Based on these reviews, the Commission or the Council should be able to adapt guidance and standards to ensure effective protection of the marine environment. For reasons of administrative efficiency and strengthening expertise, the Authority should consider whether these reviews might be best undertaken by a separate body under the auspices of the Council, Commission, or Secretariat, prior to consideration of the Commission.

Ensuring opportunities for robust stakeholder and scientific commentary and debate should be regarded as a major responsibility of the Secretary-General. Because stakeholder engagement may differ across sponsoring States, an ISA-led stakeholder engagement process will be central to ensuring a level playing field across contractors. The Secretary-General should also, we believe, take on the role of Ambassador-Without-Portfolio to the world at large, engaging public opinion on the development of a regulatory capacity to govern an extractive activity before it begins.

### **Additional Issues**

The Secretary-General's questions provide a valuable framework for a more comprehensive discussion of the draft regulations. That larger discussion will need to cover a range of additional issues, among them:

- Standards to determine "effective protection of the marine environment";
- Specific contents of Annexes and Appendices;
- Financial regulations and payment mechanisms;
- Standards to gauge "compliance" and gradations of compliance;
- Penalties for non-compliance with both environmental and financial obligations.

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