



## Legal and Technical Commission

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### Consideration and approval of draft regulations for exploitation of mineral resources in the Area

## Draft regulations on exploitation of mineral resources in the Area

### Note by the Secretariat

#### I. Introduction

1. In July 2016, at the end of the twenty-second session of the International Seabed Authority, the Legal and Technical Commission issued a revised working draft of a set of regulations on exploitation of mineral resources in the Area. The revised working draft, which comprised exploitation regulations and standard clauses of exploitation contracts, was made available to all stakeholders for comment until November 2016. During its meeting in February/March 2017, the Commission continued its work on the mining code by considering stakeholders' comments on the draft, as well as a discussion paper prepared by the secretariat of the Authority on the development and drafting of environmental regulations on the exploitation of mineral resources in the Area.

2. From 20 to 24 March 2017, in Berlin, the secretariat, together with the German Federal Environment Agency and the Federal Institute for Geosciences and Natural Resources of Germany, organized an international workshop entitled "Towards an ISA Environmental Management Strategy for the Area". The objective of the workshop was to assist the Authority in designing a strategy for the environmental management of deep seabed mining. More specifically, the workshop provided a multi-stakeholder forum in which experts in science, law and environmental management, among others, exchanged views and provided feedback from a multidisciplinary perspective on various issues connected with the design and development of the environmental provisions of the mining code, based on the discussion paper on environmental matters issued by the secretariat in January 2017. Among the items discussed were environmental standards, environmental impact assessment procedures and criteria, adaptive management, regional environmental management and elements of a long-term environmental strategy for the Authority. The report of the workshop, identifying points for further consideration, will be published as a technical study of the Authority.



3. The secretariat and, in their personal capacity, some members of the Legal and Technical Commission also participated in an external workshop connected with the development of a payment mechanism. The key focus of the workshop, held in Singapore in April 2017, was the introduction to participant stakeholders of a working financial model and a subsequent discussion of the components of the model and its underlying assumptions. A financial model is an important deliverable because it will allow the Commission to explore royalty-rate scenarios and payment mechanism options for the various phases of exploitation and to discuss those scenarios with contractors and other stakeholders. To further develop the workshop product into a viable working model and to incorporate suggested options, the Secretary-General intends to request contractors to provide their forecasted financial data to the secretariat to allow a range of such data to be modelled. The secretariat will also work with expert economists to verify and validate the functionality of the model and the revenue and cost assumptions contained in it, with a view to modelling different royalty payment scenarios. It is anticipated that those data and the modelled scenarios will be presented to the Commission at its first meeting in 2018. Participants in the Singapore workshop also considered possible incentive mechanisms, including funds and bonds, to support the delivery of environmental objectives. Such mechanisms will require further investigation, including with regard to other market-based financial tools and the related issue of the liability regime of the Area.

4. Subsequently, the secretariat, with the assistance of external experts where necessary, reformulated the revised working draft in the light of the discussions held during the meeting of the Commission in February/March 2017, together with the outcomes of the Berlin and Singapore workshops. Provisions on environmental protection and the proposed inspection regime were integrated into the draft, thereby establishing a more concise, consolidated, streamlined and structured framework for the regulation of exploitation activities, while also avoiding duplication and inevitable inconsistencies and ambiguities arising from multiple regulatory instruments. At the same time, in line with the suggestions made by members of the Commission in March 2017, matters of technical detail were placed in annexes or will be elaborated in guidelines that will continue to evolve as exploitation proceeds.

5. The document, entitled “Draft regulations on exploitation of mineral resources in the Area”, will be made available to the Commission as a conference room paper.

## **II. General policy issues for consideration by the Commission**

6. The attention of the Commission is drawn to the policy issues outlined below. In some cases, the secretariat has exercised its best judgment on the basis of previous discussions in the Commission. On other matters, the secretariat seeks guidance from the Commission.

### **A. Regulations versus the standard contract**

7. Several provisions that had formerly been in the standard contract terms have been moved to the draft regulations. Furthermore, every effort has been made to avoid duplication between the regulations and the contract. It is considered that this approach gives the Authority greater flexibility as a regulator, since, subject to any relevant provisions of the United Nations Convention on the Law of the Sea and the 1994 Agreement relating to the Implementation of Part XI of the United Nations

Convention on the Law of the Sea of 10 December 1982,<sup>1</sup> the regulations may be changed to reflect new knowledge and experience, whereas changes to the contract require agreement between the Authority and the contractor. As it is a contractual requirement for contractors to comply with the regulations as may be amended from time to time, best practice requires that major regulatory changes be introduced following widespread consultation, including with contractors and the industry.

## **B. Application process**

8. The application process for the approval of a plan of work for exploitation and the requirements for related application documents have been considerably streamlined and brought into line with the Commission's understanding of the various exploitation phases, such as pre-feasibility, feasibility, commercial production and closure. The need to produce a separate mining plan has been eliminated, as that would simply duplicate information contained in the pre-feasibility and feasibility studies. The secretariat will provide a flowchart of the application and approval process to assist the Commission.

9. The draft regulations now require an applicant to submit a scoping report prior to conducting an environmental impact assessment and to the subsequent delivery of an environmental impact statement. In the secretariat discussion paper, it had been suggested that that step could be optional. The overwhelming response from a broad range of stakeholders, including contractors, was to make it a mandatory part of the process. The draft regulations also include an updated template for an environmental impact statement. It may be noted that, in due course, more detailed guidelines will be required to support that, and other, documentation requirements.

## **C. Sponsoring States**

10. The need for clarity on the role and responsibilities of sponsoring States had been highlighted in previous discussions, especially in the light of the advisory opinion issued by the Seabed Disputes Chamber on 1 February 2011, in which the Chamber accepted that obligations could be placed directly on sponsoring States under the Authority's regulations. Accordingly, the new draft regulations list various provisions that require sponsoring States to take action, without taking away from the general nature of the responsibilities and obligations of sponsoring States under the Convention.

## **D. Definition of the contract area**

11. In its previous discussions, the Commission had struggled with the problem of how to allocate exploitation rights and with the relationship between exploration and exploitation. The provisions in the revised working draft were vague and ambiguous. The draft regulations define the maximum size of the contract area by reference to the total area remaining to the contractor under the contract for exploration. Specific mining areas are defined under the plan of work, which may be modified or reviewed from time to time in accordance with the regulations. Contractors may continue exploration in other parts of the contract area.

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<sup>1</sup> For example, section 8, paragraph 1 (e), of the annex to the Implementation Agreement stipulates that any changes to the system of payments may only be made with the agreement of the contractor.

## **E. Regulatory jurisdiction of the Authority**

12. The approach taken with respect to the limit of the regulatory jurisdiction of the Authority has been to remain consistent with the interpretation given to the term “activities in the Area” by the Seabed Disputes Chamber in its advisory opinion of 1 February 2011. Several stakeholders have raised questions concerning the extent of the Authority’s jurisdiction and the relationship between the Authority’s regulations and other international instruments. A legal workshop on jurisdictional issues will be necessary at some point on these matters, including on issues such as responsibility for downstream processing of minerals from the Area and waste disposal.

13. Stakeholders have also noted that, under article 150 of the Convention, the Authority has a responsibility to take into account certain policies relating to the development of resources in the Area, as well as a broader stewardship role. Consequently, certain downstream issues, such as the management of waste from processing and the implementation of the payment mechanism, could require greater visibility.

## **F. Financial terms of contracts**

14. The provisions relating to royalty administration and management have been revised and updated in the light of stakeholders’ comments and previous discussions. The draft regulations also reflect the mechanics of the suggested royalty mechanism that has emerged from payment regime workshops and other discussions. At the time of writing, the quantum (percentage) of royalty had not been specified. As noted above, the financial model needs to be validated and scenarios modelled with the participation of the Commission. That part of the draft regulations is therefore offered as a basis for further discussion, without any specific recommendation or endorsement at the current stage.

## **III. Next steps**

15. To focus its discussions in August 2017, it is suggested that the Commission consider the following matters with respect to next steps:

- (a) The need for a road map and timelines;
- (b) The need for further stakeholder consultation;
- (c) Questions to be addressed to the Council of the International Seabed Authority.

16. On the last day of the meeting in March 2017, the Commission reviewed a possible road map for the delivery of the exploitation regulations to the Council and for their subsequent approval. On the basis of the discussion at that time, the secretariat will present a revised road map and timeline for consideration by the Commission in August, including identifying where and how future consultations should be held. The Commission may wish to consider providing that document to the Council so that expectations may be managed.

17. It is recommended that the draft regulations be issued for stakeholder consultation as soon as possible after the present session. In doing so, however, the Commission may wish to consider a more targeted approach, including addressing specific questions to stakeholders. While much of the content of the draft regulations is based on previous stakeholder input, including from workshops, it

may not be helpful at the present stage of development to receive overly detailed and potentially repetitious input. The Commission may also wish to consider targeted consultations with specific groups of stakeholders.

18. Another concern is that responses from member States to stakeholder consultations have been limited. Only six member States have responded to the stakeholder consultation on the revised working draft. To ensure that the development of the regulations proceeds in a direction that is acceptable to the Council, the Commission may wish to consider identifying specific policy questions for consideration by the Council.

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