ISBA/24/C/CRP.1
21 February 2018
English only

Briefing note to the Council on the submissions to the draft regulations on exploitation of mineral resources in the Area[1]

[1] This briefing note was prepared originally in advance of the Foreign and Commonwealth Office of the United Kingdom and The Royal Society Workshop on the draft regulations for the exploitation of mineral resources in the Area: policy, legal and institutional considerations held in London on 12 and 13 February 2018. It has been partially revised and is now re-issued as a conference room paper for the meeting of the Council, 5 to 9 March 2018. A separate workshop report will be made available.

Contents

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I. Introduction

1. On 10 August 2017, the secretariat of the International Seabed Authority (ISA) made publicly available the draft regulations on exploitation of mineral resources in the Area (draft regulations).[2] Stakeholders were invited to make comments on the draft regulations, and in particular to address a number of general and specific questions (ISBA/23/C/12).

2. The draft regulations reflect a common appreciation that having consolidated exploitation regulations incorporating environmental and inspection provisions, would be more beneficial in providing an integrated approach to the application process, and to the on-going management and regulation of mining activities. Equally, the draft regulations aim to present the fundamentals of the application process, and subsequent management and administration of contractor activities, rights and obligations. Detailed plans of work (documentation), together with comprehensive process requirements and clear performance standards that can be measured, monitored and enforced under an exploitation contract, remain to be crafted.

3. The purpose of this briefing note is to provide members of the Council with a broad overview of the content of the responses received to the above stakeholder exercise, and to discuss a number of common themes arising from stakeholder submissions. An exchange of views on these common themes took place at the London workshop in February 2018. It is anticipated that a focused discussion within the Council on the common themes will help unpack key elements in the regulatory development process, facilitate a better understanding of the issues faced, and enable the Council to provide appropriate guidance to support the Legal and Technical Commission in its ongoing regulatory development role.

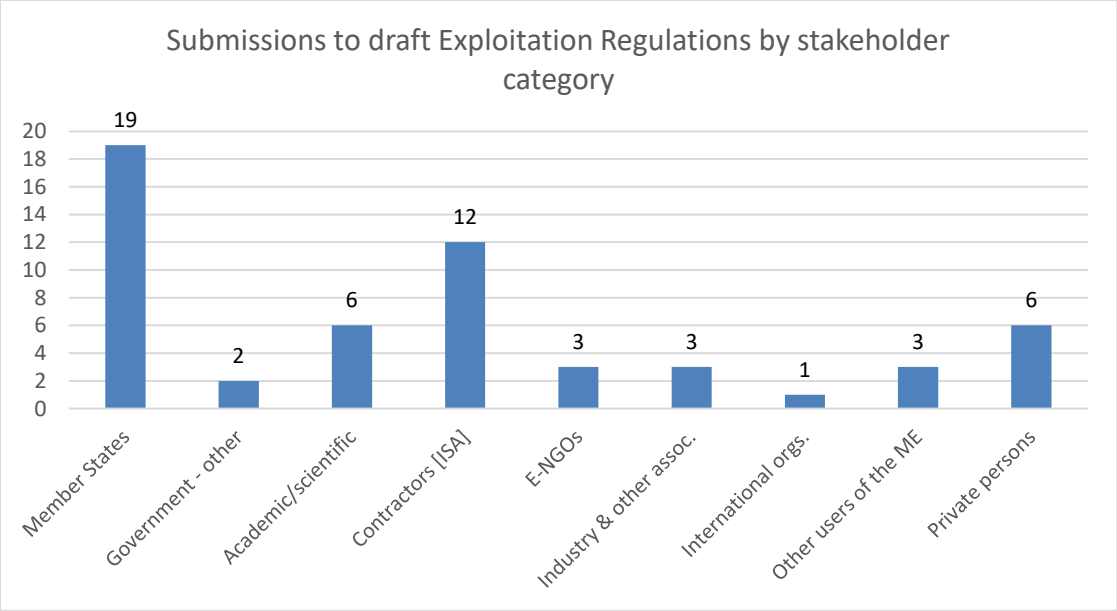
II. Stakeholder submissions

4. The secretariat received 55 submissions to the draft regulations.[3] While this compares favourably to some 54, 47 and 43 submissions received in connection with the Authority's first stakeholder survey (issued in March 2014), draft legal framework (issued in March 2015) and draft exploitation regulations (issued in July 2016) respectively, responses from member States has increased from a handful to 19, including a first response from a regional group (African Group).

5. Some stakeholder submissions provide high level responses to the questions asked, while others have provided or elaborated on constituent elements of the regulations in more detail. It is not the intention of this briefing note to discuss such specific detail, save to the extent it conflicts fundamentally with the general content of the draft regulations issued. The Commission will consider all submissions at its March 2018 meeting where a number of legal and technical matters will be discussed together with required improvements and clarity in the structure of the draft regulations and regulatory text.

[2] ISBA/23/LTC/CRP.3*.
[3] A list of stakeholders making a submission is available at https://goo.gl/2aodWR, including links to individual submissions.

6. The chart below shows the breakdown of stakeholder submissions by stakeholder category.



III. Common themes arising from stakeholder submissions

7. This section of the briefing note highlights common themes arising across the responses to the draft regulations. It is felt that these matters would benefit from further discussion and deliberation within the Council. For each theme a short "Issue Note" has been prepared, and is made available as a relevant annex to this briefing note. It is hoped that each Issue Note will help focus discussions by providing the background to each issue, points for further consideration and guiding questions where applicable. Each of these themes is addressed below.

8. Annex I: *Issue Note 1 Understanding the pathway to exploitation and beyond*: it is thought that providing a clear overview and understanding of the respective phases under exploitation, and its link to exploration will drive a better approach to the structure and flow of the regulations and the transition between a pre-feasibility study/stage and feasibility study/stage.

9. Annex II: *Issue Note 2 The payment mechanism (including administrative fees):* a number of points have been raised by stakeholders in connection with the payment mechanism, not least from those who neither attended relevant workshops nor followed the development of the payment mechanism closely. This Issue Note 2 explores briefly the guiding objectives and principles to the development of financial terms under the Convention and the 1994 Agreement, together with an overview of work undertaken to date in advancing the mechanism and ISA financial model.

10. Annex III: *Issue Note 3 The role of the Sponsoring State(s):* this has been an "open" issue since the Commission adopted a number of "high level issues" for consideration in 2015. It was also addressed as a specific question this time round to stakeholders, with a degree of divergence in the responses as to what should be prescribed for in the regulations.

11. Annex IV: *Issue Note 4 The role and legal status of standards, recommendations (LTC) and guidelines*: The development of an appropriate mix of performance and procedure related standards must be advanced, including an inclusive and transparent process for their development. At the same time, the legal status of Commission's "recommendations for the guidance of contractors" must be revisited under the exploitation regime, and consideration given to the development of relevant "guidelines" under a consensus-based approach.

12. Annex V: *Issue Note 5 Broader environmental policy and the regulations.* There has been much discussion to date regarding the need for and development of a broader environmental policy framework to deliver the objectives under article 145 of the Convention. The development and implementation of regional environmental management plans, as part of that policy framework, are a key consideration. But how and where such plans fit within the regulations requires clarification.

13. Annex VI: *Issue Note 6 The roles of the Council, Secretary-General and the Legal and Technical Commission in regulation:* it is evident from stakeholder submissions that greater clarity, flowing from the text of the regulations, is required around the respective roles of the different organs of the Authority in relation to regulatory approvals and monitoring of compliance. This relates in particular to the balance between the role of the Council and that of the Secretary-General.

14. The above themes, together with comments from stakeholders do and will continue to raise questions and issues about the functioning of the Authority going forward, not least the resourcing of the secretariat, development of a fit-for-purpose and cost-effective inspection mechanism, and the frequency in meetings of the various organs. That is, there is an important interplay between the development of the regulations and the institutional functioning and governance mechanisms in place required to administer and manage implementation of the regulations. What the Authority seeks to regulate in accordance with the Convention and how it will regulate in conjunction with sponsoring States, will impact its structure and day to day functioning. Equally, the interface between other relevant international organizations, for example, the International Maritime Organization, will need to be explored and finalized.

IV. Stakeholder responses to general and specific questions

15. This section of the note provides an overview of stakeholder responses to the general and specific questions put forward by the secretariat in document ISBA/23/C/12. The discussion is not exhaustive, but is intended to provide a flavour of the broad range of stakeholder responses. As highlighted above, the Commission, with the assistance of the secretariat, will consider stakeholder responses in detail with a view to delivering a revised set of draft regulations as soon as practicable after the Commission's meeting in March 2018.

General questions

16. Q1: *Do the draft regulations follow a logical structure and flow?* While a number of stakeholders who commented on this question generally consider the structure of the draft regulations sufficiently clear and logical, there is a general sentiment that the structure and flow of the regulations should be re-examined to facilitate comprehension and implementation, with a focus on the end-users of the draft regulations. Other comments include a need for a table of contents, and a flowchart for the application and approval process for a plan of work. Some stakeholders make proposals for the re-ordering of the

different parts making up the draft regulations. A restructure of the regulatory provisions is under consideration, and will be presented to the Commission for discussion. However, it is evident from a number of submissions that the various processes and workflows under the draft regulations are not clearly understood as presented. To aid further discussion of the structure of the regulations (and in connection with the transition between an exploration contract and exploitation contract), annex I to this briefing note also contains an understanding of the proposed process for exploitation as presented in appendix 1 to the Government of New Zealand's submission.

17. Q2: *Are the intended purpose and requirements of the regulatory provisions presented in a clear, concise and unambiguous manner?* A number of specific comments are made in connection with this question. Some stakeholders consider that the preamble to the draft regulations should better contextualize and reflect the objectives and intention of the Convention and the 1994 Agreement, including: the mandate to operationalize principle of the common heritage of mankind; that activities are conducted in accordance with sound commercial principles, and the obligation to ensure effective protection of the marine environment. Some stakeholders request that the rights of contractors be clearly stated in the text of the regulations. Other stakeholders note a need to define more clearly the procedural steps involved in the development of the environmental impact statement, environmental management and monitoring plan and closure plan. Stakeholders also note a need to develop specific environmental thresholds and standards, and to develop specific guidance on the meaning and application of the precautionary approach and ecosystem-based approach under the draft regulations. Some stakeholders also wish to see clear guidance under the respective consultation processes and the role of the relevant actors. A number of stakeholders seek clarification on the relationship between regional environmental management plans and the regulation of exploitation activities and whether there is a need to clarify this within the body of the regulations. Finally, comment is made on the level of documentation and detail that will be made available to the Council following any recommendation for approval by the Commission of an application for a plan of work

18. Q3*: Is the content and terminology used and adopted in the draft regulations consistent and compatible with the 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 Convention?* Although there is a general sentiment that the content and terminology in the regulations are consistent with the Convention and the 1994 Agreement, a number of specific points are raised by stakeholders. These include the introduction of new terms such as "Good Industry Practice", which requires clearer articulation, and that the definition of serious harm should be based on best available science and the precautionary principle. Comments are also made in the use of terms such as "reasonable" and "satisfied" across the draft, such terms being considered vague and subjective. This is an inevitable use of drafting language, and while all regulatory provisions will be scrutinized for clarity, the Authority's future guidelines can elaborate on such terms including, where applicable, from a policy perspective. Other terminologies stakeholders seek further clarity on include "optimize", "monopolize" and "effective control". One area that draws a number of comments from stakeholders is that of the legal status of the Commission's recommendations. Some stakeholders consider that such recommendations should not be binding, as they potentially introduce uncertainty under an exploitation contract, while others consider that any recommendations should be binding (particularly if they are to cover environmental thresholds and standards), with the Council playing a role in endorsing such recommendations.

19. Q4*: 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?* It is acknowledged by stakeholders generally that the draft regulations are much improved in terms of clearer timelines compared to the first working draft exploitation regulations issued in July 2016. However, further work is required on some regulatory provisions to provide further certainty / clarity in the decision-making process, including, where applicable, the option to extend timelines. Equally, clarity is required on the different roles of the Council, Secretary-General and the Commission as regards oversight in the regulatory process. Timelines and roles will need to be re-examined and expressly incorporated so as to provide certainty under the regulatory evaluation and decision-making processes. This may also drive the frequency of meetings of the various decision-making organs of the Authority, and a need for delegated authorities to be put in place by the Council to support the day-to-day regulatory functioning of the secretariat.

20. Q5*: Is an appropriate balance achieved between the content of the regulations and that of the contract?* It is acknowledged in some submissions that under national jurisdictions there has been a move away from a reliance on contract terms toward headline legislation and regulations. However, there is some divergence in stakeholder views between the content of the regulations and that of the exploitation contract, and that certain regulations, for example those relating to financial terms, should be included in the contract. Other observations include a necessity for the regulatory framework to have high level content that facilitates adaptability and evolution, but one that also provides sufficient certainty and predictability.

21. Q6*: Exploration regulations and regime: are there any specific observations or comments that the Council or other stakeholders wish to make in connection with their experiences, or best practices under the exploration regulations and process that would be helpful for the Authority to consider in advancing the exploitation framework?* A number of observations are made in connection with this question and lessons learnt, including: ensuring transparency in the decision-making process; public access to environmental data; consideration of resource-specific regulatory provisions, and the effect of mining activities in the vicinity of other contract areas. Some stakeholders observe that the approach of using guidance, rather than overburdening the regulations appears to have worked well.

Specific questions

22. Q1: *Role of sponsoring States: draft regulation 91 provides for 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?* There are a number of diverging views in relation to the content of draft regulation 91, and the approach taken to the role of sponsoring States under the regulations. Comments received include that while the list of obligations identified in draft regulation 91 could be used as illustrative, the list is not exhaustive, and that the general wording of draft regulation 91(b) could be sufficient to capture all obligations. Other stakeholders considered it unnecessary to prescribe for sponsoring State obligations. On a more practical level stakeholders do see a need for clarity in cooperation between the Authority and sponsoring State(s), particularly in relation to monitoring and enforcement to avoid duplication. The sharing and communication of information between the Authority and sponsoring State(s) is also seen as a key element to be reflected in the regulations. In essence, there is a need to set out how the Authority and

sponsoring State(s) will interact and co-operate in practice, and in co-ordination on information-sharing, monitoring and enforcement. Comments are also made in connection with the need for sponsoring States to be consulted in certain areas, for example in connection with the transfer of rights and obligations under an exploitation contract. Furthermore, clarity is sought on the legal implications of one of multiple sponsoring States terminating a sponsorship arrangement. Some of these points are addressed as part of Issue Note 3 at annex III to this note.

23. Q2: *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 (that is, activities and undertakings similar to those under an exploration contract). Are the concepts and definitions of "contract area" and "mining area(s)" clearly presented in the draft regulations?* It is evident from stakeholder submissions that the regulations would benefit from further clarity in the definitions for "contract area" and "mining area(s)", and to consider incorporating a definition of "Impact Area" to cover potentially affected areas falling outside a contract area. As to continuing exploration activities within a contract area, these could be undertaken by reference to the relevant exploration regulations. The draft regulations could however benefit from further clarity as to what activities are being undertaken and where.

24. Q3: *Plan of work: there appears to be confusion over the nature of a "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?* While contractors have generally planned for a pre-feasibility phase/study, stakeholders consider that the regulations are not sufficiently clear as to the requirements and content of a feasibility study (and lacking an appropriate definition), and to the Authority's expectations on the transition between pre-feasibility and feasibility. Given the importance of the plan of work, there is a need to clarify which documents should be annexed to a plan of work, and accordingly annexed to an exploitation contract, including a mining plan (which was omitted in the draft regulations). Some stakeholders consider that all information submitted as part of an application for a plan of work should be annexed to an approved plan of work. Given a degree of confusion in this area, it would, as a starting point, be beneficial to provide an understanding of the respective processes and phases under exploration and exploitation (see Issue Note 1 at annex I).

25. Q4: *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?* While the draft is welcomed by a number of stakeholders, concerns are expressed in defining an objective standard (and mechanism) for determining confidential information. Many stakeholders consider that a more meaningful and practical approach to this issue, is

that a list of confidential information (rather than non-confidential information) should be drawn up for consideration and presented to stakeholders (with a possible sense-checking by the Commission initially). Some stakeholders also seek clarification in the procedures for designating information as confidential as between a contractor and the Secretary-General, including the development of objective evaluation criteria. Additionally, to allow the Council and other stakeholders visibility of any evaluation and to facilitate consistent treatment across the contractor base, a general description of such information, and the nature of such information should be provided. This is also considered important for the Council in relation to its oversight and regulatory function. Conversely, a high importance is placed on the integrity of confidential data, and the need for the Authority to be accountable for safeguarding such data. There remains a general consensus on the public availability of environmental data and information and its consequential sharing.

26. Q5: *Administrative review mechanism: as highlighted in the Authority's discussion paper No. 1,*[4] *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?* While there is some support for a more cost-effective route to the resolution of technical disputes, and that this should be open for further discussion and consideration of alternatives as the core regulations are developed, a number of stakeholders requested that such a mechanism be approached with caution given the finely crafted dispute settlement provisions in the Convention, and access to existing arbitral processes.

27. Q6: *Use of exploitation contract as security: draft regulation 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?* It is evident from submissions that further work needs to be performed in respect of this draft regulation 15, and the structure of any possible financing arrangements fully understood. There is support in principle for this provision, but a number of comments by stakeholders should be explored, including: a requirement of sponsoring State consent; location of any financial institution outside a sponsoring State; factoring-in additional safeguards, and the required credentials of any financial institution e.g. accords to the Equator principles. The issues raised by stakeholders on this technically complex matter will be placed before the Commission for guidance.

28. Q7: *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?* Stakeholders generally support an inclusive and transparent process. The term "stakeholder" is preferred to that of "interested person" in a number of

[4] International Seabed Authority, "Dispute resolution considerations arising under the proposed new exploitation regulations", discussion paper No. 1. Available from: www.isa.org.jm/files/documents/EN/Pubs/DPs/DP1.pdf.

responses, to encourage the widest possible public comments process. That said, some stakeholders do note that the term should not be too broadly defined and / or limited to those with expertise in the specific subject-matter. That said, submissions support a need for the development of a clear process and procedure for consultation, including parameters for the degree of influence and weighting attaching to public comments, and that the expectations of those choosing to make comments are properly managed. What is less clear is the role of the sponsoring State in the consultation process and mechanism, and the consultation activities required of applicants prior to making an application. Indeed, some stakeholders advocate that stakeholder engagement should be led by the Authority to ensure a level playing field across all applicants, although others note that this could lead to an unwarranted extension of the Authority's mandate into internal processes of member States.

Annexures – Issue Notes

Annex I

Issue Note 1: Understanding the pathway to exploitation and beyond

1. This Issue Note 1 aims to advance a more fruitful discussion on the structure and content of the draft regulations, by presenting the respective workflows envisaged under the draft regulations, together with an understanding of the transition between a pre-feasibility stage and feasibility stage with reference to polymetallic nodules.

2. The accepted definition of "exploration" contained in the exploration regulations anticipates an evaluation stage (environmental, technical, economic and commercial factors) in addition to the searching for and discovery of resources. The exploration regulations thus anticipate that the exploration phase will deliver pre-feasibility data and information setting the stage for the development of a DSM exploitation operation.

3. The definition of "exploitation" anticipates the commercial recovery of resources, extraction of the minerals, and includes construction and operation of mining, processing and transportation systems. Consequently, under the exploitation contract there will be a further evaluation phase (feasibility) followed by a construction and development phase leading to the production phase and ultimately closure of the mining site. It is conceivable that contractors (applicants for exploitation) will apply for a plan of work for exploitation over part of a contract area, whilst continuing to explore and evaluating the rest.

4. Attachment 1 to this note provides an overview of the various phases and activities toward the commercial mining of polymetallic nodules. The draft regulations have been developed to reflect these phases, and consequential document delivery.

5. Attachment 2 to this note presents an extract of the New Zealand Government's understanding of the workflow processes reflected under the draft regulations.

6. It is thought that a useful discussion can be had around these attachments in order to facilitate a better understanding of the processes and stages involved, and the transition between exploration and exploitation. This should contribute to a better understanding of and improvement to the structure and content of the regulations.

7. The Council may wish to consider the questions addressed at the London workshop in connection with the structure of the draft regulations, and to reflect on the corresponding discussion output contained in the workshop report.

Attachment 1 to Issue Note 1

Overview of Contractor Activities (Polymetallic nodules)

<table>
<tr><td></td><td colspan="2">Under EXPLORATION Contract</td><td colspan="5">Under EXPLOITATION Contract</td></tr>
<tr><td>Contractor activities</td><td>Exploration phase: +- 15 years</td><td>Contract continues in force</td><td>Indicative timings:</td><td>+- 5 years?</td><td>+- 3 years?</td><td>+- 2 years?</td><td>+- 20 years?</td><td>+ [x] years</td></tr>
<tr><td colspan="3"></td><td colspan="2">Feasibility</td><td>Construction</td><td>Production</td><td>Commercial Prodn.</td><td>Closure</td></tr>
<tr><td>Pre-feasibility stage / study[1]</td><td>Est. mineable areas / grade & quality of resource (inferred / indicated); testing of components</td><td rowspan="2">[Application for Approval of a Plan of Work for Exploitation]</td><td colspan="5">Continued exploration activities</td></tr>
<tr><td>Environmental baseline, risk assessment, monitoring and management</td><td>Est. baselines; monitoring programme + Prior EIA for specific activities (e.g. testing)</td><td colspan="5">Continued environmental assessment. Monitoring and management under Environmental Management and Monitoring Plan & Closure Plan</td></tr>
<tr><td>Feasibility stage (FS) / study (bankable)[2]</td><td rowspan="5"></td><td rowspan="5"></td><td colspan="2">FS required to raise investment capital (probable / proven reserve)</td><td></td><td rowspan="3"></td><td rowspan="4"></td><td rowspan="4"></td></tr>
<tr><td>Construction</td><td colspan="2"></td><td>Infrastructure (e.g. Mining vessel)</td></tr>
<tr><td>Production: ramp up (commencement of mining activities)</td><td colspan="2"></td><td></td><td>As pPer Feasibility Study / Mining Plan</td></tr>
<tr><td>Commercial production</td><td colspan="2"></td><td></td><td></td><td>As pPer FS / Mining Plan</td></tr>
<tr><td>Closure / Post closure monitoring</td><td colspan="2"></td><td></td><td></td><td></td><td>As pPer Closure Plan</td></tr>
</table>

[1] A comprehensive study of the viability of a mineral project that: (a) has advanced to a stage where the mining method has been established and where an effective method of mineral processing has been determined; and (b) includes a financial analysis based on reasonable assumptions of technical, engineering, legal, operating and economic factors and the evaluation of other relevant factors sufficient for a suitably qualified and experienced qualified person to determine, within reason, whether all or part of the mineral resource may be classified as a mineral reserve (ISBA/21/LTC/15).

[2] A comprehensive study of a mineral deposit in which all geological, engineering, legal, operating, economic, social, environmental and other relevant factors are considered in such detail that it may reasonably serve as the basis for a final decision by a financial institution to finance the development of the deposit for mineral production (ISBA/21/LTC/15).

Attachment 2 to Issue Note 1

Understanding of the proposed process for exploitation under the regulations[5]

Pre-application activities

- Applicant provides scoping report in accordance with information requirements (Annex IV)

- Scoping report published and comments invited

- Commission considers at next meeting and provides comments

- Applicant may revise scoping report

Application to undertake exploitation

- Applicant undertakes an EIA to inform EIS

- Applicant applies for approval of Plan of Work and provides the following:

- Pre-feasibility study (in accordance with information requirements in Annex II)
- EIS (in accordance with Annex V)
- Financing Plan (in accordance with Annex III)
- Emergency response and contingency plan (in accordance with Annex VI)
- Health, safety and maritime security plan
- Training plan
- EMMP (in accordance with Annex VII)
- Closure Plan (in accordance with Annex VIII)
- Administrative fee (in accordance with Annex II)

- EIS, EMMP and CP published and comments invited

- Applicant may revise documents in response to comments within 60 days

- Commission considers application at next meeting and can request additional information from applicant

- Applicant must respond to any information request within 90 days

Decision-making process

- Commission provides report and recommendations to Council based on criteria (in accordance with draft regulation 7, 10 and 21)

- Applicant can make representations within 90 days if notified by Commission that it does not meet the criteria

- Report of Commission published

- Council considers report and recommendations at next meeting (in accordance with criteria in UNCLOS Art 162)

Pre-commencement requirements

- At least 12 months prior to production, contractor provides feasibility study, revised financing plan, a revised EMMP and a revised CP

- EMMP and CP published and comments invited

- Applicant may revise documents in response to comments within 60 days

- Commission considers at next meeting and may approve or recommend amendments as a condition for approval

- Approved plans published and contractor notified

Monitoring and review

- Activities undertaken in accordance with EMMP and contract

- Environmental Performance review submitted within 6 months of start of 2nd, 5th and 10th years following commencement

- Exploitation contract will provide for a review between the SG and the contractor of the activities under a Plan of Work (not greater than 5 years). This may result in modifications to be approved by the Commission and Council.

Modifications and Renewal

- An applicant can request to amend or modify its application in light of new knowledge or information at any time prior to consideration of the Commission's report by the Council or any time prior to the execution of an exploitation contract.

- Only minor or administrative changes are allowed to a Plan of Work annexed to a contract, otherwise approval must be sought from the Commission and Council under regulations 10 and 11.

- The contractor may renew its contract for periods not more than 10 years. If the SG determines the Contractor is in compliance with the conditions set out in draft regulation 10 of the Standard Clauses for exploitation contract, the contract is renewed on the same terms and conditions.

Close-out requirements

- Contractor submits final CP for approval one year prior to cessation of activities

- CP published and comments invited

- Contractor may revise CP in response to comments within 60 days

- Commission considers at next meeting and may approve or recommend amendments as a condition for approval

- Contractor continues to monitor after cessation for period set out in CP

[5] Extracted from Appendix I of New Zealand's submission to the draft regulations.

Annex II

Issue Note 2: The payment mechanism

1. Developing a system of payments (or payment mechanism) that delivers a fair and equitable return to the common heritage of mankind, balances commercial interests and supports technological development and change is one of the most challenging aspects of regulatory development.

2. The Convention articulates a number of objectives that the Authority must be guided by in negotiating financial terms under an exploitation contract,[6] including: to ensure optimum revenues for the Authority from the proceeds of commercial production; to attract investments and technology to the exploration and exploitation of the Area; to ensure equality of financial treatment and comparable financial obligations, and to provide incentives for contractors to undertake joint arrangements with the Enterprise and developing or their nationals.

3. The 1994 Implementation Agreement introduced a number of principles to guide the development of a future system of payments.[7] These include that the system of payments to the Authority should be fair to both the contractor and to the Authority; that the rates of payment should be within the range prevailing in respect of land-based mining of the same or similar minerals in order to avoid giving deep seabed miners an artificial competitive advantage or imposing on them a competitive disadvantage, and that the system should not be complicated and should not impose major administrative costs on the Authority or on contractors.

4. The payment mechanism represents one element of the financial obligations to be imposed by the regulatory regime, and one which is yet to be fully developed.

5. Attachment 1 to this Issue Note V provides an overview of the development of financial terms to date through a series of studies and workshops over the last 4 years, reflecting a range of views and leading to the presentation of a financial model in 2017, and financial term provisions in the draft regulations (Part VII). These provisions include: a mechanism for calculating the royalty base (on a given "basket of metals" scenario); anticipate a first and second period of commercial production, and provide for the review of the system of payments and the rate of payments (though no royalty rates have been specified under the draft regulations). As highlighted in ISBA/23/LTC/6 such terms are offered as the basis for further discussion within the Council, Commission and relevant stakeholder base. A further financial model is now under development through a multi-disciplinary team at the Massachusetts Institute of Technology. This project was commissioned by the Secretariat to deliver a robust and independent financial model for use by the Authority in developing financial terms . It is hoped that a discussion paper to advance the development of such terms will be issued prior to the July 2018 Annual Session of the Authority.

6. It should be noted that not all stakeholders endorse a pure royalty driven approach, and that there should be a link to profitability and / or a progressive mechanism. Further consideration of this has not been dismissed. However, this must also be viewed in the light of the tension that exists between that of economic efficiency and that of administrative efficiency (challenges in information collection and transparency in that information). Equally, there also needs to be a level

[6] Article 13(1), Annex III of the Convention.
[7] Section 8, Annex, 1994 Implementation Agreement.

playing field, with different contractor entities potentially engaging in mining activities (States, State enterprises, private investors).

7. To date there has been support for a transitional mechanism until such time as the economics of the industry are better understood. There is also a need to develop such a mechanism that provides reasonable certainty and predictability.

8. Additionally, there is also the question of how to determine an annual fixed fee contemplated by the 1994 Implementing Agreement, its purpose and rationale, and principles for its calculation, including resource-specific considerations.

9. A discussion within the Council would be beneficial toward identifying aspects or concerns relating to the payment mechanism that require closer examination by the Commission.

10. To this end, the Council may wish to consider:

(a) What do member States want a payment mechanism to do?
(b) What advice and guidance can the Council provide to the Commission to achieve the desired outcome?
(c) In addition to the work of the Commission, what other ways or methods of working does the Council consider appropriate to ensure that respective interests in the development of a payment mechanism be properly addressed, discussed and integrated (with due regard to the objectives of the Convention and the 1994 Agreement)? For example, should an *ad hoc* expert working group (representative) be formed to work with MIT under the guidance of the Commission to develop the ISA financial model further?

Attachment 1 to Issue Note 2

Overview of workshops and studies on the development of financial terms

2013	ISA Technical Study 11: *Towards the Development of a Regulatory Framework for Polymetallic Nodule Exploitation in the Area*	This technical study presents a comprehensive overview of the background and drivers of a regulatory framework. It also incorporates a discussion around a fiscal regime.	ISA Technical Study No. 11
2014	*Developing Financial Terms for Deep Sea Mining Exploitation*	An independent study commissioned by the secretariat to compare mining industry fiscal regimes and comparable royalty and other taxes.	Developing Financial Terms for Deep Sea Mining Exploitation
2015	ISA *Discussion Paper on the Development and Implementation of a Payment Mechanism in the Area*	Paper issued by the secretariat to stimulate discussion on the development of financial terms, and the administration and management thereof.	ISA Discussion Paper Stakeholder responses to ISA Discussion Paper
2015	Mineral exploitation in the Area, Joint CIL-ISA Workshop (Singapore, 2015)[8]	This workshop discussed and provided a proposed path, with a transitional regime of an annual fixed fee and a royalty for a period of time, then a review.	ISA Briefing Paper
2016 (May)	Deep Seabed Mining Payment Regime #1 (San Diego)	This workshop began to explore in more detail the proposed transitional mechanism. It also looked at the points considered by the ISA Discussion Paper issued in 2015. The workshop also explored environmental incentives.	Workshop report
2016 (December)	Deep Seabed Mining Payment Regime #2 (London)	This workshop was a precursor to the development of a working financial model; discussion centred on the cost component lines of such a model, and on the anticipated value chain.	Workshop report
2017 (April)	Deep Seabed Mining Payment Regime #3 (Singapore)	This workshop explored and discussed the principles and assumptions underlying a working model as presented to workshop participants.	Workshop report

[8] Discussions continued at a further workshop directed toward transparency in Bellagio late 2016. Report available at: http://www.resolv.org/site-dsm/files/2016/09/Toward-Transparency-and-Best-Practices-For-Deep-Seabed-Mining-Final-Report.pdf.

Annex III

Issue Note 3: The role of the Sponsoring State(s)

1. Sponsoring State(s) and the Authority – a clear division of duties and responsibilities in managing and regulating sponsored activities in the Area?

2. One area that raised concern in prior stakeholder consultations was the lack of sufficient reference to the involvement of the sponsoring State. Draft regulation 91 of the present draft regulations was crafted in an attempt to better reflect the obligation on a sponsoring State(s) to take all necessary measures to secure contractor compliance with a number of obligations under the draft regulations.

3. Recent stakeholder submissions reflect a divergence in views as to whether such obligations should be prescribed for in a set of regulations that regulates principally the relationship between a contractor and the Authority. Nevertheless, there is a common understanding that the role of the sponsoring State as regards co-operation and collaboration with the Authority, does need to be clarified and clearly addressed in the regulations, including the exchange of relevant information and data.

4. To date there has been little in the way of formal dialogue between the Authority and sponsoring States to address this matter. In 2015, the Commission addressed this matter as a "High level issue" and noted:

> *"It is not believed that the division of duties and responsibilities is clearly defined between a sponsoring State and the Authority. This relates to matters including enforcement and monitoring / inspection, offence and penalty systems, liability and responsibility of a contractor etc. From a contractor's perspective there is the potential for a duplicative regulatory and financial burden. This needs to be clarified and duties and responsibilities more clearly defined. Equally, this also points to effective co-operation between the Authority and a sponsoring State. Matrix setting out duties and responsibilities to be developed."*[9]

5. The due diligence obligation of the sponsoring States to take all appropriate measures under the Convention was discussed at length by the Seabed Disputes Chamber in 2011 (ITLOS Case No.17). The Assembly has also requested the Secretary-General "to provide the Council with a comparative study of the existing national legislation with a view to deriving common elements therefrom before the end of 2018."[10]

6. It is for the Authority to set the necessary standards for activities in the Area with the sponsoring State making reference to those standards in its national rules. It is also open to sponsoring States to prescribe higher standards under national rules as regards environmental protection.

7. From a practical perspective, the Council may wish to focus its discussion around the following questions:

(a) To what extent, if any, and what obligations should be placed on sponsoring States under the draft regulations?
(b) What obligations should the Authority have toward sponsoring States under the regulations e.g. access to information (confidential or

[9] Draft framework, High level issues and Action plan, Version II 15 July 2015 (Reviewed and revised for Stakeholder responses to the Report to Members of the Authority and all stakeholders issued 23 March 2015).

[10] ISBA/23/A/13.

otherwise), joint consents, where applicable?

(c) How should the division of duties and responsibilities between a sponsoring State (or State) and the Authority be addressed in practice? (There is also a related issue of the jurisdictional competencies of and cooperation with other State actors, including flag States). Would a matrix of duties and responsibilities be helpful initially? How should the relationship between the Authority and sponsoring State(s) be formalized?

(d) What of any monetary penalties levied by a sponsoring State or the Authority in respect of any contract or other violations? Is there a hierarchy or primacy? What of the possibility of a dual penalty system – fairness and equity?

(e) Monitoring, compliance and enforcement mechanisms– e.g. reporting, inspection. The possibility of duplication and additional costs placed on contractors?

(f) Exchange of information: what, when and how?

(g) What of the disclosure of any arrangements between the above parties between a sponsoring State(s) and a sponsored contractor (and that between a State, State enterprise and any third party contractor)? This relationship may be of interest to Authority in determining the suitability of any exploitation application – financial capability and technical capability in particular.

(h) What of the disclosure of the reasons for any termination of sponsorship?

(i) What guidance should the Authority provide to sponsoring States on the assessment and evaluation of exploitation applications, ongoing monitoring and compliance? How are standards (operational, safety, environmental) to be consistently applied in the Area to ensure a level playing field?

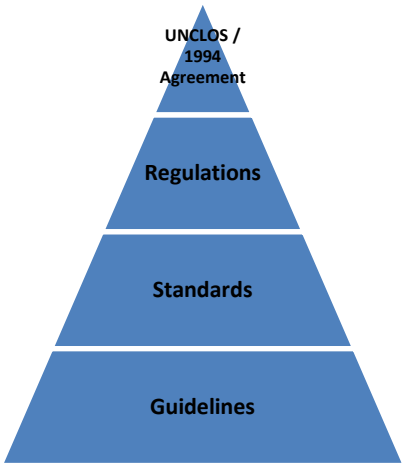
(j) What specifics must be addressed where there are 2 or more sponsoring States?

(k) Should a workshop be convened between sponsoring States, State contractors and the Authority? What should be the timing of this?

Annex IV

Issue Note 4: The role and legal status of standards, recommendations (LTC) and guidelines

1. The Authority's legal framework for the regulation of activities in the Area, and the relative hierarchy of the different instruments employed, can be summarized simply as follows:



2. Annex III, article 17(1) of the Convention stipulates a number of matters in respect of which the Authority must adopt and uniformly apply rules, regulations and procedures. Article 17(1)(b)(xii) specifically refers to "mining standards, and practices, including those relating to operational safety, conservation of the resources and the protection of the marine environment".

3. "Standards" will play an extremely important role under, and in the implementation of the regulations and monitoring performance. Consequently, in 2015, the Commission identified the importance of standard development. Many standards developed in parallel industries will be directly applicable to mining activities in the Area; others will require adaptation together with the development of Area-specific standards.

4. The issue of standards, recommendations and guidelines was also considered in the "Discussion Paper on the development and drafting of *Regulations on Exploitation for Mineral Resources in the Area (Environmental Matters)*"and a number of questions identified. The matter was explored further at the workshop held in Berlin in March 2017[11] in relation to environmental management. The workshop identified *inter alia* a need to define the term "standards", and to determine the appropriate mix of performance standards (e.g. environmental thresholds set out in a plan of work) and procedural (or process) standards (e.g. ISO 14001:2015).

5. Currently, the draft regulations make a number of references to the Authority's "guidelines", "applicable standards", "generally accepted…standards" and to "Recommendations"[12]. The status and content of these terms require re-visiting (or further guidance provided) in order that regulatory certainty is achieved.

6. Indeed, in connection with the "recommendations for the guidance of contractors" a more fundamental issue arises as to the legal basis for the making of such recommendations under the Convention. Article 165 of the Convention makes no reference to the Commission's power to make recommendations directly to contractors. Recommendations are to be made solely to the Council. It is understandable that some stakeholders now consider that incorporating such "recommendations" into the exploitation regulations could give rise to legal uncertainty and instability in the regulatory regime, particularly if the recommendations are changed or updated frequently.

7. Therefore, the current system and process of issuing "recommendations" should be

[11] ISA Technical Study No. 17: Report of an International Workshop convened by the German Environment Agency (UBA), the German Federal Institute for Geosciences and Natural Resources (BGR), and the Secretariat of the International Seabed Authority (ISA) in Berlin, Germany, 20-24 March 2017.

[12] Draft regulation 80 permits the Commission to issue recommendations of a technical or administrative nature for the guidance of contractors.

re-visited under the exploitation regulations. A focus on standard development and relevant "Authority guidelines" to provide guidance in respect of specific subject matters and areas is needed.

8. The above lends itself to a dedicated workshop to consider:

(a) An operating framework for reviewing, developing and integrating DSM-related standards in the Area, through a consensus and transparent based approach;
(b) The requirements and content of performance and process-related standards potentially applicable to DSM;
(c) What "guidelines" the Authority should put in place;
(d) The mandatory versus voluntary status of such standards and guidelines under the regulatory framework; and
(e) The role of the Council in endorsing such standards and guidelines.

9. To facilitate discussion, the Council may wish to reflect on:

(a) Principles for a process for the development of standards and guidance;
(b) A re-examination of the role of the Commission's recommendations for the guidance of contractors under the exploitation framework.

Annex V

Issue Note 5: Broader environmental policy and the regulations

1. Following on from stakeholder submissions to the draft regulations, and the output from the workshop held in Berlin in March 2017 in relation to the Authority's strategy for environmental management[13], the development of a policy framework for the implementation of article 145 of the Convention is paramount. This includes the (further) development of regional environmental management plans (REMPs) as called for by the Council.

2. Document ISBA/24/C/3 (Preliminary strategy for the development of regional environmental management plans for the Area) provides a background to and discussion of the development of REMPs, together with a short-term strategy proposal and recommendations for consideration by the Council.

3. However, what is not clear is the extent to which such environmental policy framework should be reflected in the draft regulations, not least as the latter is designed principally to implement Annex III of the Convention by regulating the application process and establishing the rights and obligations of contractors vis-a-vis the Authority.

4. Concern has been expressed by some stakeholders that the text of the draft regulations makes no reference to either the development and content of REMPs or to their relationship to the application process and on-going environmental management obligations. Others take the view that while the development and implementation of REMPs do not need to be prescribed for in the regulations, there does need to be a clearer understanding of the link and relationship between REMPs and the Authority's broader environmental policy.

5. Some stakeholders have advocated that REMPs should be implemented prior to the issue of exploitation contracts. However, there remains a practical consideration of the time required for the development of REMPs, and the need for data and information to support their development. In their submission to the draft regulations, Germany has suggested that a time limit could be placed on the development of REMPs which could solve the potential problem where no REMPs are under development.

6. The United Kingdom submission to the draft regulations also provides a number of examples on how cooperative and collaborative working can prove beneficial.

7. The Council may wish to consider:

(a) The need for, and content of an environmental policy framework;
(b) How such a framework, particularly that of REMPs, should be incorporated into the draft regulations?

[13] ISA Technical Study No. 17: Report of an International Workshop convened by the German Environment Agency (UBA), the German Federal Institute for Geosciences and Natural Resources (BGR), and the Secretariat of the International Seabed Authority (ISA) in Berlin, Germany, 20-24 March 2017.

Annex VI

Issue Note 6: The roles of the Council, Secretary-General and the Legal and Technical Commission in implementing the regulations

1. First, there remain a number of references to "the Authority" in the draft regulations. This flows not least from Annex III to the Convention with its many references to "the Authority". As the draft regulations are revised, the relevant provisions should make it clear which organ of the Authority is specifically responsible for undertaking a particular action or decision-making.

2. Secondly, as highlighted by a number of stakeholders, there are a number of references in the draft regulations to actions or decisions being undertaken by the Secretary-General without formal recourse to the Council. This includes, for example, the acceptance of a feasibility study (draft regulation 29) and the renewal of a contract (draft regulation 13).

3. In connection with the monitoring of compliance with plans of work for exploration, document ISBA/24/C/4 (Information relating to compliance by contractors with plans of work for exploration) sets out the roles of the Council, Secretary-General and the Commission as provided for under the Convention.

4. Except in connection with those aspects of the role of the Secretary-General (supported by technical and legal staff within the secretariat function) that have been clarified under the exploration regulations, there needs to be an understanding of the specific authorities afforded to the Secretary-General under the Convention and the draft regulations. This is key to the orderly implementation of the regulations vis-à-vis contractors, and effective day-to-day functioning of the Authority as a regulator. Equally, the regulatory framework must ensure that the Council is provided with the necessary oversight to execute its duty to exercise control over activities in the Area in accordance with article 153.

5. Accordingly, the Council may wish to consider:

(a) As a matter of policy, what functions and levels of authority should be delegated to the Secretary-General by the Council?
(b) What guidance should be provided with regard to the approach to decision-making by the Secretary-General?
(c) Should decisions (some or all) be provisional until validated by the Council?