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Review of outstanding issues with respect to the draft regulations on prospecting and exploration for polymetallic sulphides in the Area

Prepared by the Secretariat

1. The purpose of the present paper is to provide members of the Council with a further update on the outstanding issues with respect to the draft regulations on prospecting and exploration for polymetallic sulphides in the Area in preparation for continued discussion of the regulations during the fifteenth session of the Authority.

I. Background and progress to date

2. Members of the Council will recall that during the fourteenth session, the Council continued its detailed consideration of the draft regulations, which it had commenced at the thirteenth session in 2007. By the end of the fourteenth session, the Council had completed a review of those draft regulations that had been left pending at the end of the thirteenth session, as well as a review of informal texts of annexes 1 and 2 (ISBA/14/C/CRP.3) and annex 4 (ISBA/14/C/CRP.4), aligned with the informal text of regulations 1 to 44 (ISBA/13/C/CRP.1/Rev.1).

3. The Council had agreed to continue its work on the outstanding regulations at the fifteenth session and requested the Secretariat to provide additional background material, as appropriate, on the remaining outstanding issues with respect to the draft regulations as well as a revised text of the whole draft regulations, harmonized in all official languages, incorporating the revisions agreed to date. Such a text has been prepared and is available under the symbol ISBA/15/C/WP.1 and Corr.1. At this stage in the consideration of the draft regulations, and in the absence of any specific new proposals by members of the Council, there is little that can usefully be added to the technical information previously provided in documents ISBA/14/C/4, ISBA/12/C/2 and ISBA/12/C/3. The present document therefore responds to the

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specific request to provide additional background material on remaining outstanding issues.[1]

II. Outstanding issues

4. The Secretariat had been specifically requested to provide additional information and suggested revisions for regulation 23 (overlapping claims), annex 4, section 17.5 (a proposed new provision on termination in the event of force majeure) and annex 4, section 25.2 (enforceability of decisions by competent courts or tribunals). These are discussed further below. In addition, the Secretariat had been requested to provide information relating to the proposed quantum of the fee for exploration. Again, this information is provided below.

5. Other provisions of the draft regulations which members of the Council had expressed a wish specifically to revisit included regulation 29(2) on the frequency and duration of extensions to contracts for exploration (and annex 4, section 3.2), and annex 2, section II, relating to the technical data and information to be submitted with an application.

6. Although the matter was discussed extensively during the fourteenth session, it was not possible for the Council to reach final consensus on the question of the formula for determining the size of the exploration area. While there was broad agreement concerning the use of a clustered block system and the number of such blocks that may be allocated to each contractor, concerns remained about the appropriate spatial distribution of blocks within a particular geographical area. Following detailed discussion of the different proposed options for a geographical limitation on the spatial distribution of the permitted clusters of blocks, there was widespread support for the formula that is currently reflected in regulation 12(3) in ISBA/15/C/WP.1, whereby exploration blocks would be organized in non-contiguous clusters of at least five blocks each and confined within an overall geographic area not exceeding 300,000 square kilometres in size and where the longest side does not exceed 1,000 kilometres in length. Some delegations, however, expressed the need to study the proposal further and to seek further technical advice.

A. Fee for applications (regulation 21)

7. The arguments relating to the amount of the fee for applications for exploration were set out at length in paragraphs 17 to 28 of document ISBA/14/C/4 and do not need to be repeated here. Some delegations, however, had requested further information on the components of the work associated with processing and administering a plan of work for exploration (from application to contract) that is performed by the Authority. This information is provided in annex I to the present document.

[1] A detailed background narrative to the discussions on the draft regulations since 1998, together with a chronology, appears in document ISBA/14/C/4 and is not repeated here.

B. Overlapping claims

8. During the fourteenth session, a preliminary discussion took place on the issue of overlapping claims. It was recalled that, in the case of polymetallic nodules, it had not been necessary to make any provision in the regulations for overlapping claims since all overlapping claims to potential mine sites had in fact been dealt with under resolution II of the Third United Nations Conference on the Law of the Sea or by arrangements reached during the work of the Preparatory Commission. In the case of polymetallic sulphides and cobalt-rich crusts, however, the basic principle in the regulations was that application would be taken on a "first-come, first-served" basis. In these circumstances, and recognizing that initial applications may be submitted for overlapping areas, the Legal and Technical Commission had considered it necessary to include a procedure for resolving such claims on a fair and equitable basis.

9. Accordingly, draft regulation 24(2) in document ISBA/13/C/WP.1 had been proposed by the Legal and Technical Commission on the basis of a similar procedure found in resolution II of the Third United Nations Conference on the Law of the Sea. Regulation 24 provided that, in the event of overlapping claims, the Secretary-General would notify the applicants before the matter is considered by the Council. Applicants would then have the opportunity to amend their claims so as to resolve any conflicts with respect to their applications. However, in the event of a conflict, the Council would then determine the area or areas to be allocated to each applicant on an equitable and non-discriminatory basis.

10. During the discussions at the fourteenth session, it became clear that most members of the Council did not agree with the proposal as formulated by the Legal and Technical Commission. In particular it was generally considered inappropriate for the Council to be forced to make a choice between competing applications. A preference was expressed for a time period to be allowed during which competing applicants could determine between themselves the resolution of any overlaps, with the ultimate possibility of recourse to binding dispute settlement. Following an initial debate, an alternative proposal for a draft regulation 22 bis was prepared by the Secretariat (ISBA/14/C/CRP.2) and circulated on 2 June 2008. There was insufficient time to discuss this proposal in detail and several delegations asked for more time to consider the legal issues and precedents involved.

11. In the light of the preliminary discussions to date, the Secretariat has prepared suggested language for consideration by the Council at the fifteenth session. This is set out in annex II to the present document. According to the revised formulation shown in annex II, an overlapping application submitted within a period of 60 days of an earlier application would have the effect of suspending further action on both (or all) applications until such time as any conflicts between applicants could be resolved. Neither the Convention nor the Agreement provide for a mechanism for either the Legal and Technical Commission or the Council to make a choice between competing applications,[2] and for this reason it is suggested that no further action

[2] The power of the Council to approve a recommendation relating to a plan of work for exploration is strictly limited by the 1994 Agreement, Section 3, paragraphs 11 and 12. There is no procedure for the approval of part of a plan of work or for the resolution of disputes by the Council.

should be taken on any such application until all conflicts in respect of such applications are resolved.

12. Competing applicants would be provided with an opportunity to resolve conflicts by negotiations. During this period, any such applicant may submit an amended claim.

13. In the event that it is not possible to resolve overlapping claims, it would be necessary to refer the claims to an appropriate form of dispute settlement. Such a procedure was included in resolution II, paragraph 5, of which laid out a procedure for binding arbitration. Such arbitration was to be conducted in accordance with the United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules, taking into account a number of factors specified in paragraph 5(d) of resolution II. While this is a useful precedent, during preliminary discussion of this issue at the fourteenth session, some delegations had expressed the need to act in a manner consistent with article 188 of the Convention, while others had expressed doubts as to the current status of the UNCITRAL Arbitration Rules.

14. The Arbitration Rules were adopted by UNCITRAL in 1976 after extensive consultation with arbitral institutions and arbitral experts. In the same year the General Assembly, in its resolution 31/98, recommended the use of the Arbitration Rules in the settlement of disputes arising in the context of international commercial relations. Since then, the Arbitration Rules have become well known and are widely referred to by contracting parties, whether States or other legal entities, in their arbitration clauses or agreements. As noted by some members of the Council during the fourteenth session, the Arbitration Rules are presently under review with a view to their modernization and to promote their greater efficiency. However, the mandate given to the working group established to review the Arbitration Rules makes it clear that the guiding principle is that their original structure and spirit is to be maintained. According to the most recent report presented by UNCITRAL to the General Assembly,[3] it is intended that the final review and adoption of any necessary revisions to the Arbitration Rules be done at the forty-second session of UNCITRAL in 2009. Given this context, it is not expected that any revisions to the Arbitration Rules would have any substantial impact on their use in the context of the draft regulations. In any event, the Arbitration Rules that would be applicable to any such dispute would be the version in force at the time the dispute arises.

15. Should members of the Council remain concerned about reference to the UNCITRAL Arbitration Rules, another possibility may be to make reference to the arbitration rules of the Permanent Court of Arbitration, in particular the Optional Rules for Arbitration of Disputes Relating to Natural Resources and/or the Environment. These Optional Rules, effective since 19 June 2001, are based on the UNCITRAL Arbitration Rules with appropriate modifications to reflect the particular characteristics of disputes having a natural resources, conservation or environmental component and also to reflect the public international law element which pertains to disputes which may involve States and the utilization of natural resources. Like the UNCITRAL Arbitration Rules, the Optional Rules are also available to States, international organizations and private parties.

16. Whichever option for arbitration is chosen, the other issue that arose during the discussions at the fourteenth session was the question of consistency with

[3] *Official Records of the General Assembly, Sixty-third Session, Supplement No. 17* (A/63/17).

Part XI, section 5, of the Convention. Article 188, paragraph 1, of the Convention provides for the submission of certain categories of disputes to a special chamber of the International Tribunal for the Law of the Sea formed in accordance with articles 15 and 17 of annex VI to the Convention or to an ad hoc chamber of the Seabed Disputes Chamber of the Tribunal. However, the categories of disputes that may be referred in this manner are disputes between States parties concerning the interpretation or application of Part XI of the Convention and relevant annexes, as referred to in article 187 of the Convention. This would appear to preclude disputes between potential applicants which do not concern the interpretation or application of Part XI. Article 187(d) provides for the jurisdiction of the Seabed Disputes Chamber in the case of disputes between the Authority and a prospective contractor, being a qualified applicant sponsored by a State concerning the refusal of a contract or a legal issue arising in the negotiation of a contract. Once again, however, this would appear to preclude disputes arising solely between applicants prior to the stage at which a contract is refused and not involving the Authority.

17. Article 188, paragraph 2, establishes a procedure for the referral of disputes involving parties to a contract as described in article 187, subparagraph (c)(i), to binding commercial arbitration. Again, this procedure would appear to preclude disputes between potential applicants who have not yet been awarded a contract with the Authority. An important point of principle, however, that is specified in article 188, paragraph 2(a) and (b), is that an arbitral tribunal to which a dispute is submitted shall have no jurisdiction to decide any question of interpretation of the Convention. Any such issue involving a question of interpretation of Part XI or with respect to activities in the Area shall be referred to the Seabed Disputes Chamber for a ruling and the arbitral tribunal shall render its award in conformity with the ruling of the Seabed Disputes Chamber. The Council may consider that this principle, which is also reflected in article 189 of the Convention, should also be maintained in the draft regulations.

18. Suggested language for a new regulation 23 is set out in annex II to the present document and proposed as a basis for continued discussion by the Council.

C. Force majeure (annex 4, section 17)

19. Section 17 of the standard clauses for exploration contract (ISBA/15/C/WP.1 and Corr.1, annex 4) provides for the possibility of extension of the term of the contract where, for reasons of force majeure, the contractor is temporarily prevented from its obligations under the contract. Force majeure in this context is defined as “an event or condition that the contractor could not reasonably be expected to prevent or control; provided that the event or condition was not caused by negligence or by a failure to observe good mining industry practice”. In such circumstances, the contract may be extended by a period equal to the period by which performance was delayed by force majeure.

20. During the discussion of this provision at the fourteenth session, concern was expressed that there should be a provision whereby a contract may be considered terminated should an event of force majeure persist for an indefinite period. As this was generally considered to be a technical matter, the Secretariat was requested to review the relevant provisions and propose a suitable draft for further consideration.

21. It is important to observe that while section 17 of annex 4 deals with force majeure, provisions relating to the suspension and termination of contracts are set out in section 21 of annex 4. This section confers on the Council power to suspend or terminate a contract, by notice to the contractor, on the occurrence of certain events specified in section 21.1. Importantly, section 21 also sets out the procedural safeguards for contractors in the event that notice of termination or suspension is given. It is suggested, therefore, that any provision relating to termination of a contract by reason of a persistent event of force majeure would be most appropriately located within section 21 rather than section 17 of annex 4. In this way it would be clear that the same procedural and legal safeguards would apply and that the decision to terminate the contract on such grounds would be made only by the Council. This could be accomplished by inserting the following (or similar language) into section 21.1 as an additional ground upon which the Council could decide to suspend or terminate a contract:

> (d) if the contractor is prevented from performing its obligations under this contract by reason of an event of force majeure, as described in section 17.1, which has persisted for a continuous period exceeding two years, despite the contractor having taken all reasonable measures to remove its inability to perform and comply with the terms and conditions of this contract with a minimum of delay.

D. Enforceability of decisions of courts or tribunals

22. During the fourteenth session, several delegations had raised a question concerning the correct interpretation to be given to annex 4, section 25.2 of the draft regulations. In particular, the observation was made that the provision was too broad in scope and that there were legal difficulties in the application of the provision as drafted.

23. The language of section 25.2 is drawn directly from article 21, paragraph 2, of annex III to the Convention, which is applicable to all States parties to the Convention. The general obligation in article 21, paragraph 2, of annex III to make judgements of a competent court or tribunal relating to the rights and obligations of the Authority and of a contractor enforceable is thus applicable to all States parties. However, in transposing this obligation into a contractual term, the obligation needs to be made more specific. As presently drafted, the provision is ambiguous and could be interpreted as placing a binding obligation on States that are not party to the contract concerned. It is suggested that the ambiguity could be removed by making it clear that the contractual obligation of compliance lies on the parties concerned (i.e. the parties to the contract) and that, in the context of the contractual relationship, the obligation to make final decisions enforceable lies only on those States parties to the Convention that are directly affected (i.e. sponsoring States). Suggested language to this effect is proposed in annex II.

E. Applications by affiliated applicants

24. Members of the Council would also recall that in 2008 the Legal and Technical Commission had recommended the insertion of an anti-monopoly provision into both the draft regulations on polymetallic sulphides and the draft regulations on

cobalt-rich ferromanganese crusts. In his summary report to the Council, the Chairman of the Commission noted that the anti-monopoly provision contained in annex III to the Convention in relation to polymetallic nodules could not be applied effectively to either polymetallic sulphides or cobalt-rich crusts. In place of that provision, the Commission recommended that the regulations for both polymetallic sulphides and cobalt-rich crusts should prevent multiple applications by affiliated applicants in excess of the overall size limitations referred to in regulation 12 (i.e. 2,000 square kilometres in the case of cobalt-rich crusts and 10,000 square kilometres in the case of polymetallic sulphides). For the purposes of that provision, applicants would be regarded as affiliated if they were directly or indirectly controlling, controlled by or under common control with one another.[4] Implementation of this recommendation would require an additional paragraph in regulation 12. Suggested language to this effect appears in annex II to the present document.

III. Recommendations

25. The Council is invited to take note of the background to the draft regulations on prospecting and exploration for polymetallic sulphides in the Area and the summary of progress to date. With respect to the matters identified in the present paper, the Council is invited to address these issues during the fifteenth session with a view to adoption of the draft regulations. In this regard, the Council may also recall paragraph 33 of General Assembly resolution 63/111 on oceans and the law of the sea, in which the Assembly encouraged the finalization of the regulations for prospecting and exploration for polymetallic sulphides as soon as possible.

[4] ISBA/14/C/8, para. 13. Note that the same wording is used in the nodules regulations (ISBA/6/A/18, annex 4, section 18) to define “affiliated companies”.

Annex I

Elements to be considered in the cost of processing a plan of work for exploration

- Receipt, custody and acknowledgement of application
- Checking of coordinates, data entry
- Preparation for consideration by the Legal and Technical Commission
- Review and evaluation of application and data
- Meeting of the Legal and Technical Commission (staff time, translation, interpretation, meeting servicing costs)
- Participation by developing-country members of the Legal and Technical Commission
- Preparation for consideration by Council
- Council meeting (documentation, translation, interpretation, meeting servicing costs)
- Preparation of contract for exploration
- Receipt and safekeeping of annual reports
- Consideration by the Legal and Technical Commission of annual reports (preparatory work, staff time, translation, interpretation, meeting servicing costs)
- Supervision of contracts, inspection, maintenance of database, including confidential and environmental data, periodic review of the implementation of the plan of work. Review and cross-checking of data for consistency and standardization
- Database and Geographic Information System maintenance and software updates

Annex II

Suggested possible revisions to relevant provisions in document ISBA/15/C/WP.1 and Corr.1

Regulation 12
Total area covered by the application

5. The total area covered by applications by affiliated applicants shall not exceed the limitations set out in paragraphs 2, 3 and 4 of this regulation. For the purposes of this regulation, an applicant is affiliated with another applicant if an applicant is directly or indirectly controlling, controlled by or under common control with another applicant.

Regulation 23
Overlapping claims

1. Applicants for approval of a plan of work for exploration and their sponsoring States and prospective applicants and their sponsoring States shall use their best efforts to ensure, before making an application pursuant to these regulations, that areas in respect of which applications are made do not overlap one another.

2. Notwithstanding paragraph 1, if, within 60 days of the date upon which an application for a plan of work for exploration for polymetallic sulphides is received by the Secretary-General, one or more other applications for a plan of work for exploration for polymetallic sulphides are submitted that overlap with the same area or areas, the Secretary-General shall notify all applicants concerned, including the original applicant. Neither the Legal and Technical Commission nor the Council will take any further action with respect to the applications concerned until any conflicts between applicants have been resolved in accordance with the procedures set out in this regulation.

3. The applicants concerned and their sponsoring States shall resolve any conflicts with respect to overlapping claims as soon as possible by negotiations. Any such applicants may, within 60 days of the notification by the Secretary-General, amend their applications so as to resolve conflicts with respect to such applications.

4. If any such conflict has not been resolved within 60 days of the notification by the Secretary-General, the applicants concerned shall arrange for the submission of all such claims to binding arbitration in accordance with the UNCITRAL Arbitration Rules, unless the parties to the dispute otherwise agree.

5. In determining the issue as to which applicant involved in a conflict shall be awarded all or part of each area in conflict, the arbitral tribunal shall find a solution which is fair and equitable, having regard, with respect to each applicant involved in the conflict, to the following factors:

(a) the continuity and extent of past activities, including prospecting, relevant to each area in conflict and the application area of which it is a part;

(b) the date on which each applicant concerned or component organization thereof commenced activity at sea in the application area;

(c) the financial cost of activities measured in constant United States dollars relevant to each area in conflict and to the application area of which it is a part; and

(d) the time when those activities were carried out and the quality of those activities.

6. An arbitral tribunal to which a dispute is submitted under this regulation shall have no jurisdiction to decide any question of interpretation of the Convention and the Agreement. When the dispute also involves any question of the interpretation of Part XI and the annexes relating thereto, with respect to activities in the Area, that question shall be referred to the Seabed Disputes Chamber for a ruling. The arbitral tribunal shall then proceed to render its award in conformity with the ruling of the Seabed Disputes Chamber.

7. The parties to any dispute concerning an overlapping claim shall keep the Secretary-General and the Council currently and fully informed of any efforts to resolve conflicts with respect to overlapping claims and of the results thereof.

Annex 4
Standard clauses for exploration contract

Section 21
Suspension and termination of contract and penalties

21.1 The Council may suspend or terminate this contract, without prejudice to any other rights that the Authority may have, if any of the following events should occur:

…

(d) if the contractor is prevented from performing its obligations under this contract by reason of an event of force majeure, as described in section 17.1, which has persisted for a continuous period exceeding two years, despite the contractor having taken all reasonable measures to remove its inability to perform and comply with the terms and conditions of this contract with a minimum of delay.

Section 25
Disputes

25.2 In accordance with article 21, paragraph 2, of annex III to the Convention, any final decision rendered by a court or tribunal having jurisdiction under the Convention relating to the rights and obligations of the Authority and of the contractor shall be complied with by the parties concerned and shall be enforceable in the territory of any State party to the Convention affected thereby.