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Periodic review of the international regime of the Area pursuant to article 154 of the United Nations Convention on the Law of the Sea

Note by the Secretary-General

1. In his annual report for the twentieth session of the Assembly of the International Seabed Authority in 2014, the Secretary-General drew the attention of member States to the provisions of article 154 of the United Nations Convention on the Law of the Sea. In the light of: (a) growing interest in the development of marine minerals in the deep seabed, both within the limits of national jurisdiction and in the Area; (b) the increased workload of the secretariat, in particular in the areas of contract administration and supervision; (c) the need to acquire further baseline environmental data for the lesser known deposits of polymetallic sulphides and cobalt-rich ferromanganese crusts, including the use of standardized taxonomies; and (d) the need to make progress on the development of an appropriate fiscal regime that would allow those contractors in a position to do so to proceed to exploitation, while at the same time safeguarding the interests of the members of the Authority as a whole, the Secretary-General noted that the Assembly may wish to take the opportunity to undertake a general and systematic review of the manner in which the international regime for the Area has operated in practice (ISBA/20/A/2, para. 93).

2. During the general debate on the report of the Secretary-General, the Assembly took note of the provisions of article 154 and the comments of the Secretary-General and decided to revisit the matter in more detail during its twenty-first session in 2015. The Assembly noted that, in order to ensure that such a general and systematic review was undertaken properly, it would be important for the Assembly to prepare terms of reference and information requirements for the review and to determine an appropriate methodology.

3. The present note has been prepared to assist the Assembly in its consideration of the possible terms of reference and methodology for a periodic review pursuant to article 154. A brief analysis is provided of how the Authority approached the requirements under article 154 during the first two decades following the entry into

force of the Convention, together with suggested terms of reference for a review and a proposed methodology for its implementation by the end of 2016.

4. Under article 154, the Assembly is required, every five years from the date of entry into force of the Convention, to undertake a general and systematic review of the manner in which the international regime of the Area established in the Convention has operated in practice. It is provided that, in the light of the review, the Assembly may take, or recommend that other organs take, measures in accordance with the provisions and procedures of part XI of the Convention and the annexes relating thereto which will lead to the improvement of the operation of the regime.

5. Under article 155, paragraph 1, of the Convention, a Review Conference is mandated to be convened 15 years from 1 January of the year in which the earliest commercial production of minerals from the Area. Further to 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, that provision no longer applies (see annex, sect. 4, of the agreement), although the Assembly may at any time, upon the recommendation of the Council, undertake a review of the matters referred to in article 155, paragraph 1, of the Convention. The 1994 Agreement did not, however, affect the requirement, under article 154 of the Convention, for the Assembly to undertake, at five-yearly intervals, a general and systematic review of the manner in which the international regime of the Area has operated in practice.

6. The Convention entered into force on 16 November 1994 and the first periodic review under article 154 therefore fell due in 2000. In his annual report for the sixth session of the Authority (see ISBA/6/A/9, para. 63), in 2000, the Secretary-General recorded that the first four years of operation of the Authority had been devoted primarily to consideration of the organizational issues relating to the proper functioning of the Authority as an autonomous international organization. He added that, while the Authority had commenced its operational and substantive activities, it was too early at that stage to make a determination as to whether the regime established by the Convention and the Agreement had functioned effectively in practice. Following consideration of the matter, the Assembly concurred with the recommendation of the Secretary-General that, in the light of the very limited experience that the Authority had had in implementing the regime, it would be premature for the Assembly to take any measures as envisaged under article 154 (ISBA/6/A/19, para. 8).

7. The evolution in the programme of work and priority activities of the Authority since 2000 may be seen from a review of the annual reports of the Secretary-General. Thus, in 2004, in his annual report for the tenth session of the Authority, the Secretary-General concluded that the organizational phase of the Authority's work had been completed (ISBA/10/A/3, paras. 104-105). He noted further that, following the adoption in 2000 of the Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area, the Authority had entered into 15-year exploration contracts with the registered pioneer investors, thus effectively bringing to an end the pioneer regime under resolution II of the Third United Nations Conference on the Law of the Sea. In the same report, the Secretary-General proposed for the first time a three-year programme of work (2005-2007) for the secretariat of the Authority, focusing on the implementation of items (c), (d), (f),

(g), (h), (i) and (j) listed under paragraph 5 of section 1 of the annex to the 1994 Agreement, namely:

- The supervisory functions of the Authority with respect to existing contracts for exploration for polymetallic nodules;
- The development of an appropriate regulatory framework for the future development of the mineral resources of the Area, particularly hydrothermal polymetallic sulphides and cobalt-rich crusts, including standards for the protection and preservation of the marine environment;
- Ongoing assessment of available data relating to prospecting and exploration for polymetallic nodules in the Clarion-Clipperton Fracture Zone;
- The promotion and encouragement of marine scientific research in the Area through, inter alia, an ongoing programme of technical workshops, and the dissemination of the results of such research;
- Information-gathering and the establishment and development of unique databases of scientific and technical information with a view to obtaining a better understanding of the deep ocean environment.

8. In his proposal, the Secretary-General clarified that it was not considered necessary or cost-effective at that time for the Authority to invest its limited resources in studying the potential impact of mineral production from the Area on the economies of developing land-based producers of minerals (item (e) in the list set out in paragraph 5 of section 1 of the annex to the 1994 Agreement), or in the elaboration of rules, regulations and procedures for exploitation (item (k) in the list), since it was clear that commercial exploitation was still many years away. He added that implementation of some of the items on the list, for example, items (c) and (i), required only passive monitoring and no additional resources within the secretariat, while others overlapped to a greater or lesser extent.

9. The substantive work programme of the Authority has remained largely unchanged since 2004 and the Assembly has not explicitly revisited the subject of article 154 since 2000. That in itself may be considered sufficient reason for a strategic review of the work programme. In addition, however, the last few years have seen a significant increase in the pace of activities in the Area and, as a result, in the work of the Authority. For example, in 2013, in his report for the nineteenth session of the Authority, the Secretary-General noted that interest in the development of marine minerals in the deep seabed continued to grow and had resulted in a significant increase in the workload of the Authority over the previous year (ISBA/19/A/2, para. 6). The Secretary-General also pointed out that, in 2012, five applications for plans of work for exploration had been approved by the Council and that it was expected that, by the end of 2013, the Authority would have issued 17 exploration contracts. Meanwhile, the first exploration contracts issued by the Authority, signed in 2001 and 2002, would come to an end in 2016 and 2017, with the expectation that the contractors would be in a position at that time to proceed to exploitation.

10. The situation has created a number of challenges for the Authority. First, it is apparent that effective management and supervision of the legal and technical aspects of exploration contracts are becoming increasingly complex, time-consuming and demanding for the secretariat, also placing increasing demands on

the Legal and Technical Commission. Second, it has been agreed by the Council that it is now imperative to make progress on the development of an appropriate fiscal regime to allow those contractors that are in a position to proceed to exploitation to do so, while at the same time safeguarding the interests of the members of the Authority as a whole. Third, it is imperative to ensure that adequate measures are in place for the protection of the marine environment.

11. How to achieve those objectives presents real challenges for the Authority. In the Authority's Technical Study No. 11,[1] commissioned to assess and analyse the issues associated with the development of a regulatory framework for mineral exploitation in the Area, it was noted that it would be necessary for a strategic framework to be developed that allowed the Authority to put in place the necessary mandates, organizational capacities (technical and administrative), policies and regulations and capacities (fiscal, manpower and specialties). It was noted that, in accordance with the evolutionary approach to its establishment, reflected in the 1994 Agreement, the Authority has been principally operating as an international organization providing meeting services to member States and expert bodies. A number of organizational, fiscal and research recommendations were highlighted that would need to be addressed as part of an overall strategic plan, including the development of an internal mining inspectorate with the specific responsibilities of maintaining oversight over, and compliance with, all exploration and exploitation activities, as well as the creation of a permanent body to address the clear and urgent need to rationalize and incorporate past and present environmental rules, regulations and procedures within the evolving framework for exploitation. Those concerns and needs have been further highlighted by the Legal and Technical Commission in its consideration of the draft framework for exploitation. In that regard, the Commission identified a number of high-level issues requiring consideration and produced a draft action plan to deliver the regulatory framework in a report circulated to member States in March 2015.[2] Although some of the issues highlighted in that report are to be discussed by the Council and the Finance Committee in July 2015, the capacity of the Authority to deliver the outcomes expected by the Commission, within current operational constraints, is limited.

12. Should the Assembly decide to proceed with a periodic review under article 154, it is suggested that the following methodology be adopted in order to ensure that the review is undertaken in a general and systematic manner, based on the best information available, and provides a basis for a more strategic vision for the future workplan of the Authority.

13. The review would be carried out by the Assembly at its twenty-second session. It would be for the Assembly to determine how any recommendations arising from the review should be implemented. The review would be informed by a comprehensive study, to be presented to the members of the Authority no later than three months prior to the twenty-second session. Suggested terms of reference for the study are contained in the annex to the present note. It is suggested that the study be prepared by external consultants, reporting to a review committee consisting of the Secretary-General or his designate or designates, the President of

[1] International Seabed Authority, *Towards the Development of a Regulatory Framework for Polymetallic Nodule Exploitation in the Area, Technical Study No. 11* (Kingston, 2013).

[2] International Seabed Authority, "Developing a Regulatory Framework for Mineral Exploitation in the Area", report to members of the Authority and all stakeholders (March 2015).

the Assembly, the President of the Council and one representative from each of the other regional groups.

14. It is envisaged that the review committee would advise on the selection of consultants for the review, meet with the consultants to decide on the scope of the report prior to drafting and review the final draft report and recommendations, and present the report to the Assembly at its twenty-second session, including any draft recommendations designed to improve the operation of the regime. The report would be circulated to all member States at least three months in advance of the twenty-second session.

Annex

Draft terms of reference for a background study to inform the periodic review of the international regime for the Area pursuant to article 154 of the United Nations Convention on the Law of the Sea

1. The International Seabed Authority is an autonomous international organization established under the United Nations Convention on the Law of the Sea (the Convention) 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 (the 1994 Agreement). The Authority is the organization through which States parties to the Convention are required, in accordance with the Convention, to organize and control activities in the Area, particularly with a view to administering the resources of the Area.

2. Under article 154 of the Convention, the Assembly of the Authority is required, every five years from the date of entry into force of the Convention, to undertake a general and systematic review of the manner in which the international regime of the Area established in the Convention has operated in practice. The purpose of article 154 is to allow the Assembly the opportunity to take, or recommend that other organs take, measures, in the light of experience and the changing circumstances of the Authority's existence, which will lead to the improvement of the operation of the regime.

3. The Assembly intends to conduct a periodic review under article 154 at its twenty-second session in 2016. In order to provide a basis for such a review, a comprehensive report is to be prepared according to the following terms of reference.

4. The report will review the manner in which the various organs and suborgans of the Authority have operated in practice, and whether they have effectively performed the functions stipulated in paragraph 5 of section 1 of the annex to the 1994 Agreement. In particular, in relation to the principal organs of the Authority (the Assembly, the Council, the secretariat, the Legal and Technical Commission and the Enterprise) the report will:

(a) Review the level of representation and attendance of members of the Authority at its regular annual sessions;

(b) Analyse the performance of the Assembly as the supreme organ of the Authority in establishing general policies and in the exercise of its additional powers and functions pursuant to article 160, paragraph 2, of the Convention;

(c) Analyse the performance of the Council as the executive organ of the Authority in establishing specific policies to be pursued by the Authority on any question or matter within the competence of the Authority and in the exercise of its additional powers and functions pursuant to article 162, paragraph 2, of the Convention;

(d) Review the performance by the secretariat of its functions as referred to in article 157, paragraph 1, of the Convention, including those under paragraph 5 of section 1 of the annex to the 1994 Agreement;

(e) Review the current staffing structure of the secretariat with particular reference to the distribution of technical and professional staff to determine whether the current balance allows for maximum efficiency and is capable of delivering the necessary administrative and technical support for a regulatory system for exploitation;

(f) Review the current and projected workload of the Legal and Technical Commission and identify measures that will lead to the improvement of its future operations.

5. The report and any recommendations arising therefrom are to be prepared under the supervision of a review committee consisting of the Secretary-General or his designate or designates, the President of the Assembly, the President of the Council and one representative from each of the other regional groups.