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OUTSTANDING ISSUES WITH RESPECT TO THE DRAFT REGULATIONS ON PROSPECTING AND
EXPLORATION FOR POLYMETALLIC NODULES IN THE AREA (ISBA/5/C/4/Rev.1)

Note by the Secretariat

I. INTRODUCTION

1. At the end of the fifth session of the Authority, the Council decided that, with respect to the organization of work for the sixth session of the Authority, priority would be given to the work of the Council on the draft regulations for prospecting and exploration for polymetallic nodules, with a view to adopting the regulations during 2000. It was further agreed that, to advance the work of the Council on the draft regulations, the Secretary-General would consult with the incoming President of the Council and with the regional groups and interest groups with a view to identifying the main areas of difficulty in the current draft and the most efficient working method which would enable the outstanding issues to be resolved. The present document summarizes the work carried out on the draft regulations from 1997 to date and, based on the discussions that took place during the fifth session, attempts to identify the key outstanding issues.

2. According to the mandate provided by the United Nations Convention on the Law of the Sea and the Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982, the elaboration and adoption of rules, regulations and procedures for exploration for polymetallic nodules is one of the major legislative tasks for the Authority.¹ Such rules, regulations and procedures shall incorporate applicable standards for the protection and preservation of the marine environment.

3. The Legal and Technical Commission commenced work on the draft regulations in March 1997. As the basis for its work, the Commission used the working papers prepared by Special Commission 3 of the Preparatory Commission for the International Seabed Authority and for the International Tribunal for

¹ Convention, art. 162, para. 2 (o) (ii); Agreement, annex, Sect.1, para. 15.

the Law of the Sea between 1984 and 1993. The Commission also took into account the provisions of the Agreement and the special situation of the registered pioneer investors under resolution II of the Third United Nations Conference on the Law of the Sea. The Commission worked extensively on the draft regulations during its meetings in March 1997 and August 1997 and March 1998 (the third and fourth sessions of the Authority), completing its work in March 1998.

4. The draft regulations proposed by the Commission were submitted to the Council under symbol ISBA/4/C/4/Rev.1 and were considered by the Council at the resumed fourth session of the Authority in August 1998. The Council met in informal session, open to all interested members of the Authority, from 18 to 21 and on 24 and 26 August to examine the text regulation by regulation. Following the examination of the text, an informal revision of the preamble and regulations 2 to 21 of the draft regulations was prepared by the Secretariat together with the President of the Council and issued under the symbol ISBA/4/C/CRP.1.

5. During the fifth session of the Authority in August 1999, the Council held informal meetings from 10 to 13 August to continue the examination of the text of the draft regulations proposed by the Legal and Technical Commission. In the light of the discussions, the Secretariat, together with the President, prepared a revised text issued under symbol ISBA/5/C/4 and Add.1. In further informal meetings on 23 and 24 August, the Council examined the preamble and part of regulation 1 of the revised text. Subsequently, the revised text was reissued with minor technical amendments under the symbol ISBA/5/C/4/Rev.1.

6. The draft consists of 40 regulations, organized into 9 parts, and four annexes. Part I of the regulations consists of introductory material and definitions. Part II deals with prospecting. Part III deals with the process of applying for approval of a plan of work for exploration, including the content of the plan of work, the form of the application and the procedure for consideration of applications by the Legal and Technical Commission and the Council. Part IV describes the form and content of the contract for exploration. Parts I to IV of the draft regulations are basically an elaboration of Annex III of the Convention, which contains the basic conditions of prospecting, exploration and exploitation. Annex III itself elaborates upon the provisions of article 153 of the Convention by describing the procedures by which States, state enterprises and other entities may apply for prospecting, exploration and exploitation in the international seabed area, the procedures for approval of plans of work and the basic legal and contractual conditions attached to such plans of work.

7. Part V of the draft regulations deals with protection and preservation of the marine environment, including the procedure for the application of emergency orders pursuant to article 162, paragraph 2 (w), of the Convention. Part VI deals with confidentiality, an issue which has not so far been resolved to the satisfaction of the Council. Part VII contains general procedures for the implementation of the regulations. Part VIII deals with settlement of disputes and Part IX sets out the procedure to be followed should the prospector or contractor locate resources other than polymetallic nodules. Annexes 1 and 2 are the forms used to notify the Authority of prospecting and to apply for a plan of work for exploration. Annex 3 is the

contract for exploration and Annex 4 contains the standard clauses of the contract for exploration.

II. SUBSTANTIVE CHANGES INTRODUCED BY THE COUNCIL DURING THE FIRST READING OF THE DRAFT REGULATIONS

8. During the first reading of the draft regulations, the Council introduced revisions of a substantive nature proposed by the Legal and Technical Commission, as well as numerous editorial changes.

9. The Council was of the view that the power of the Legal and Technical Commission to issue guidelines or recommendations should be clarified. New regulation 38, therefore, provides that the Commission may from time to time issue recommendations of a technical or administrative nature for the guidance of contractors to assist them in the implementation of the rules, regulations and procedures of the Authority. Such guidelines or recommendations are to be reported to the Council, which may request the modification or withdrawal of any such guideline or recommendation if it is found to be inconsistent with the regulations.

10. In response to concerns raised by a number of States, substantial revisions were made to Part V of the draft regulations, relating to the protection and preservation of the marine environment and the related sections of Annex 4. These included:

(a) Revision of regulation 32 to ensure consistency with article 145 of the Convention;

(b) Revision of Section 6 of Annex 4 to clarify the purpose of contingency plans;

(c) Revision of regulation 33 to clarify the procedure for the implementation of emergency orders pursuant to article 162, paragraph 2 (w), of the Convention and the residual power of the Secretary-General to take immediate measures of a temporary nature to prevent, contain and minimize serious harm to the marine environment; and

(d) Revision of regulation 34 (previously regulation 29) to ensure consistency with article 142 of the Convention and to permit any coastal State which has grounds for believing that any activity in the Area by a contractor is likely to cause serious harm to the marine environment under its jurisdiction or sovereignty to notify the Secretary-General.

11. In response to concerns expressed by some States, a clear linkage between regulation 34 and regulation 33 was established. Thus, in the event that a coastal State notifies the Secretary-General that it has grounds for believing that any activity in the Area by a contractor is likely to cause serious harm to the marine environment under its jurisdiction or sovereignty, and there are clear grounds for such a belief, the Secretary-General is bound to invoke the procedures for emergency orders set out in regulation 33 by reporting immediately to the Legal and Technical Commission and the Council.

12. With respect to the issue of confidentiality, an attempt was made to define confidential data and information by reference to their commercial value and a time limitation on confidentiality was inserted.

13. Among the other substantive matters introduced by the Council were the following:

(a) The procedure for review of the programme of work by the Secretary-General and the contractor at five-year intervals was clarified;

(b) The number of definitions in regulation 1 was reduced by omitting redundant definitions and those terms which are also defined in the Convention and the Agreement;

(c) The reporting periods and accounting periods under the standard terms of contract were made consistent with the calendar year;

(d) The provisions dealing with the content of reports to be submitted to the Authority by the contractor were streamlined;

(e) The provisions of the contract dealing with inspection by the Authority were clarified, including the addition of a new Section 14.7 of Annex 4, dealing with reports by inspectors.

III. OUTSTANDING ISSUES

14. Based upon the discussions during the fifth session, the remaining areas of disagreement with respect to the draft regulations would appear to be centred on the following subject areas:

(a) The relevance and application of the precautionary principle;

(b) Certain aspects relating to protection and preservation of the marine environment (regulations 32 - 35 and annex 4, sections 5 and 6);

(c) Certain aspects relating to confidentiality of data and information (regulations 6 and 36 and annex 4, section 12).

15. Several delegations at the fifth session supported a proposal to include in regulation 1 a definition of the precautionary principle, based upon the language contained in Principle 15 of the Rio Declaration. Subsequently, following informal consultations among delegations, the delegation of the Netherlands submitted a proposal to amend regulation 32 to provide for the application of the precautionary principle in the conduct of activities in the Area, including the possibility for the Legal and Technical Commission to issue recommendations to the Council on the implementation of regulation 32. That proposal, contained in document ISBA/5/C/L.8, is yet to be fully discussed by the Council. Some delegations however considered that, in view of the uncertainty associated with seabed exploration, it would be difficult, if not impossible, to identify and apply precautionary measures. It should be noted, however, that what is important is to ensure the systematic collection and evaluation of environmental data in order to identify the potential for adverse effects on the marine environment from exploration activities.

16. With respect to liability for damage to the marine environment, a proposal was made that the contractor should remain liable for such damage for a period of up to six months following the exploration phase. Some delegations, however, considered that the proposal would unnecessarily limit the application of the general provision relating to responsibility and liability contained in regulation 30 and Section 16 of Annex 4. It was also proposed that the contractor should be obliged to notify the Authority prior to the removal of equipment and installations following exploration to allow the Authority, as well as affected coastal States, the opportunity to inspect the site. In this regard, it was pointed out by some delegations that existing international rules and regulations already cover the use, removal and disposal of offshore installations, for example, the regulations of the International Maritime Organization. It was further pointed out that the proposal made was perhaps more appropriate to the case of exploration for oil and gas than the case of exploration for polymetallic nodules, in which no permanent installations are envisaged.

17. The provisions on confidentiality of data and information continue to cause difficulties for some delegations. The only guidance to be found in the Convention on this matter is in article 14 of Annex III, relating to the transfer of data by the contractor to the Authority. Paragraph 1 of article 14 establishes the obligation of the contractor to transfer to the Authority all data which are both necessary for and relevant to the effective exercise of the powers and functions of the principal organs of the Authority in respect of the area covered by the plan of work for exploration. Paragraph 2 provides that data deemed proprietary may only be used for the purposes set forth in the article, i.e. where they are necessary for and relevant to the effective exercise of the powers and functions of the principal organs of the Authority. However, data necessary for the formulation by the Authority of rules, regulations and procedures concerning protection of the marine environment and safety, other than equipment design data, shall not be deemed proprietary. Paragraph 3 prohibits the Authority from disclosing proprietary data transferred to it by prospectors, applicants for contracts or contractors, either to the Enterprise or to anyone external to the Authority. Data on reserved areas may, however, be transferred to the Enterprise.

18. Paragraph 1 of article 14 refers generally to all data which are both necessary for and relevant to the effective exercise of the powers and functions of the principal organs of the Authority. Such data would clearly include the data required under article 8 of Annex III, relating to the estimated commercial value of the total area under application. It would also include data to be submitted during the prospecting, exploration and exploitation phases in accordance with the regulations adopted pursuant to article 17 of Annex III. Paragraphs 2 and 3 of Article 14 prevent the disclosure of data deemed proprietary. They make no reference to non-proprietary data. Paragraph 2 makes it clear that data necessary for the formulation by the Authority of rules, regulations and procedures concerning protection of the marine environment and safety, other than equipment design data, shall not be deemed proprietary. Neither paragraph 2 nor paragraph 3, however, define what data are of a proprietary nature.

19. The draft regulations elaborate upon the provisions of article 14 of Annex III as follows:

(a) They impose an obligation upon the Secretary-General to maintain the confidentiality of confidential data and information and describe the measures which must be taken to ensure confidentiality (regulations 6 (1) and 36 (3));

(b) They attempt to define which data are of a confidential nature by reference to their "commercial value", while at the same time excluding certain data and information from confidentiality, e.g. data and information which are generally known or publicly available from other sources (regulation 36 (1));

(c) They establish a time scale of ten years following the expiration of the contract for exploration during which such data and information are to be considered confidential (regulations 6 and 36 (4) and Annex 4, Section 12).

20. Other relevant articles of the Convention, which are reflected in the draft regulations, include article 163, paragraph 8, and article 168, paragraph 2. These provisions make it incumbent upon members of the Legal and Technical Commission and secretariat respectively not to disclose, even after the termination of their functions, "any industrial secret, proprietary data which are transferred to the Authority in accordance with Annex III, article 14, or any other confidential information coming to their knowledge by reason of their employment with the Authority."

21. Discussions during the fifth session of the Authority centred around the definition of confidential data and information, in particular whether it should be left to the contractor to determine which data are confidential, and the time period during which such data should be kept confidential. As the regulations are currently drafted, it is the contractor who determines which data and information are confidential. Some delegations, however, suggested that the contractor should be required to justify its request to keep data confidential, or that there be some procedure to determine whether a request for confidentiality is justified. An example of such a procedure may be found in the United States Deep Seabed Mining Regulations for Exploration Licenses issued pursuant to the Deep Seabed Hard Mineral Resources Act. Under those regulations, the contractor is required to substantiate each request for confidential treatment of data and information and to state the period of time for which confidential treatment is desired.

22. With respect to the time period provided for in the draft regulations, some delegations considered that confidential data should remain confidential indefinitely. Others considered that the general rule should be that the confidential status of data and information should apply only while an exploration contract is in force, unless it is followed by a contract for exploitation. Finally, some delegations considered that the provisions relating to the obligations of the staff of the Authority with respect to confidentiality should be made more specific, although it may be noted in this regard that the obligations of staff members will be addressed in the Staff Regulations of the Authority.
