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Draft regulations on exploitation of mineral resources in the Area

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Part I: Regulations 2 to 5

Drafting proposals submitted by delegations as compiled on 30 March 2022

Part I
Introduction

Regulation 1
Use of terms and scope

1. Terms used in these regulations shall have the same meaning as those in the Rules of the Authority.

2. In accordance with the Agreement, the provisions of the Agreement and part XI of the Convention shall be interpreted and applied together as a single instrument. These regulations and references in these regulations to the Convention are to be interpreted and applied accordingly.

3. Terms and phrases used in these regulations are defined for the purposes of these regulations in the schedule.

4. These regulations shall not in any way affect the freedom of scientific research, pursuant to article 87 of the Convention, or the right to conduct marine scientific research in the Area pursuant to articles 143 and 256 of the Convention. Nothing in these regulations shall be construed in such a way as to restrict the exercise by States of the freedom of the high seas as reflected in article 87 of the Convention.

5. These regulations are supplemented by Standards and Guidelines, as referred to in these regulations and the annexes thereto, as well as by further rules, regulations and procedures of the Authority, in particular on the protection and preservation of the Marine Environment.

6. The annexes, appendices and schedule to these regulations form an integral part of the regulations and any reference to the regulations includes the annexes, appendixes and schedule thereto.

7. These regulations are subject to the provisions of the Convention and the Agreement and other rules of international law not incompatible with the Convention.

Regulation 2
Fundamental policies and principles

In furtherance of and consistent with Part XI of the Convention and the Agreement, the fundamental policies and principles of these regulations are, inter alia, to:

(a) Recognize that the rights in the Resources of the Area are vested in mankind as a whole, on whose behalf the Authority shall act;

(b) Give effect to article 150 of the Convention by ensuring that activities in the Area shall be carried out in such a manner as to foster the healthy development of the world economy and the balanced growth of international trade, and to promote international cooperation for the overall development of all countries, especially developing States, and with a view to ensuring:

(i) The development of the Resources of the Area;

(ii) Orderly, safe and rational management of the Resources of the Area, including the efficient conduct of activities in the Area and, in accordance with sound principles of conservation, the avoidance of unnecessary waste;

(iii) The expansion of opportunities for participation in such activities consistent, in particular, with articles 144 and 148 of the Convention;

(iv) Participation in revenues by the Authority and the transfer of technology to the Enterprise and developing States as provided for in the Convention and the Agreement;

(v) Increased availability of the minerals derived from the Area as needed in conjunction with minerals derived from other sources, to ensure supplies to consumers of such minerals;

(vi) The promotion of just and stable prices remunerative to producers and fair to consumers for minerals derived both from the Area and from other sources, and the promotion of long-term equilibrium between supply and demand;

(vii) The enhancement of opportunities for all States Parties, irrespective of their social and economic systems or geographical location, to participate in the development of the resources of the Area and the prevention of monopolization of activities in the Area;

(viii) The protection of developing countries from serious adverse effects on their economies or on their export earnings resulting from a reduction in the price of an affected Mineral or in the volume of exports of that Mineral, to the extent that such reduction is caused by activities in the Area;

(ix) The development of the common heritage for the benefit of mankind as a whole; and

(x) That conditions of access to markets for the imports of minerals produced from the resources of the Area and for imports of commodities produced from such minerals shall not be more favourable than the most favourable applied to imports from other sources.

(c) Ensure that the Resources of the Area are Exploited in accordance with sound commercial principles, and that Exploitation is carried out in accordance with Good Industry Practice;

(d) Provide for the protection of human life and safety;

(e) Provide, pursuant to article 145 of the Convention, for the effective protection of the Marine Environment from the harmful effects which may arise from Exploitation, in accordance with the Authority's environmental policy, including regional environmental management plans, based on the following principles:

(i) A fundamental consideration for the development of environmental objectives shall be the effective protection of the Marine Environment, including biological diversity and ecological integrity;

(ii) The application of the precautionary approach, as reflected in principle 15 of the Rio Declaration on Environment and Development;

(iii) The application of an ecosystem approach;

(iv) The application of "the polluter pays" principle through market-based instruments, mechanisms and other relevant measures;

(v) Access to data and information relating to the protection and preservation of the Marine Environment;

(vi) Accountability and transparency in decision-making; and

(vii) Encouragement of effective public participation;

(f) Provide for the prevention, reduction and control of pollution and other hazards to the Marine Environment, including the coastline;

(g) Incorporate the Best Available Scientific Evidence into decision-making processes;

(h) Ensure the effective management and regulation of the Area and its Resources in a way that promotes the development of the common heritage for the benefit of mankind as a whole; and

(i) Ensure that these regulations, and any decision-making thereunder, are implemented in conformity with these fundamental policies and principles.

I – Members

New Zealand

(e) (ii) The application of the precautionary approach~~, as reflected in principle 15 of the Rio Declaration on the Environment and Development~~

Rationale

This proposal ensures the precautionary approach is applied as it has evolved since the Rio Declaration 1992, and will continue to evolve in the specific context of deep sea mining. The Rio Declaration articulation of the precautionary approach is inapt to describe its application in the context of the UNCLOS obligation to protect and preserve the marine environment (see Article 6 of the Fish Stocks Agreement as a more appropriate articulation in this context). New Zealand endorses Italy's view that the practical implementation of the precautionary approach and ecosystem approach to the specific context of deep sea mining could be the subject of a policy adopted, and regularly reviewed and updated, by the Authority.

(e)(vii) ~~Encouragement of~~ effective public participation.

Rationale
We consider that the Authority should ensure effective public participation, not simply encourage it, as the language of this subparagraph currently suggests.

II - Observers to the International Seabed Authority as referred to in rule 82 of the Rules of Procedure of the Assembly

Advisory Committee on Protection of the Sea

(f) Provide for the prevention, reduction and control of pollution and other hazards to the Marine Environment, including the coastline, **and of interference with the ecological balance of the marine environment;**

Rationale
Further to our proposal made in the sessions of the IWG-Environment re the need to address **"the interference with the ecological balance of the marine environment"** in the exploitation regulations, ACOPS considers that this criterion, as explicitly required by Article 145, must also be included here, in the same place as it appears in the LOS Convention itself, namely right after the current text again taken up here in (f).

ACOPS sees no reason to include in the exploitation regulations a required environmental criterion from Article 145 and omit the environmental criterion immediately following it in the Convention, which criterion is equally required to be addressed in the exploitation regulations under the LOS Convention.

ACOPS will submit further textual proposals with regard to this criterion (and other comments) for addition to the draft exploitation regulations in due course.

Regulation 3
Duty to cooperate and exchange of information

In matters relating to these regulations:

(a) Members of the Authority and Contractors shall use their best endeavours to cooperate with the Authority to provide such data and information as is reasonably necessary for the Authority to discharge its duties and responsibilities under the Convention;

(b) The Authority, sponsoring States and flag States shall cooperate towards the avoidance of unnecessary duplication of administrative procedures and compliance requirements;

(c) The Authority shall develop, implement and promote effective and transparent communication, public information and public participation procedures;

(d) The Authority shall consult and cooperate with sponsoring States, flag States, competent international organizations and other relevant bodies as appropriate, to develop measures to:

(i) Promote the health and safety of life and property at sea and the protection of the Marine Environment; and

(ii) Exchange information and data to facilitate compliance with and enforcement of applicable international rules and standards;

(e) Contractors, sponsoring States and members of the Authority shall cooperate with the Authority in the establishment and implementation of programmes to observe, measure, evaluate and analyse the impacts of Exploitation on the Marine Environment, to share the findings and results of such programmes with the Authority for wider dissemination and to extend such cooperation and collaboration to the implementation and further development of Best Environmental Practices in connection with activities in the Area;

(f) Members of the Authority and Contractors shall use their best endeavours, in conjunction with the Authority, to cooperate with each other, as well as with other contractors and national and international scientific research and technology development agencies, with a view to:

(i) Sharing, exchanging and assessing environmental data and information for the Area;

(ii) Identifying gaps in scientific knowledge and developing targeted and focused research programmes to address such gaps;

(iii) Collaborating with the scientific community to identify and develop best practices and improve existing standards and protocols with regard to the collection, sampling, standardization, assessment and management of data and information;

(iv) Undertaking educational awareness programmes for Stakeholders relating to activities in the Area;

(v) Promoting the advancement of marine scientific research in the Area for the benefit of mankind as a whole; and

(vi) Developing incentive structures, including market-based instruments, to support and enhance the environmental performance of Contractors beyond the legal requirements, including through technology development and innovation; and

(g) In order to assist the Authority in carrying out its policy and duties under section 7 of the annex to the Agreement, Contractors shall use

their best endeavours, upon the request of the Secretary-General, to provide or facilitate access to such information as is reasonably required by the Secretary-General to prepare studies of the potential impact of Exploitation in the Area on the economies of developing land-based producers of those Minerals which are likely to be most seriously affected. The content of any such studies shall take account of the relevant Guidelines.

I – Members

Fiji

Reg 3 (f)
1.Stakeholders could be expanded to include coastal states that would include those that share seabed or connection via the marine resource area.

2.Sharing of information with coastal states etc will ensure that transfer of knowledge and continuity of the management of the activity1. area.

3.Agree with other delegations FSM, UK etc on ensuring that the responsibility is not diluted.

Rationale
1.There should be an important and serious consideration for those coastal states that share common areas of interest within the neighbouring seabeds-support FSM .

Italy

a) Members of the Authority and Contractors shall ~~use their best endeavours to~~ cooperate with the Authority to provide such data and information as is reasonably necessary for the Authority to discharge its duties and responsibilities under the Convention; [...]

(g) In order to assist the Authority in carrying out its policy and duties under section 7 of the annex to the Agreement, Contractors shall ~~use their best endeavours~~, upon the request of the Secretary-General, ~~to~~ provide or facilitate access to such information as is ~~reasonably~~ required by the Secretary-General to prepare studies of the potential impact of Exploitation in the Area on the economies of developing land - based producers of those Minerals which are likely to be most seriously affected. The content of any such studies shall take account of the relevant Guidelines.

Rationale
DR 3(a): The description of the DR is "Duty to Cooperate", while the use of "their best endeavours" and "reasonably" dilute its essence.
DR 3 (g)The wording of the regulation appears too loose and convoluted, reducing significantly its effectiveness.

Regulation 4
Protection measures in respect of coastal States

1. Nothing in these regulations affects the rights of coastal States in accordance with article 142 and other relevant provisions of the Convention.

2. Contractors shall take all measures necessary to ensure that their activities are conducted so as not to cause Serious Harm to the Marine Environment, including, but not restricted to, pollution, under the jurisdiction or sovereignty of coastal States, and that such Serious Harm or pollution arising from Incidents in their Contract Area does not spread into areas under the jurisdiction or sovereignty of a coastal State.

3. Any coastal State which has grounds for believing that any activity under a Plan of Work in the Area by a Contractor is likely to cause Serious Harm or a threat of Serious Harm to its coastline or to the Marine Environment under its jurisdiction or sovereignty may notify the Secretary-General in writing of the grounds upon which such belief is based. The Secretary-General shall immediately inform the Legal and Technical Commission, the Contractor and its sponsoring State or States of such notification. The Contractor and its sponsoring State or States shall be provided with a reasonable opportunity to examine the evidence, if any, and submit their observations thereon to the Secretary-General within a reasonable time.

4. If the Commission determines, taking account of the relevant Guidelines, that there are clear grounds for believing that Serious Harm to the Marine Environment is likely to occur, it shall recommend that the Council issue an emergency order pursuant to article 165 (2) (k) of the Convention.

5. If the Commission determines that the Serious Harm or threat of Serious Harm to the Marine Environment, which is likely to occur or has occurred, is attributable to a breach by the Contractor of the terms and conditions of its exploitation contract, the Secretary-General shall issue a compliance notice pursuant to regulation 103 or direct an inspection of the Contractor’s activities pursuant to article 165 (2) (m) of the Convention and Part XI of these regulations.

I – Members

Australia

2. Contractors shall take all measures necessary to ensure that their activities are conducted so as not to cause Serious Harm to the Marine Environment, including, but not restricted to, pollution, under the jurisdiction or sovereignty of coastal States, and that such Serious Harm or pollution arising from Incidents in their Contract Area does not spread into areas under the jurisdiction or sovereignty of a coastal State. Such measures shall include consulting with any coastal State concerned with a view to ensuring that the rights and legitimate interests of coastal States are not infringed.

Rationale

The proposed amendment amends Australia's previous proposal in order to reflect the proposed inclusion of an obligation to consult coastal states as part of the Environmental Impact Assessment process in proposed draft regulation 46bis(7). However, the proposed text reflects Australia's position that Contractors should be required, or at least encouraged, to consult with concerned coastal states on an ongoing basis for the life of the activity.

Fiji

1.Agree with title alt 1 as in compilation provided prior

2.4 (2)-we would request that the need to consult coastal states should be mandatory and not just a loose part of process-agree with Germany/PEW and DCSS

Rationale

1.Coastal states may heavily depend on the fisheries and shipping routes on these proposed areas for activity and therefore consultations should be seriously mandated

2.Support FSM and Australia in the 'No Harm Principle' in relation to maritime zones

3.Question-are the maritime zones or coastal states are informed? Are they informed of the plan of work? Are they included in the stakeholder participation or consultation as was discussed in the Environment Parts of the Draft Reg

Regulation 5
Qualified applicants

1. Subject to the provisions of the Convention, the following may apply to the Authority for approval of Plans of Work:

(a) The Enterprise, on its own behalf or in a joint arrangement; and

(b) States parties, State enterprises or natural or juridical persons which possess the nationality of States or are effectively controlled by them or their nationals, when sponsored by such States, or any group of the foregoing which meets the requirements of these regulations.

2. Each application shall be submitted:

(a) In the case of a State, by the authority designated for that purpose by it;

(b) In the case of the Enterprise, by its competent authority; and

(c) In the case of any other qualified applicant, by a designated representative, or by the authority designated for that purpose by the sponsoring State or States.

3. Each application by a State enterprise or one of the entities referred to in paragraph 1 (b) above shall also contain:

(a) Sufficient information to determine the nationality of the applicant or the identity of the State or States by which, or by whose nationals, the applicant is effectively controlled; and

(b) The principal place of business or domicile and, if applicable, the place of registration of the applicant.

4. Each application submitted by a partnership or consortium of entities shall contain the information required by these regulations in respect of each member of the partnership or consortium.

5. In the case of a consortium or any group, the consortium or group shall specify in its application a lead member of the consortium or group.

I – Members

Canada

2. Contractors shall take all measures necessary to ensure that their activities are conducted so as not to cause ~~Serious Harm to the Marine Environment, including, but not restricted to,~~ damage/harm, including by pollution, in areas under the jurisdiction or sovereignty of coastal States, and that any ~~such Serious Harm or~~ pollution arising from Incidents in their Contract Area does not spread into areas under the jurisdiction or sovereignty of a coastal State.

3. Any coastal State which has grounds for believing that any activity under a Plan of Work in the Area by a Contractor is likely to cause ~~Serious Harm or a threat of Serious Harm~~damage/harm ~~to its coastline or~~ to the Marine Environment under its jurisdiction or sovereignty may notify the Secretary-General in writing of the grounds upon which such belief is based. The Secretary-General shall immediately inform the Legal and Technical Commission, the Contractor and its sponsoring State or States of such notification. The Contractor and its sponsoring State or States shall be provided with a reasonable opportunity to examine the evidence, if any, and submit their observations thereon to the Secretary-General within a reasonable time.

4. If the Commission determines, taking account of the relevant Guidelines, that there are clear grounds for believing that ~~Serious Harm~~damage/harm to the Marine Environment under its jurisdiction or sovereignty of the coastal State is likely to occur, it shall recommend that the Council issue an emergency order pursuant to article 165 (2) (k) of the Convention.

5. If the Commission determines that the ~~Serious Harm or threat of Serious Harm~~damage/harm to the Marine Environment under the jurisdiction or sovereignty of the coastal State, which is likely to occur or has occurred, is attributable to a breach by the Contractor of the terms and conditions of its exploitation contract, the Secretary-General shall issue a compliance notice pursuant to regulation 103 or direct an inspection of the Contractor's activities pursuant to article 165 (2) (m) of the Convention and Part XI of these regulations.

Rationale

We believe the threshold of serious or significant harm is too high. "Damage" or "harm" is more consistent with article 194, paragraph 2 of UNCLOS: "States shall take all measures necessary to ensure that activities under their jurisdiction or control are so conducted as not to cause damage by pollution to other States and their environment, and that pollution arising from incidents or activities under their jurisdiction or control does not spread beyond the areas where they exercise sovereign rights in accordance with this Convention." and with article 142, paragraph 3 of UNCLOS: "Neither this Part nor any rights granted or exercised pursuant thereto shall affect the rights of coastal States to take such measures consistent with the relevant provisions of Part XII as may be necessary to prevent, mitigate or eliminate grave and imminent danger to their coastline, or related interests from pollution or threat thereof or from other hazardous occurrences resulting from or caused by any activities in the Area."

Italy

Regulation 5, para 3 (add sub c.):

(c) Sufficient information that the applicant has the necessary financial capability to carry out the Proposed Plan of Work.

Rationale

Criteria leading to qualification of applicants (States enterprises and natural or juridical persons) should also include their economic and financial capability since the very beginning of the assessment process and without waiting the consideration of applications by the Commission, under regulation 13. In many national legislations a minimum economic and financial capability is required to apply for a license of exploitation of marine abiotic resources under their jurisdiction. This minimum guarantee would mitigate the issues relating to change of control of the ownership of a Contractor, or of the membership of a joint venture or consortium (draft regulation 24), and transfer of rights of a contract of exploitation (draft regulation 23).

Moreover, Italy would like to point out the necessity to identify clear criteria against which to evaluate the financial qualification of the applicant.

Italy notes that under Annex to ISBA/25/C/3 it was stated that 'These guidelines should include an outline of how a Plan of Work will be evaluated by the Legal and Technical Commission against the criteria set out in DR13, in particular the financial and technical capability of the applicant, as well as criteria for the evaluation of the environmental plans. In addition, the guidelines should include standard application forms and details on the lodgement of the application and information on supporting documentation to be submitted'.

However, the present version of the guideline does not clarify, as expected, how 'proof of technical capability' and 'financial capacity' can be given or which data should be submitted to the Authority for appropriate evaluation by the LTC. This seems pivotal in ensuring the degree of transparency to which the ISA committed through its Strategic Plan.

Offshore Incident Statistics provide evidence that there is a relation between the size of enterprises and the repetitive occurrence of small-scale accidents. These accidents are often related to deficiencies in safety measures, design requirements and design methodologies, operations planning and component reliability. Furthermore, it must be

taken into account that there are not only accidents caused by the negligence of an offshore operator but there are also risks of “natural-hazard triggered technological accidents (Natech)" for offshore industrial installations and the ability to recover from those accidents is proportional to the economic capacity of the operator.

Regulation 5, general remark.

Rationale

Italy supports Norway relating to the issue of effective control.

The nationality of a company is already a critical issue, but the level of control required for a Country to sponsor a private company remains a debated issue.

In 2014, the LTC noted that the decision to grant sponsorship through a certificate is in itself valid to demonstrate the possession of the requirements of effective control over the private company. The Commission considered that effective control was an assessment that each Country must carry out under its own conditions and through its own national laws. However, we would like to highlight that Article 4 (3) of the Annex III to UNCLOS provides that the Authority itself is called to develop criteria and procedures for the implementation of the provisions on sponsorship. For the consequences it can entail, we find the Regulations, and particularly Regulations 5 and 6 are relevant to develop such rules and procedures on sponsorship with a view to ensure that the requirement of effective control is duly met.