Stakeholder Consultation on the International Seabed Authority's Draft Regulations on Exploitation of Mineral Resources in the Area

RESPONSE TO CONSULTATION SUBMITTED BY MERGER

INTRODUCTION

On 8 November 2017, the Centre for Marine Ecological Resilience and Geological Resources (MERGeR) held a workshop led by Mr. Chris Whomersley (former Deputy Legal Adviser, Foreign & Commonwealth Office, United Kingdom) with a focus on the International Seabed Authority's Draft Regulations on Exploitation of Mineral Resources in the Area. Participants were invited to share their thoughts and opinion on the Draft Regulations, with a view to submitting a "MERGeR response" to the Authority's consultation. The following are their comments on the set of questions listed in document (ISBA/23/C/12).

QUESTIONS RELATING TO THE DRAFT REGULATIONS ON EXPLOITATION OF MINERAL RESOURCES IN THE AREA

GENERAL QUESTIONS

1. DO THE DRAFT REGULATIONS FOLLOW A LOGICAL STRUCTURE AND FLOW?

a) Generally, yes. However, we suggest that Regulation 38 (Human Remains and Archaeological Sites) should come before Regulation 34 (Safety, labour and health standards) as should Regulations 40 (Preventing and Responding to Incidents) and 41 (Notifiable Events).

2. Are the intended purpose and requirements of the regulatory provisions presented in a clear, concise and unambiguous manner?

a) yes

3. 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?

a) The term 'wrongful act' mentioned in Annex IV, Article 22, of UNCLOS and in Section 8 of the Draft Regulation (Liability and Responsibility) could be taken to suggest that the liability for environmental damage is limited. The Authority should consider whether it would be possible to provide for a strict liability regime for environmental harm caused by sponsored entities. The efforts of the Authority to elucidate the liability issues is to be applauded.

b) The Authority should consider whether it ought to play a greater role by stipulating for declarations of commercial discovery, as well as through the way in which the Authority might deal with a discovery which (a) the contractor made but did not consider commercial; and (b) the contractor considered commercial but is not prepared to develop and/produce within a stipulated time frame. In practice, this may not be consistent with the intent of the provisions set out in Part XI.

4. 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?

a) No comment

5. Is an appropriate balance achieved between the content of the regulations and that of the contract?

a) No comment

6. 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) Given the likelihood that an environmental disaster takes place during deep seabed mining operations and the risk that the contractor winds up his company to avoid any form of liability, the Draft Regulations should provide for remediation measures. For instance, Under Annex X (Standard contract terms) section 8 (responsibility and liability), it would be beneficial to have the contractor deposit a bond to cover at least a percentage of costs for remedial action if environmental harm occurs. Despite the terms of Article 139(2) of UNCLOS, the Authority might explore the possibility of holding sponsoring states liable for any harm caused by the contractor. In this sense, Draft Regulation 91 might impose liability for environmental harm as a result of mining activities on the sponsoring State. Alternatively, contractor should pay into a fund similar to those used in relation to shipping accidents to cover remedial works. A trust fund could also be considered.
b) What happens in the event of a Contractor finding a different class of mineral resources during mining exploitation? Is the Contractor given preemption rights for the award on the new resource when other parties become interested in this new resource?

Specific questions

1. 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?

a) Considering the risk of ecological disaster that might result from deep-seabed mining activities, the Draft Regulations should be equipped with robust monitoring measures so to ensure that the impact of mining on the deep-sea environment is monitored and regularly reviewed. For this reason, Draft Regulation 91 might impose:

- an explicit obligation on sponsoring States to ensure that the contractors that they have sponsored comply with the requirement to make information freely available. Effective monitoring is not possible until data and information are made freely and easily accessible;

- liability on sponsoring State for environmental harm caused by contractors that they have sponsored, notwithstanding Article 139(2) of UNCLOS; and

- in furtherance of the same Article, an explicit obligation on sponsoring state to ensure that mining activities carried out by contractors that they have sponsored are (i) in compliance with wider obligations under UNCLOS, in particular under Part XII (Protection and Preservation of the Marine Environment) and Part VII (High Seas) and that they do not interfere with the rights of State Parties, and (ii) in compliance with the general principles of international environmental law.

2. 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?

a) Obligations in non-mining areas should relate to marine environmental preservation and be designed to ensure no harm to the ecosystem of the seabed.

b) The definitions found in Schedule 1 are clear; however, the distinction between "contract area" and "mining area(s)" is not clearly presented in the Draft Regulations.

3. 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?

a) Article 153(3) of UNCLOS is admittedly a constraint. However, compared to other mining operations, it appears that there is some kind of "inverted" process: usually after exploration and production rights/contracts have been granted to the investor, the investor develops a general work plan and then specific work programmes which must be approved for blow by blow exploration, development or production work. In this case the plan of work comes even before the contract is awarded thereby incorporating the plan of work as contractual terms. There also seems to be no provisions requiring the preparation and approval of specific work programmes after contract has been executed (although there is provision for amendment of the original plan of work).

4. 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?

a) no comment

5. ADMINISTRATIVE REVIEW MECHANISM: AS HIGHLIGHTED IN AUTHORITY DISCUSSION PAPER N°1, 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?

a) The consultation paper refers to regulation 23.9 of the Exploration regulations which provides for an administrative review procedure. The procedure is similar to that used in UK regulatory processes, but lacks the possibility of administrative appeal to a separate entity such as an ombudsman. It would, be useful to create such an appeal mechanism in addition to the mechanism provided under regulation 23.9.

"If the Commission finds that an application does not comply with these Regulations, it shall notify the applicant in writing, through the Secretary-General, indicating the reasons. The applicant may, within 45 days of such notification, amend its application. If the Commission after further consideration is of the view that it should not recommend approval of the plan of work for exploration, it shall so inform the applicant and provide the applicant with a further opportunity to make representations within 30 days of such information. The Commission shall consider any such representations made by the applicant in preparing its report and recommendation to the Council."

6. 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?

a) No comment

7. 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?

a) How should the Authority interpret the term "interested persons"?

- Following best practice in other international organisations, (Kirk, Biodiversity 2016) the term "interested person" could include key stakeholders, or any stakeholder which expresses an interest in the mining activity. The danger of too narrow a definition is that some stakeholders are excluded from discussion. Even if the Authority draws in those it thinks have relevant information, research has shown (Sherlock et al, 2004; Kirk et al 2007) that regulators tend to be path dependent – drawing on information or potential contributors they have drawn on previously and not recognizing potentially beneficial (but new to them) information.

- To provide some level of consistency across international regimes it is suggested that the term "interested person" be interpreted in the same manner as the term "public concerned" defined under the Article 2(5) of the 1998 Aarhus Convention on

Access to Information, Public Participation in Decision-making, and Access to Justice in Environmental Matters.

- The definition of "interested person" under Schedule 1 could also be removed. This would provide more leeway for interpretation.

b) What is the role and responsibility of sponsoring States in relation to public involvement?

- Sponsoring States should ensure that information is prepared by the mining company in a format accessible to the public and provided to the Authority in good time to enable consultations to take place. Sponsoring States should also bear the costs of running consultations.

c) To what degree and extent should the Authority be engaged in a public consultation process?

- Mining of the deep seabed raises some significant ethical issues. We are only now beginning to understand the full panoply of life on the deep seabed and in the deep oceans. Society's perceptions of the benefits to be drawn from the deep seabed and of the ethical issues associated with its mining are likely therefore to change. In this changing context there is a need to ensure that mining operations continue to be seen as legitimate. For these reasons, there is considerable need to consult with the public in general and not just with identified stakeholders.

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