Briefing on Draft Exploitation Regulations

Duncan E J Currie, LL.B. (Hons.) LL.M.
Key Deficiencies and Problems

Fundamental Principles
• Weakened: now fundamental “Policies” and Principles
• Crucial: e.g. common heritage ONLY appears in DR2; precautionary that and 44.
• Now Include a ‘need’ for mining
• Not integrated and mainstreamed into regulations
• Need amending: deleted ‘conservation’ from environmental protection

Environmental Impact Assessment
• Provisions Mostly Lacking
• No independent scientific assessment, no hearing
• Administered by closed Legal and Technical Commission
• Only 1 EIS – but how about development of entire mining area?

EIS, EMMP (Management Plan) etc
• Contractor holds the pen makes – and can ‘reject’ - amendments– who is regulator?
• Again, no hearing process

Granting Contract
• No general discretion to refuse contract
• Indefinite, automatic extensions - infinity duration of contracts

REMPs need to be mainstreamed, compulsory, prerequisite
Key Deficiencies and Problems

Transparency
- ‘relevant’ stakeholders introduced – restrictive
- Transparency around performance assessments, reviews, modification of plans of work, completeness review, request for reconsideration by Applicant
- No opportunity to call expert scientists, challenge applicant scientists, no hearings process, open or even otherwise
- no transparency around LTC decision-making

Liability

- No liability regime has been established or even discussed by Council or Assembly
- There needs to be 2 funds: a liability fund and a sustainability fund. They must be separate and must be fully funded from the start instead of being ‘drip fed’ starting from zero.
Overview: Looking ahead: Benefit sharing

**UNCLOS Art 162(2) Council: Powers and Functions**

(o) (i) recommend to the Assembly rules, regulations and procedures on the **equitable sharing of financial and other economic benefits** derived from activities in the Area ...taking into particular consideration the interests and needs of the developing States and peoples who have not attained full independence or other self-governing status;

**Council: Consensus (UNCLOS Art 161(8)(d))**

Council article 162(2)(m) and (o))
Development of the Code
Voting: Looking ahead

• 2/3 majority needed, including no opposing majority in any chamber (IA Section 3 para 5)
• Council: Consensus needed for benefit sharing - taking into account Finance Committee recommendations (IA, Section 9, para. 7)
• Assembly: 2/3 vote required (IA Section 3 para 3)
  160 (2)(f)(i) If the Assembly does not approve the recommendations of the Council, the Assembly shall return them to the Council for reconsideration in the light of the views expressed by the Assembly
• For council to reject exploitation contract: need 2/3 majority + majority of members present & voting in each chamber (IA Section 3 para 11)
2. Fundamental Principles [and Policies]

Added most provisions of UNCLOS Art. 150, including the following:

(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

Seems to be a political act by ISA to justify mining

LTC: “In response to stakeholder concerns that reproducing only part of the text of article 150 could be misleading”

But who says all provisions of article 150 are “fundamental policies”

And what is a “fundamental policy”? Policies are weighed against each other: fundamental principles are intended as binding principles meant to apply in all circumstances.

And how weigh against other policies and provisions of UNCLOS?

e.g. production policies (Art 151 (8) and (10) – rest repealed)

And Assembly can establish policies (Art 160(1))

How about States’ environmental policies (Art 193, 194)? Overridden by 151? Policies on technology transfer (Art 277)?

Enterprise is to act in accordance with “general policies” of Assembly. (Annex IV). Overridden by ‘fundamental policies’?
2. Fundamental Principles [and Policies]

**DR 2(e) (i)**

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

LTC “request by the Council to maintain the distinction between ‘conservation’ and ‘preservation’ in the regulations”. No further explanation given

Cf. ISBA/24/C/22: ‘5. Requests the Commission and the Secretariat to implement, as appropriate, the recommendations contained in the submission by the Netherlands entitled “Overview of existing measures, means and actions relating to the protection and conservation of the marine environment in areas beyond national jurisdiction”, within available resources; “ (said the opposite)

Art 145(b) the protection and conservation of the natural resources of the Area and the prevention of damage to the flora and fauna of the marine environment.

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

**Bootstrap**: need to insert provisions in DR 12, 13 etc to require implementation
2. Fundamental Principles [and Policies]

*DR 2(vi)* Accountability and transparency in decision-making;
Should include all aspects (implementation, monitoring, compliance etc

*DR 2 (vii)* Encouragement of effective public participation;
Should read ensure (or facilitate) public participation

And most importantly must be mainstreamed: e.g. precautionary approach is only in DR 2, and 44 (general obligations)

DR 12 (General) instead of “regard to the principles, policies and objectives relating to activities in the Area as provided for in Part XI and annex III of the Convention, and in the Agreement”
Should require compliance with DR 2 fundamental principles – otherwise conflict with UNCLOS, others etc
And DR 13 (Assessment) should likewise. Fundamental means fundamental – not on level of others
And DR 15 (LTC Recommendation) should as well.
Key issue: who revises documents: ISA or the Applicant?

Revision of environmental plans (DR 11), ISA can only “request” contractor to amend Plan of Work — and contractor can “reject” the proposal (DR 14)
no detail in DR 47 (EIS), 52 (contractor conducts performance assessment) 57 (modification of work by contractor/material change — no scope for ISA to do same); 58 Review (‘contractor wishes to make changes’)

Crucial issue: who is the regulator? Contractor or ISA?

“The Commission shall then, in the light of the applicant’s response, make its recommendations to the Council.” (DR 14) — but DR 15 – “shall recommend approval”
**Effective Control**

**Convention:** Annex III Article 4(3) as well as Article 9(4) with respect to reserved areas, and Article 139 with respect to compliance and liability, and Article 153(2)(b) with respect to the Enterprise.

**Yet DR 24:** Change in control=50%. But can change with 1%

**Read Andres Sebastian Rojas and Freedom-Kai Phillips paper:** must be economic control

Contractor can gain new sponsoring state without giving reasons – just certificate (DR 6, 21,23)

Sponsoring State may terminate for malfeasance etc – ISA should retain discretion to refuse certificate. Fundamental change of circumstances.
Key issue: No general discretion to refuse contract – or extension

1. “If the Commission determines that the applicant meets the criteria set out in regulations 12 (4) and 13, it shall recommend approval of the Plan of Work to the Council.”
(Council can only reject by 2/3 majority, including majority of chambers (IA 3 para 11)
3. “The Commission shall recommend to the Council the approval of an application to renew an exploitation contract” - “each renewable period shall be a maximum of 10 years”
4. No general discretion
**Key issue: how is assessment conducted**

**DR 10,13,14,15**

- DR 10 SG completeness review: is it a procedural or substantive review?
- Should provide for fundamental principles to be applied (e.g. precautionary approach not in DR 13 now – only DR 2, 44); common heritage *only* appears in DR 2!!

This is of critical importance. Fundamental principles must be fundamental – not weighed against others

- No external scientists, no hearing

Belgium proposed the use of experts. The LTC responded that “While the Commission sees merit in seeking inputs from external experts to complement the expertise within the Commission, the Commission was conscious to avoid establishing a mechanism that would be overly bureaucratic and formalistic.” Having outside experts is not formalistic or bureaucratic: it is essential with all the scientific uncertainties

- Again, no general discretion in DR 13
- Only Commission can ask for further information (14), ‘request’ changes; contractor can reject
- DR 15 should require the LTC to provide sufficient detail as to the Plans of Work and a record of the LTC’s deliberations to be placed before the Council; for Council to give reasons
**Key issue: REMPS need to be mainstreamed**

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<thead>
<tr>
<th>DR 2(e), 47(3), 48, Annex III Closure Plan</th>
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<tbody>
<tr>
<td>• REMPs not compulsory or pre-requisite</td>
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<td>• No prohibition of prospecting, mining inside APEI</td>
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<td>• No process for development of REMPs</td>
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<td>• No way to prevent claims being made in area where REMPs may require APEIs</td>
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Key issue: how is EIA and EIS conducted

DR 47

- No clarity even over who is responsible for overseeing the EIA process and who carries out the EIA, other than stating that the applicant or contractor prepares the EIS.
- Specific provision needs to be added for a standard on baselines, adequate baselines and review when baseline information is inadequate. (DR 10 not enough)
- A hearing process needs to be included, and provision for independent scientific advice.
- Only 1 EIA, EIS, yet highly likely contractor only has assessed part of claim – rest later. Yet has contract by then!
- More detail is needed on assessing the completeness of documents (see DR 10), expert/independent scientific review, revision of the environmental documents prior to the DR 11 review
**Key issue: how is information released**

<table>
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<th>DR 89</th>
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<td>• DR 89.4 should allow objection by the Secretary-General at any time. 30 days may be far too short: an issue may arise weeks or months later.</td>
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<td>• Moreover, there should be a procedure for stakeholders to object to the designation of information as confidential.</td>
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<td>• The academic exemption in DR 89.2(f) should be deleted: environmental information should not be withheld from the public or stakeholders for academic reasons</td>
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<td>• There should be an accessible and simplified dispute procedure; not recourse to courts and ITLOS which is inappropriate to determine individual matters relating to confidential information: an administrative procedure is necessary.</td>
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<td>• DR 89(3) gives the Secretary-General discretion to agree with a Contractor that data may remain confidential beyond 10 years following its submission to the ISA. This needs a review procedure.</td>
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<td>Key issue: Transparency</td>
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<td><strong>DR 94, 95, 107, EIS</strong></td>
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<td>&quot;stakeholders&quot; – delete relevant</td>
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<td><strong>DR 10</strong></td>
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<td>No transparency around completeness review. SG reviews, then is placed on website. No point if not substantive review.</td>
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<td><strong>DR 11</strong></td>
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<td>No hearings process, no guarantee LTC will even hold open meetings. No opportunity to call expert scientists, challenge applicant scientists.</td>
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<td><strong>DR 13</strong></td>
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<td>No transparency around LTC decision-making</td>
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<td><strong>DR 14</strong></td>
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<td>No transparency around amendment of Plans of Work</td>
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<td><strong>DR 15</strong></td>
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<td>No transparency around any request for reconsideration by Applicant if refused</td>
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<td><strong>DR 52</strong></td>
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<td>No public comment around performance assessment</td>
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<td><strong>DR 57</strong></td>
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<td>No transparency around modification request by contractor</td>
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<td><strong>DR 58</strong></td>
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<td>No public comment during review process</td>
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### Key issue: accessible dispute settlement

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<td>Arbitration closed expensive, even litigation expensive, likely to be seldom accessed</td>
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<td>Need accessible, cost effective dispute settlement</td>
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<td>Dispute Section V of Part XI dispute resolution should be used only as a last resort.</td>
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Key issue: Liability and Funds

DR 54

- ITLOS identified a gap where there may be damage but contractor e.g. runs out of capital – suggested a fund.
- DR 54 has a fund – “Environmental Compensation Fund”, but most of its purposes are not a liability backup fund but are essentially education, training research, etc – these should be funded anyway by contractors. They have no part in a backup liability fund.
- There must be 2 funds: sustainability fund, and liability fund
- Funding the funds: must be funded up front, not ‘drip fed’ otherwise there will necessarily be insufficient funds in all but late years. (drip feeding may have been suitable for e.g. oil transport when the industry was already underway, but not for a new industry)
- Mining should not start until liability regime is established. Harmonisation of national laws, forum, threshold, standards are critical.