



# Briefing: Proposed Guidelines on Observer Status at the International Seabed Authority

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## Introduction

The Note from the Secretary-General proposing *Guidelines for observer status of non-governmental organizations with the International Seabed Authority*, Assembly document [ISBA/25/A/7](#), proposes highly restrictive guidelines which are out of step with international practice on transparency, which would likely exclude almost all NGOs currently in observer status and which it seems are based largely on similarly restrictive rules in the International Maritime Organization (IMO) which are currently under review and which have been strongly criticized by Transparency International. A request by the Assembly to review “comparable procedures” seems not to have been followed, and instead the IMO rules have been chosen for a template, while the IMO rules have been heavily criticized by Transparency International and are subject to a motion for amendment in the IMO this year. No account has been taken of the common heritage of mankind.

The proposed Guidelines:

- lay down 5 restrictive guidelines which must all be satisfied;
- would require an undertaking that the NGO will both support the activities of the ISA and, promote and disseminate its work;
- for existing NGO observers, propose that the Assembly may withdraw observer status from any NGO that did not make a substantial contribution to the work of ISA, or if any conflict of interest arises or even is likely to arise between the activities of the ISA and those of the NGO concerned; and
- implement a five-year review, with new provisions on removal of observer status.

These proposals run counter to [Article 136](#) of the Convention, which states that “[t]he Area and its resources are the common heritage of mankind.” Activities in the Area shall be carried out for the benefit of mankind as a whole. Arvid Pardo wrote that common heritage requires a system of management involving all users, and described that as one of the revolutionary bases of the common heritage concept: “Although not everybody necessarily has to share to the same extent, everybody participates in management”.<sup>1</sup> Nor is there any suggestion in Article 169 of the Convention, which addresses consultation and co-operation with NGOs, that observer status must or should be predicated on support for ISA activities.<sup>2</sup> They are also inconsistent with the [Strategic Plan](#), which states that:

#### Transparency

*25. Transparency is an essential element of good governance and is therefore a guiding principle for the Authority in the conduct of its business as a publicly accountable international organization. This includes transparency in the internal administration of the Authority, as well as its internal procedures, the procedures of its various organs and subsidiary bodies and its procedures towards States. Transparency plays a fundamental role in building trust in the ISA and in enhancing the Authority's accountability, credibility and support across its stakeholder base.*

As well as Strategic Direction 8.2

*8.2. Ensure a fuller, more active and more informed participation by members of the Authority and other stakeholders through the adoption of working methods which are focused, targeted and effective and delivered under enhanced conditions of transparency and accountability, leading to a more inclusive approach to decision-making.*

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<sup>1</sup> Arvid Pardo, Perspectives on Ocean Governance. In Freedom for the Seas in the 21<sup>st</sup> Century. In M. Van Dyke, Durwood Zaelke, Grant Hewison, eds. 1993. Page 39.

<sup>2</sup> ARTICLE 169: CONSULTATION AND CO-OPERATION WITH INTERNATIONAL AND NON-GOVERNMENTAL ORGANIZATIONS 1. The Secretary-General shall, on matters within the competence of the Authority, make suitable arrangements, with the approval of the Council, for consultation and co-operation with international and non-governmental organizations recognized by the Economic and Social Council of the United Nations.

2. Any organization with which the Secretary-General has entered into an arrangement under paragraph 1 may designate representatives to attend meetings of the organs of the Authority as observers in accordance with the rules of procedure of these organs. Procedures shall be established for obtaining the views of such organizations in appropriate cases.

3. The Secretary-General may distribute to States Parties written reports submitted by the non-governmental organizations referred to in paragraph 1 on subjects in which they have special competence and which are related to the work of the Authority.

And Strategic Direction 9: Commit to transparency.

The proposed ISA requirements are modelled on IMO rules which have been strongly criticized. A report in relation to the IMO observer rules stated: which found that their impact was that NGOs “are not free to criticise the IMO. The rules of membership require members to “be fully in harmony with the spirit, functions and principles of the IMO” and to “support the activities of the IMO”. This is a particular challenge for civil society organisations who are often mandated to campaign publicly and robustly on issues, which may be incompatible with the requirements to be in harmony with and support the activities of the IMO. Consequently, they can face expulsion.” These points would apply equally to the ISA, if the ISA adopts the proposed draft Guidelines modelled on the IMO precedent.

## Observer Status in International Law and Practice

Principle 10 of the [Rio Declaration](#) in 1992 stated that environmental issues are best handled with participation of all concerned citizens, and emphasised the opportunity to participate in decision-making processes. 20 years later, in the Rio+20 outcome document, [The Future We Want](#), all States agreed that “We need institutions at all levels that are effective, transparent, accountable and democratic.” (paragraph 11). States recognized that “that effective governance at local, sub-national, national, regional and global levels representing the voices and interests of all is critical for advancing sustainable development” and agreed to “(h) enhance the participation and effective engagement of civil society and other relevant stakeholders in the relevant international fora and in this regard promote transparency and broad public participation and partnerships to implement sustainable development.” (Paragraph 76)

The [Environmental Management Plan for the Clarion-Clipperton Zone](#) has transparency as a Guiding Principle: (“f) Transparency. The Authority shall enable public participation in environmental decision-making procedures in accordance with the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, 1998, and its own rules and procedures.” That Convention guarantees the “three pillars”, being access to information, participation in decision-making and access to justice in environmental matters.<sup>3</sup>

Parties to the Convention, known as the [Aarhus Convention](#), agreed the [Almaty Guidelines](#),<sup>4</sup> which emphasised that participation of the public concerned should be as broad as possible. (para 30) and should include:

- (a) The members of the public who are, or are likely to be, most directly affected;
- (b) Representatives of public-interest organizations, such as environmental citizens’ organizations; and
- (c) Representatives of other interests that might cause, contribute to, be affected by or be in a position to alleviate the problems under discussion.

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<sup>3</sup> See Aarhus Convention, Article 3.

<sup>4</sup> Decision II/4, Promoting the application of the principles of the Aarhus Convention in international forums . Adopted at the second meeting of the Parties held in Almaty, Kazakhstan, on 25-27 May 2005.

Accreditation procedures should be “transparent, fair, timely, accountable and accessible, and aimed at securing meaningful and equitable participation, while avoiding excessive formalization.” (paragraph 31) Decision-making processes in international forums are enhanced by the participation of an informed, knowledgeable public, representing diverse constituencies. (paragraph 38).

The ‘Regional Agreement on Access to Information, Participation and Access to Justice in Environmental Matters in Latin America and the Caribbean’ (or [‘Escazu Agreement’](#)) adopted just last year, not only reiterates the Aarhus three pillars, but adds a fourth pillar of provision of a safe and enabling environment for persons, groups and organisations that promote and defend human rights in environmental matters, in recognition of the repression that can be faced by civil society campaigning on environmental matters (Article 9).

## History of the Proposed Guidelines

Last year’s Secretariat paper of 8 May 2018 ([ISBA/24/A/3](#)), described how the observer application/ approval process had to date ‘been adequate’ but noted concerns expressed at the 23rd annual session about an application for observer status (from Earthworks, whose application was later approved) that did not provide sufficient detail to enable a decision.

The 2018 paper suggested that the Assembly may wish to adopt guidelines or objective criteria according to which it can assess the merits of applications for observer status ‘in view of the growing interest in the work of the ISA... evidenced by an increase in recent years in the number of applications to the Assembly for observer status’.

No particular issue was raised in these documents with regard to:

- (i) NGO observers, as opposed to other categories of observers,
- (ii) Observer numbers causing difficulties or obstructing proceedings,
- (iii) Observer behaviour causing difficulties or obstructing proceedings,
- (iv) NGOs having been approved as observers, and then having caused problems due to a lack of appropriate expertise or interest,

And no suggestion was made that comments made inside or outside the ISA should provide a basis for stripping an NGO of observer status.

The 2018 paper indicated that, if the Assembly wishes to adopt such guidelines, the Secretariat would consider “comparable procedures” for the ISA and submit draft guidelines to the Assembly for its review and consideration at the twenty-fifth session. But despite the undertaking to review comparable procedures, the June 2019 Note states that the Secretary-General ‘mainly’ considered only one other organisation (the IMO) as a precedent, and focused on adapting the IMO’s specific rules, in preparing the June 2019 draft Guidelines.

The 24th Annual Session Assembly considered the Secretariat’s May 2018 note, and in [ISBA/24/A/12](#) requested the Secretariat “to develop more detailed guidelines and criteria for assessing the merits of observer applicants, for consideration by the Assembly at its twenty-fifth session.” The instruction was not apparently restricted to NGO observers. Nor did the Assembly ask the Secretariat to provide guidelines for a period review process which would enable withdrawal of observer status.

## The Current Laws and Procedures

Article 169 of the Convention provides that:

1. "The Secretary-General shall, on matters within the competence of the ISA, make suitable arrangements, with the approval of the Council, for consultation and co-operation with international and non-governmental organizations recognized by the Economic and Social Council of the United Nations." and
2. Any organization with which the Secretary-General has entered into an arrangement under paragraph 1 may designate representatives to attend meetings of the organs of the ISA as observers in accordance with the rules of procedure of these organs. Procedures shall be established for obtaining the views of such organizations in appropriate cases.

Rule 82(1)(e) of the Assembly's Rules of Procedure provides that "The following may participate as observers in the Assembly ...: Non-governmental organizations with which the Secretary-General has entered into arrangements in accordance with Article 169(1) UNCLOS, and other non-governmental organizations invited by the Assembly which have demonstrated their interest in matters under the consideration by the Assembly."

Rule 75 of the Council's Rules of Procedure provides that "[o]bservers referred to in rule 82 of the rules of procedure of the Assembly may designate representatives to participate, without the right to vote, in the deliberations of the Council, upon the invitation of the Council, on questions affecting them or within the scope of their activities."

It is worth noting that Rule 82(1)(e) of the Assembly's Rules of Procedure refers to Article 169(1) UNESCO NGOs as well as other NGOs invited by the Assembly *which have demonstrated their interest in matters* under the consideration by the Assembly.

Rule 75 of the Council's Rules of Procedure similarly refer to "*questions affecting them or within the scope of their activities.*"

## The Proposal

The June 2019 Secretariat note, without further explanation or justification, introduces in paragraph 12 two purposes of the guidelines, which were not previously presented to or raised by the Assembly, and which do not appear compatible with the existing criteria contained in the Rules of Procedure / UNCLOS:

- to ensure that the ISA grants observer status to entities that contribute effectively to its mission and activities' and
- ensuring that a balanced range of interests is represented.

The Note refers variously to 'purposes and work of the ISA', 'main purposes and work of the ISA', 'work of the ISA', 'programmes and initiatives carried out by the ISA', 'work and interests of the ISA', 'mandate, mission and strategic directions of the ISA', 'objectives and functions of the ISA', and 'activities of the ISA'. It is unclear whether these are intended to have the same meaning, or

differing meanings. Such ambiguity is unhelpful and makes an NGO's evidential task even more challenging.

## **Part A: Requests for Observer Status and Criteria**

The Note in paragraph A.5 sets five criteria which must **all** be met in determining whether an NGO can reasonably demonstrate its interest in matters under consideration by the Assembly: (note: it is not clear why only the Assembly and not the Council is referred to).

- a) Purposes of the NGO are “directly related” to the purposes and work of ISA or the NGO can contribute to the work of the ISA (information, advice, expertise, consultancy contacts),
- b) “Activities of the NGO have a direct bearing” on the “main purposes and work of the ISA,”
- c) The NGO has demonstrated its “expertise and capacity to contribute, within its field of competence,” the work of the ISA, “in particular in connection with the law of the sea, the offshore and deep-sea mining industry, technology, minerals processing and marketing, activities in the Area and marine scientific research in the Area, including the protection of the marine environment”, and
- d) The NGO has demonstrated its “interest in and ability to support the capacity-building programmes and initiatives of the ISA, and
- e) Whether the NGO has any “programmes or projects that can reasonably demonstrate the relevance of its work and interests to those of the Authority.”

If any of these are not met, the application is to be denied, and the applicant invited to re-apply if it wishes to address any of the five criteria that were not fulfilled. These criteria taken in combination are highly restrictive. The criteria do not appear consistent with the purposes set out in Article 169 of the Convention, the Assembly or Council Rules of Procedure or the Strategic Plan. Few, if any, NGOs are likely to satisfy all five criteria.

The Guidelines would also prevent observer NGOs whose interest in the ISA is ancillary to their main purposes, for example an academic institution conducting research on international organisation governance, or a civil society group, seeking to extrapolate lessons learned from the ISA to inform advocacy around national jurisdiction seabed mineral issues from observer status.

Protection of the marine environment is included as a component of the ISA's work as the last item in a list contained in paragraph (c), and appears to be described as a sub-set of marine scientific research. Numerous other aspects of the ISA's work are excluded, such as the protection of developing countries from adverse effects on their economies, facilitating the participation of developing countries in activities in the Area, or deriving and the equitable sharing of financial and other economic benefits from activities in the Area, for example.

## **Part B: Purposes of Observer Status**

Under paragraph B, in paragraph 7, the decision to grant observer status to an NGO should serve two purposes:

- (a) to enable the Authority to obtain information or expert advice from relevant NGOs with special knowledge in a particular sector of the Authority's activities; and
- (b) to enable such NGOs whose activities have an important and direct bearing on the work of the Authority to express their points of view to the Authority.

Both purposes are more restrictive than Article 169 of the Convention, which simply refers to “obtaining the views of such organizations”: not to special knowledge, nor to “important and direct bearing”.

The second cited purpose of observer status (to express points of view to the ISA), are undermined by Part C, discussed below.

## Part C: Objectives and Activities of NGOs

Part C provides that:

*8. Before inviting an NGO to participate as an observer, the Assembly should be satisfied that:*

- (a) The activities of the NGO concerned relate directly to the mandate, mission and strategic directions of the ISA, as defined in the United Nations Convention on the Law of the Sea, the Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982 and the strategic plan of the ISA;*
- (b) The objectives and functions of the NGO are in consonance with those of the ISA;*
- (c) The NGO has demonstrated that it has expertise and the capacity to contribute, within its field of competence, to the work of the ISA.*

Note that all three requirements must be satisfied.

- a) The first criterion refers to “activities of the NGO”. This is broader than purposes, and invites investigation of its activities. The requirement that the activities “relate directly” to the mandate, mission and strategic directions (as defined by the Strategic Plan) is highly restrictive, and would exclude the majority of current observers, as well as most would-be observers. The activities of many academic institutions, for instance, may not relate directly to the mandate, mission and strategic directions – all three – of the ISA. It even seems from the current drafting of the Guidelines that an observer application would be refused unless all activities of all observers relate directly to all Strategic Directions 1-9.
- b) Requiring that the objectives and functions of the NGO are in consonance with those of the ISA is both subjective, vague and undemocratic. What does “in consonance” mean? Which objectives and functions of the ISA must the NGO be in consonance with? Who decides? This seems to be a requirement contrary rather than supportive of “enhanced conditions of transparency and accountability” required by in the Strategic Plan.
- c) The requirement for expertise is also unduly restrictive. There is no requirement for specific expertise in the Convention or the Strategic Plan, and nor should there be one. Observers are not there solely to provide expertise, but to provide a range of views, or to observe proceedings in order to learn and disseminate that knowledge more widely.

## Part D: General Undertakings

Paragraph 9 states that “Observer status may not be granted to an NGO unless it undertakes to support the activities of the Authority.”

This required undertaking is contrary to principles of transparency and accountability. It entails a commitment undertaking not only to support current activities but also (unknown) future activities, and is not specific as to which activities. It requires blind support for all present and future activities of the ISA. This is an undertaking which very few NGOs are likely to be permitted by their own rules of governance to provide.

## **Part G. Periodic review of the list of non-governmental organizations**

This 5 year periodic review provides in paragraph 13 that “The Assembly may withdraw observer status from any NGO that, during the period under review, did not make a substantial contribution to the work of ISA or if any conflict of interest arises or is likely to arise between the activities of the ISA and those of the organization concerned.”

This paragraph 13 adds two further grounds for restricting observer status (this time not for not granting status, but for withdrawing it), namely: that it

1. “did not make a substantial contribution to the work of Authority” or
2. “if any conflict of interest arises or is likely to arise between the activities of the Authority and those of the organization concerned.”

With respect to the first ground, a “substantial contribution” was not a requirement for observer status, and should not be: observer status is intended to provide transparency and an opportunity for views to be expressed. It is also unclear what is meant here by “substantial”.

The term “contribution” is explained further in paragraphs 14(a)-(c) as attendance of ISA sessions, participation at workshops, and dissemination and promotion of ISA work.

Paragraph (b) suggests that the Assembly may review the “type” of submissions made by an NGO. It is unclear what is intended here, and what ‘type’ of submissions would be considered to merit observer status and which ‘type’ would lead to its withdrawal. This would appear to effect a prior censorship of submissions.

Paragraph (c) requires efforts by the NGO “to disseminate and promote the work of the Authority.” But it should not be a role, let alone an obligation, for observers to “disseminate and promote the work of the Authority”. Observers should be free to disagree with some work of the ISA, or to use their learning from observing ISA meetings in any way that meets their purposes.

With respect to the second ground contained in paragraph 13, a conflict of interest is nowhere defined, let alone a conflict of interest that “is likely” to arise. This is a draconian provision. Again, the purpose of observers status is to provide transparency and for the expression and exchange of views. The issue of ‘conflict of interest’ should not arise. Some NGOs may well have interests that differ from other NGOs, and from individual members of the ISA, or from the ISA/ISA as a whole (if it is possible to identify ISA ‘interests’). ‘Conflicting’ interests should not be an issue unless the party in question is a decision-maker, or is deriving improper personal gain from its involvement in proceedings – neither of which is a relevant factor for an NGO observer to the ISA. That should not be grounds for expulsion.

The final paragraphs of the rules are even more draconian. Under paragraphs 16 and 17, the withdrawal of observer status may occur at any time (including as result of any information brought to the attention of the Assembly by any member States or any organs of the Authority), and an NGO cannot reapply for two years, and there is no procedure to appeal a decision taken.

## Enclosure 1      Format and content of applications

An “undertaking” will be required “that the organization will support the activities of the Authority and promote the dissemination of its work” and a statement must be made as to the “[m]eans by which the organization will support, promote and disseminate the work of the Authority.”

This undertaking and this requirement are entirely inappropriate. Observers must be free to support, not support or be agnostic to the work and activities of the ISA, and it should not be a required role for observers to support, promote or disseminate the work of the ISA – let alone all three.

## IMO Rules as a Precedent

That some of these suggested guidelines reflect IMO rules is not an answer to their propriety or suitability.

Firstly, the principle of the common heritage of mankind is at the heart of the role of the ISA, unlike the IMO. As such, all humankind have an interest in the ISA as well as in the Area.

Secondly, the IMO rules have been heavily criticized and may be changed this month.

Transparency International, in a [report](#) last year, found that:

*Consultative members are not free to criticise the IMO. The rules of membership require members to “be fully in harmony with the spirit, functions and principles of the IMO” and to “support the activities of the IMO”. This is a particular challenge for CSOs who are often mandated to campaign publicly and robustly on issues, which may be incompatible with the requirements to be in harmony with and support the activities of the IMO. Consequently, they can face expulsion.*

Transparency International recommended “removing restrictions on consultative members’ ability to openly criticise the IMO.”

As a result, a number of governments have this year proposed<sup>5</sup> to reform the IMO consultative processes at this year’s IMO Council meeting, stating that:

*consultation is critical to the development of sound policy and standards at IMO and NGOs play a valuable role in providing policy and technical advice. However, the current approach to granting consultative status has not ensured that the full range of interests affected by IMO policy and regulation are effectively represented. In the co-sponsors’ view, IMO would benefit from increased engagement with environmental and civil society groups, as well as from expanding its very important relationship with industry bodies.*

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<sup>5</sup> C 122/3(b)/2 30 May 2019. (b) Reform: Council assessment of applications for consultative status Submitted by Antigua and Barbuda, Australia, Brazil, France, Georgia, Nigeria and Ukraine.

The reasons given for the proposal deserve to be reproduced in full. They state that the purpose of the proposed amendments is to:

*acknowledge that IMO has an obligation to consult widely with stakeholders who will be affected by the policies and standards adopted by the Organization. The proposed amendments to include new parts (c) and (d) of rule 2 would broaden the purpose of consultative status to reflect this obligation;*

*streamline the Rules and Guidelines to ensure a focus on the potential of the applicant to provide valuable advice to the Organization or represent key maritime, civil society, environmental or other interests (proposed amendments to rules 3(c), (d), and 5);*

*allow more specialized NGOs to contribute to particular outputs at IMO. It is currently difficult for specialized NGOs to gain consultative status because eligibility is assessed on the basis of the work of IMO as a whole (proposed amendments to rule 1);*

*clarify that IMO will not remove consultative status from NGOs that criticize IMO decisions (proposed amendments to rule 3(b) and guidelines on the application of rule 1(a)); and*

*strengthen the provisions to review NGOs in consultative status (proposed amendments to rule 11).*

With respect to IMO Rule 3, the submission notes that:

*Rule 3*

*Objectives and activities of the non-governmental international organization*

*As noted in paragraph 5 of document C 121/3(b)/7, the proposal to remove rules 3(c) and (d) would encourage a greater diversity of views at IMO. The current provisions needlessly limit stakeholder access to IMO discussions and decisions. Experts will often have different or even opposing views and hearing these alternative perspectives would be an advantage to Member States and may assist IMO to develop more nuanced and flexible standards.*

*Rule 3(b) provides that the objectives and functions of the applicant NGO should be "fully in harmony with the spirit, functions and principles" of IMO. This provision has caused concern that NGOs may have their consultative status withdrawn for expressing views critical of IMO decisions (see Transparency International's 2018 report Governance at the IMO). This provision should be removed to clarify that IMO does not restrict the ability of NGOs to criticize IMO decisions.*

With respect to IMO Rule 5, the submission notes that:

*Rule 5*

*Constitution and structure of the non-governmental international organization*

*Rule 5 (renumbered rule 6) provides that the NGO must be "truly international" with "members, component branches or affiliated bodies in a sufficient number of countries". In the co-sponsors' view, whether an NGO is "sufficiently" international will not inform the Council whether the NGO is able to provide valuable expertise to IMO or whether they represent key stakeholders. The proposed amendments would give the Council the option to confer limited or short-term provisional consultative status for*

*smaller NGOs. This would ensure that if an applicant NGO is able to make a worthwhile contribution to IMO, they will have the opportunity to do so.*

With respect to IMO Rule 10, the submission notes that:

*Rule 10*

*Periodic review of the list of non-governmental international organizations*

*Rule 10 (renumbered rule 11) provides additional guidance on the periodic review of NGOs in consultative status. The proposed amendments would introduce a presumption in favour of withdrawing consultative status from NGOs that have not made a substantial contribution or attended IMO meetings over the course of a full biennium. There would be exemptions made for exceptional circumstances, but this amendment would otherwise ensure that NGOs enjoying consultative status remain fully engaged with IMO, sharing the views of their members and fulfilling the mutual obligations of consultative status.*