



## **Deep Sea Conservation Coalition**

### **Comments on the revised draft exploitation regulations issued by the LTC (ISBA/24/LTC/WP.1/Rev.1)**

30 September 2018

These comments are on the release by the Legal and Technical Commission (Commission) of draft exploitation regulations of 9 July, entitled Draft Regulations on Exploitation of Mineral Resources in the Area, (ISBA/24/LTC/WP.1/Rev.1) and the accompanying Note by the Legal and Technical Commission ([ISBA/24/C/20](#)).<sup>1</sup> They first make some overall observations which are applicable to the overall regulations and their structure, then make comments on individual draft regulations (DR).

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## **Overall Comments**

There are some matters which are fundamental or overarching and which need to be worked into the regulations as a whole.

### **The need for independent scientific advice and review**

At various stages – particularly the Environmental Impact Assessment (EIA) and Environmental Monitoring and Management Plan (EMMP) but applicable to all the Environmental Documents as well as reviews, contract extensions etc – there needs to be provision for independent scientific advice and review. This is a critical aspect of management where the area of interest is the deep sea and where data and information will overwhelmingly be held by the Contractor.

### **Testing**

There needs to be full testing of commercial equipment and sufficient time to evaluate the results of the test mining in terms of environmental impact and ground truthing models as part of an EIA prior to an application for a Plan of Work. It is not enough to rely on models, where a contract may run for decades, and where the model may not reveal all effects or their extent (“all models are wrong but some are useful” - George Box)

### **Baseline Information**

Underpinning the regulations is the fundamental need for comprehensive baseline information on the marine environment including ecosystem involved, including species specific and ecological parameters, so that reasonable predictions can be made on the potential impact of the mining and effective monitoring of the impact of mining activities. This includes the need to obtain information on ecological processes at timescales appropriate to the ecosystems concerned. Without adequate knowledge in terms of species, ecosystems, ecological processes and connectivity, the Authority will not be able to assess the potential environment risks nor the impacts of mining. This means the scoping and EIA processes are critical and need to be iterative to ensure that all necessary information is obtained.

### **Cumulative impacts and multiple stressors**

It is essential to take into account multiple stressors, not just from mining but from processes such as climate change impacts, de-oxygenation and ocean acidification and from other impacts such as fishing, persistent organic pollutants and plastics in relation to the Art 145 obligations and other relevant instruments and political commitments including Sustainable Development Goal (SDG) [14](#) and specifically SDG 14.2 (“By 2020, sustainably manage and protect marine and coastal ecosystems to avoid significant adverse impacts, including by strengthening their resilience, and take action for their restoration in order to achieve healthy and productive oceans.) This also means taking cognizance of the negotiations, processes and discussions under way at the Intergovernmental Conference on an international legally binding instrument under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction (“[BBNJ IGC](#)”).

## **Clear conservation objectives**

Clear and binding conservation standards and objectives are required to give effect to the Article 145 obligations. These could include but not be limited to, an obligation to prevent significant adverse impacts on vulnerable marine ecosystems similar to the objective established by the UN General Assembly through its resolutions 61/105, 64/72, 66/68 and 71/123 for bottom fisheries in areas beyond national jurisdiction. This conservation objective has been incorporated into regulation for bottom fisheries in most ocean regions through its incorporation into measures adopted by regional fisheries management organisations. A similar obligation already exists in the exploration regulations adopted by the ISA (e.g. the exploration regulations for polymetallic nodules (ISBA/19/C/17), Regulation 31.4) and should be included in the exploitation regulations.

## **Regional Environmental Management Plans (REMPs)**

REMPs need to provide a comprehensive framework for the management of activities in a region: this includes, but is far more than, protected areas such as Areas of Particular Environmental Interest (APEIs). The draft regulations should explicitly be integrated with REMPs, and REMPs should be required to be in place before any application is made.

The Council has described the adoption of a REMP for the Clarion-Clipperton Zone as one of the measures deemed “appropriate and necessary” for the effective protection of the marine environment. While the draft regulations reference REMPs in DR 2 (“Fundamental Principles”), DR 46 *bis* (Environmental Impact Statement), DR 46 *ter* (Environmental Management and Monitoring Plan) and in several Annexes, observation of the rules, regulations, and protected areas established by REMPs should be explicitly regarded as a condition of any exploitation contract, and no exploitation contracts should be awarded in regions without an approved REMP. Additionally, no exploitation contracts should be approved in areas designated as off-limits to mining through a REMP, such as APEIs. Draft Regulation 16(2), which sets out categories of areas in which exploitation should not be approved, should prohibit approving exploitation contracts in areas without a REMP in place and in APEIs.

## **Institutional Matters**

The institutional mechanisms of the ISA will need considerable evolution, which is provided for in the 1994 Agreement. Key factors to consider are how best to incorporate independent scientific expertise into ISA decision-making and to ensure transparency of the ISA’s regulatory and decision-making processes. DSCC has long suggested the establishment of a scientific or environmental committee, which could advise the LTC and development of a pool of qualified, independent experts that can be called upon to provide advice as required. With regard to the latter, Belgium submitted a non-paper entitled “Strengthening the environmental scientific capacity of the International Seabed Authority” which was considered by the Council and will be considered by the Commission ([ISBA/24/C/22](#)). An evolutionary approach to setting up as well as functioning of organs by the 1994 Agreement.<sup>2</sup>

## **Dispute Resolution**

The draft regulations no longer include an administrative review mechanism; this provision has been dropped entirely from the draft regulations, because, the Commission explained in

ISBA/24/C/20, member States of the Authority expressed concern that such a mechanism could undermine the finely crafted dispute mechanism in the Convention. This issue would benefit from further discussion: either a non-binding resolution or fact-finding mechanism may facilitate efficient resolution of issues, without affecting the right to take issues to the Seabed Disputes Chamber, which seems unlikely to be frequently resorted to. Relatively minor issues such as confidentiality of data could appropriately be addressed in a lower-level mechanism without affecting rights to full dispute resolution.

### **Public Participation**

There are provisions such in DR 11 for publication of environmental documents, but transparency including public participation should be streamlined into all aspects of the regulations, including the entire process of development, assessment and review of the environmental documents, other matters other than environmental, such as financial and administrative matters, reporting and reviews, applications for exploration and exploitation and contracts, issues related to compliance with the regulations, meetings of the Legal and Technical Commission (LTC), and the provision of detailed reports of LTC meetings, including explanations of the deliberations and rationale behind recommendations made by the LTC to the Council.

# Specific Comments

## DR 2: Fundamental Principles

### *Effective Protection of the Marine Environment*

DR 2(5) reads as follows:

Provide for the effective protection of the Marine Environment from the harmful effects that may arise from Exploitation, in accordance with the Authority's environmental policy and regional environmental management plans, if any, based on the following principles:

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

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

The application of an ecosystem approach; and

Access to data and information relating to the protection and preservation of the Marine Environment, accountability and transparency and encouragement of effective public participation

Firstly, DR 2(5) should properly reference article 145<sup>3</sup> and article 194(5) of the Convention.<sup>4</sup>

Secondly, reference to the ISA's environmental policy may allow derogation from the Fundamental Principles, and should be deleted.

Thirdly, the regulations must ensure effective protection, rather than (merely) provide for it.

The definition would benefit from discussion at a workshop, but could read as follows:

Ensure the effective protection of the Marine Environment from the harmful effects that may arise from *activities in the Area*<sup>5</sup>, pursuant to articles 145, 192 and 194(5) of the Convention and based on the following principles:

- (a) the protection and conservation of the Marine Environment, including biological diversity,<sup>6</sup> ecological integrity<sup>7</sup> and connectivity;<sup>8</sup>
- (b) The application of the precautionary principle, as reflected in principle 15 of the Rio Declaration on Environment and Development;
- (c) The application of an ecosystem approach;<sup>9</sup> and
- (d) Access to data and information relating to the protection and preservation of the Marine Environment, accountability and transparency and effective public participation.

### *Common Heritage of Mankind*

The principle of common heritage of mankind should be central in the Fundamental Principles, and stand on its own. Currently it is worded:

7. Ensure the effective management and regulation of the Area and its Resources in a way that promotes the development of the common heritage of mankind.

First, one observation: the Commission removed the words "long term" before "development", but wording it as "the development of the common heritage for the benefit of mankind as a whole" would be more consistent with the wording of Article 150(j) of the Convention.

Most importantly, the current wording references CHM as only the goal of effective management and regulation. It is far more than that. It should be a stand-alone provision. Article 136 provides that "[t]he Area and its resources are the common heritage of mankind." Article 140 requires that

“[a]ctivities in the Area shall, as specifically provided for in this Part, be carried out for the benefit of mankind as a whole”.

It could be better worded to simply reflect Article 136, and moved to the first principle, to read:

“The Area and its resources are the common heritage of mankind”.

The CHM principle should be incorporated into the operative regulations by amending DR 13, 14(2), and 16 to enable or require the Commission to consider whether a Plan of Work contributes to the development of the common heritage for the benefit of mankind as a whole, per UNCLOS Article 150(i).

#### *Need to mainstream the Fundamental Principles*

Crucially, the Fundamental Principles should be mainstreamed into the Regulations, including DR 14, where they are not a criterion. A new paragraph 8 seems intended to make the principles operative, but as the Commission in its Note recognized that it is circular and needs to be redrafted. One option would be to specifically incorporate a reference to them, for instance in DR 14(2) (Consideration of Environmental Plans), DR 12 (General) and DR 13(1) (Assessment of Applicants).

The regulations could also be amended to require Plans of Work and their execution to comply with the Fundamental Principles as set out in DR 2.

## **Preamble**

The objective of the Regulations is to broader than to provide for the “Exploitation of the Resources of the Area consistent with the Convention and the Agreement”. We suggest use of the term “activities in the Area”, which is the term used in the Convention.

## **DR 4: Rights of Coastal States**

### *Overall comments*

Firstly, DR 4 should be broadened to address serious harm in general: either an additional DR 4 *bis* added, to address serious harm or it should be broadened to include but not be restricted to the rights of coastal States. Articles 162(2) (for the Council) and 165 (2) (for the Commission) includes provisions for the suspension or adjustment of operations, to prevent serious harm to the marine environment arising out of activities in the Area and to disapprove areas for exploitation by contractors or the Enterprise in cases where substantial evidence indicates the risk of serious harm to the marine environment.

Moreover, the potential for damage to the marine environment of coastal States requires more consideration than it has received to date in the draft regulations. The potential for transboundary harm should be evaluated at the time of application as a matter of course during the application process, and not just when concerns are raised by coastal States. Further, the burden of proof should fall on contractors rather than coastal States: contractors should be required to demonstrate through evidence in their applications that serious harm to coastal States’ marine environments is not likely to occur.

Regardless of the decision made, the Secretary General (or Commission if concerns are registered at the application stage) should be required to respond to coastal States’ concerns in writing and both the claims and the responses should be made publicly available.

*Specific comments:*

Para 3 reads:

If there are clear grounds for believing that Serious Harm to the Marine Environment *is likely to occur*, the Secretary-General shall issue a compliance notice in accordance with regulation 101.

This threshold is too high. It should simply read, following Article 162.2(w):

If there are is substantial evidence of risk of Serious Harm to the Marine Environment, the Secretary-General shall issue a compliance notice in accordance with regulation 101.

## **DR 5 Qualified Applicant and DR 6 Certificate of Sponsorship: Effective Control**

DR 5.1(b) reads:

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.

DR 5(3) (a) requires

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;

DR 6 (2) reads:

Where an applicant has the nationality of one State but is effectively controlled by another State or its nationals, each State shall issue a certificate of sponsorship.

The term “effective control” and its equivalent also appears in DR 42 and DR 45 and elsewhere. There should be a definition of “effective control”. This is a difficult and complex question and must be addressed.

Other questions arise. If a contractor has multiple sponsoring States and one terminates its sponsorship, does this terminate the entire sponsorship agreement? Other examples are where only one sponsoring State is listed, but effective control of the contractor changes such that another State should be added as a sponsoring State.

## **DR 11 Publication and review of the Environmental Plans**

This requires the Secretary-General to:

1(a) Place the Environmental Impact Statement, the Environmental Management and Monitoring Plan and the Closure Plan on the Authority’s website for a period of 60 Days, and invite members of the Authority and Stakeholders to submit comments in writing in accordance with the Guidelines;

Firstly, there is no reference to the Environmental Impact Assessment. This is a major gap in the draft regulations and needs to be filled.

Secondly, the public comments should not be restricted to environmental documents. Others, including financial documents, should also be subject to public comment.

Thirdly, the Applicant is permitted in DR 11 to revise the Environmental Plans based on comments, but there is no other procedure for revision by any organ of the ISA, prior to the final review by the Commission. This procedure omits any integrated or iterative procedure for the obtaining of further information and advice, public and scientific review of the environmental documents at various stages, and review, all before reaching the Commission for its final review.

## **DR 12 General**

In 12(5)(b), the Commission clarified the process through which the Commission or the Authority will seek advice or reports from experts or other independent competent persons. DR 12(5)(b) clarified that either the Commission or the Secretary-General may seek advice or reports. It is important that this advice be sourced through a systematic and transparent process subject to public review. Independent scientific review will be a critically important process to assess applications, and a structured public process for such review will be an important part of a transparent process.

## **DR 13 Assessment of applicants**

DR 13.1(f) includes a requirement that the Applicant:

Has demonstrated the economic viability of the mining project.

A similar requirement should require the environmental sustainability of the proposed project.

Secondly, there should be a consideration of the environmental track record of the applicant. If the applicant has been found in breach of environmental requirements in the past, this should be disclosed and assessed.

DR 13.4 seems better placed under DR 14 in that it doesn't relate to assessment of the applicant.

In addition, the draft regulations do not include an assessment of the scientific viability of either the Plan of Work as a whole or its Environmental Plans. There should be such an assessment.

## **DR 14 Consideration of the Environmental Plans by the Commission**

### *Overall*

This is a critical step in the regulations. In order to facilitate the review, a separate review body would be of assistance to the Commission. It is also important that the review or reviews, including by the Commission, be public and open to public participation. Further integration of DR 16 is also recommended.

### *Public Comment Procedure*

DR 14 requires the Commission to examine the Environmental Plans in light of comments, and additional information, but there are no procedures for public comment on EIAs, only provision for placing the EIS (which is prepared based on the EIA), EMMP and Closure Plan, on the Authority's website, in DR 11. In essence, the current process envisages that the EIA (which so far is unspecified), EIS and EMMP are all prepared, and placed for public comment, then for the Commission to take those comments into account.

The Commission should be required to consider and address in writing any substantive comments received. The Commission should provide written evidence that stakeholder comments are given due consideration and that the Commission takes the broadest possible range of views into account. This would be best addressed in an over-arching Article addressing public participation procedures, to avoid having to repeat the procedures in every section.

The Applicant is "permitted" in DR 11 to revise the Environmental Plans based on comments, but there is no other procedure for revision by any organ of the ISA, prior to the final review by the Commission. The ISA should revise the Plans and should hold the pen, taking into account public comments. Also this procedure omits any iterative procedure for the obtaining of further

information and independent scientific advice, public and scientific review of the environmental documents at various stages, and review, all before reaching the Commission for its final review. 14(1) provides that the Commission, as part of its review of an application, should “examine the environmental plans in light of the comments made by members of the Authority and Stakeholders.”

As noted, this requirement to consider should be expanded to a requirement to consider and address in writing any substantive comments received.

Dr 14(1)(2) provides that:

The Commission shall determine whether the Environmental Plans provide for the effective protection of the Marine Environment in accordance with article 145 of the Convention, including through the application of a precautionary approach and Good Industry Practice.

DR 14 should instead provide for assessment against all the Fundamental Principles: Fundamental Principle 2(5) is broader than Article 145.

The Commission should be required to confirm that the Plan of Work is located within an approved REMP.

### **DR 15 Amendments to the proposed Plan of Work**

DR 15 provides for the Commission to propose amendments to the Plan of Work to the applicant. It provides that “The Commission shall then, in the light of the applicant’s response, make its recommendations to the Council.” It must be clear that if the applicant rejects the proposed amendment, then the Commission may decline the application in its entirety. This is not clear, since DR 16(2) provides that “If the Commission determines that the applicant meets the criteria set out in regulations 12(4) and 13, and that regulation 14(2) is complied with, it shall recommend approval of the Plan of Work to the Council.”

### **DR 16 Commission’s recommendation for the approval of a Plan of Work**

Firstly, the title assumes that the recommendation for the approval of the Plan of Work will be forthcoming. Instead, the Commission must retain discretion.

DR 16.1 provides that

If the Commission determines that the applicant meets the criteria set out in regulations 12 (4) and 13, and that regulation 14 (2) is complied with, it shall recommend approval of the Plan of Work to the Council.

DR 16 should provide for discretion to refuse or alter the Plan of Work.

It is not clear why the Commission is not required to ensure the entire of DR 14 is complied with. Instead of the current wording, DR 16 should simply provide for discretion of the Commission to approve, modify or decline the application, based, inter alia, on its consideration under DR 16.

DR 16 should also provide that the Commission shall not recommend the approval of a proposed Plan of Work if it determines that the Fundamental Principles would or may not be achieved.

Draft Regulation 16(2), which sets out categories of areas in which Exploitation should not be approved, should prohibit approving exploitation contracts in areas without a REMP in place, in breach of REMPs and specifically in APEIs.

In addition, there should be public disclosure during the entire process of assessment and recommendation. Included in this is that DR 16.5 should provide for representation of the Applicant to be made public.

## **DR 19 Rights and exclusivity under an exploitation contract**

DR 19.4 provides that

An exploitation contract shall provide for security of tenure and shall not be revised, suspended or terminated except in accordance with articles 18 and 19 of annex III to the Convention.

This draft article should provide for revision of the contract in cases such as where the regulations are amended, new circumstances or information comes to light, particularly where they would breach the Fundamental Principles.

Articles 18 and 19 of Annex III of the Convention are very restrictive.<sup>10</sup> Article 18 only applies to serious, persistent and willful violations of the fundamental terms of the contract, Part XI and the rules, regulations and procedures of the Authority; or if the contractor has failed to comply with a final binding decision of the dispute settlement body applicable to him. Article 19 requires mutual consent to vary the contract.

It is unclear whether for other minerals than that covered by the Plan of Work, contractors be expected to submit an exploration plan, EIA, and other documents required under the exploration regulations for exploration conducted under an exploitation contract? Or would these be covered under the plan of work for the exploitation contract?

This may also be an appropriate place to address the extent to which marine scientific research other than exploration or prospecting for the metals in question and including biological research can be carried out in contract areas by other than contractors. This question needs to be clarified.

### *Impact Areas*

The current draft regulations no longer include the term “impact area.” The Draft uses terms such as “contract area” (e.g. DR 19.1(b)), “mining area” (e.g. DR 57) and “Project Area” (e.g. DR 30(5)), which is now subject to delimitation in Annex IV, but it is still not clear whether the Project Area includes impact reference zones. It is important for contractors to identify their zone of reference including predicted impact area as this will enable the Commission to assess whether environmental harm is fully contained within the mined area, or if not, what the reference area is. Such a determination will also inform the Commission’s review of the Environmental Impact Assessment (EIA), Environmental Monitoring and Management Plan (EMMP), and the site’s Closure Plan as well as the effectiveness of the REMP.

Monitoring now seems to be required “across the project area,” (Annex VII Para 2 (h)) without this term being defined. Similarly, Annex VII requires the contractor to provide details on the location and planned monitoring and management of preservation reference zones and impact reference zones, without defining these terms or providing any guidance on where these should be located. Such definitions should be added, and explicit guidance should be issued promptly. There should also be scope for protected areas within claim areas.

## **DR 21 Term of exploitation contracts**

DR 21 allows for a maximum contract term at 30 years. The combination of a long contract term and a streamlined contract renewal process without a parallel system to recommend, let alone require, contract amendments, is contrary to the needs of environmental protection.

The process described in DR 21 makes no requirement for the contractor to submit a review of overall performance under the initial contract period, no opportunity to exercise discretion and consider new science or circumstances and no obvious opportunity for the contractor, Commission, or Secretary-General to recommend amendments.

The Commission added procedures for the Commission to review and recommend renewal of contracts in DR 21.3 and 21.4, but there is no reference to the Fundamental Principles or environmental matters, the term of renewal is not specified, and the Commission draft made it clear that neither the Commission nor the Council has discretion to deny renewal, provided the stated criteria are met. There is no explicit requirement for the contractor to submit a new Plan of Work or for the Commission to review the renewal application to ensure the contractor's continued compliance with the conditions set forth in DRs 12 – 14 and to ensure that the conditions established under the original Plan of Work have been sufficient to ensure the effective protection of the marine environment.

The adequacy of contractor performance, environmental matters, current scientific information and conditions, and information revealed by periodic reviews should be factored into any decision on renewal. There should be a broad discretion for the Commission and Council in view of the long time periods involved and many issues that may arise.

## **DR 22 Transfer of Sponsorship**

The proposed default 12 month period is too long: the notice of termination should also include the date for termination. Due to the requirements for due diligence of the sponsoring State, termination should result in termination of mining until a new sponsoring State is obtained: DR 22.6 should therefore provide for automatic termination of mining.

There is no provision in the new draft regulations requiring a review of the contractor's track record prior to a change of sponsoring State. Such a provision should be included. Under DR 22(6), once a sponsoring State submits a written notice of termination of sponsorship, the Council, taking account of the reasons for termination of sponsorship, may require the Contractor to suspend its mining operations until such time as a new certificate of sponsorship is submitted. However, the criteria for such a decision are unclear. Equally, change of control may mean an effective change in the responsibility of the sponsoring State, but this issue has not yet been comprehensively addressed. If 100% of the shares of a company change ownership so that all shareholders are of a different nationality, and all directors are of a different nationality, what are the implications for the sponsoring States and its obligations under the Convention and regulations?

## **DR 23 Use of exploitation contract as security**

It is unacceptable for a third party to obtain rights to engage in mining without having passed through all the requirements for Applicants, including the procedures of DR 13, to ensure the suitability of it to mine. See comments on DR 24.

## **DR 24 Transfer of rights and obligations**

The transfer of rights and obligations is highly problematic. DR 13 requires assessment of applicants, but DR 24.4(e) merely provides that:

4. The Commission shall consider whether the transferee: ... (e) Meets the criteria set out in regulations 12 (4) and 13, and has provided Environmental Plans which comply with regulation 14 (2);

This needs amendment and amplification. DR 14(2) requires that

The Commission shall determine whether the Environmental Plans provide for the effective protection of the Marine Environment in accordance with article 145 of the Convention, including through the application of a precautionary approach and Good Industry Practice.

The simple requirement that the transferee has provided Environmental Plans which comply with DR 14(2) is not consistent with the quite different Commission determination under DR 14(2). The reference to DR 12(4) seems erroneous, as those provisions are not easily described as criteria.<sup>11</sup> Similarly, not all provisions of DR 13 are easily described as criteria.

In summary, DR 24 should be revised to ensure that transferees undergo the same procedures and examination as applicants.

## **DR 25 Change of Control**

The draft exploitation regulations place significant responsibilities on sponsoring States and contracting entities. It is therefore essential for the ISA to have clear definitions of “control” and rules and procedures around any “change of control” that may occur during the course of a contract. Currently, DR 25 defines change in control as a change in ownership of 50 percent or more. This definition should be reconsidered. A much smaller percent change in ownership (e.g. 2% in a case of 51%/49% control) can lead to dramatic changes in control. In addition to clarifying the definition of “change of control,” the regulations should also consider how a change of control might affect sponsorship status.

The Commission in the Annex of its Note said that draft regulation 25 is not related to a change of control *per se*, but the consequences of such change on the financial capability of a contractor. But a change in control may lead to a material change in the nature of the contractor, leading to the assessment made in DR 13 nugatory. Moreover, if a change of control leads to a change in the nationality of the contractor, this may mean that the sponsoring State is no longer the State of nationality or “effective control”. Who has responsibility of notifying the sponsoring State of this change and for determining which State should be the sponsoring State following such a change? What happens if the new State of nationality doesn’t want to sponsor the contract? The exploitation regulations need to provide additional clarity around the definition of effective control and the procedures that must be followed for any changes, or potential changes, to effective control.

## **DR 26 Documents to be submitted prior to production**

DR 26.1 assumes that the Secretary-General can order a Material Change, but under DR 55.2, only the Contractor can suggest a Material Change.

## **DR 27 Environmental Performance Guarantee**

At present the only criteria for the Guarantee are the premature closure of Exploitation activities, the decommissioning and final closure of Exploitation activities, the post-closure monitoring and management of residual Environmental Effects: so all relate to closure or post-closure.

Criteria should also include environmental performance during mining.

Under DR 27.5, it should be the Authority, not the Contractor, who decides the revised amount.

## **DR 29 Maintaining Commercial Production, DR 30 Reduction or suspension in production due to market conditions and DR 31 Optimal Exploitation under a Plan of Work**

A contractor should be able to suspend or reduce production at its own discretion. At present it could only do so “whenever such reduction or suspension is required to protect the Marine Environment or to protect human health and safety. (DR 30.4) There may be any number of reasons a contractor wishes to reduce, suspend or moderate its mining operations. It should not be constrained from doing so.

## **DR 34 Risk of Incidents**

DR 34 provides that a Contractor shall reduce the risk of Incidents as much as reasonably practicable, to the point where the cost of further risk reduction would be grossly disproportionate to the benefits of such reduction.

This raises the specter of balancing commercial costs against environmental benefits. In no case does the Convention suggest weighing commercial costs against environmental protection.

## **DR 35 Preventing and responding to Incidents**

DR 35 provides that Contractor shall not proceed or continue with Exploitation if it is reasonably foreseeable that proceeding or continuing would cause or contribute to an Incident, or prevent the effective management of such Incident.

1. The ‘reasonably foreseeable’ test should be deleted: the test should be strict liability.
2. Even so, the test should not be whether proceeding or continuing ‘would cause or contribute’ to an incident, etc but whether it ‘may’ do so.
3. In addition, this suggests a scenario where the Contractor actually did foresee the risk but it was not reasonably foreseeable. If the Contractor foresaw the risk, then ignored it, even if it was not reasonably foreseeable, that should not absolve the Contractor of the need to take steps, or of liability.

## **DR 38 Insurance**

This section will need to be revised following examination of liability issues, but at this stage, it should be noted that the Authority must have the ability to require certain clauses, and require the deletion of others (such as Act of God or Force Majeure, for example).

## **DR 46 General obligations**

This DR 46 should refer to the entire formulation of environmental matters under the Fundamental Principles.

The precautionary approach should not be restricted to the assessment and management of risk of harm to the Marine Environment from Exploitation in the Area. It should be applied to all plans and activities.

The DR 46 should require not only ‘timely access’ to relevant environmental information but timely release of environmental information.

DR 46 does not assign responsibilities to specific entities. Rather it leaves the Authority, sponsoring States, and Contractors to “each, as appropriate, plan, implement, and modify measures necessary for ensuring the effective protection of the marine environment from Harmful Effects.” The roles of the Authority and sponsoring State still need to be clarified. These include roles in EIAs and EIS, monitoring, enforcement, consultation, and reporting.

### *Scoping*

The requirement for a scoping report preceding an application for exploitation was widely supported by Member States and observers, but has been dropped from the current draft regulations. The Secretariat’s cover note (ISBA/24/LTC/6) suggests that this requirement will be incorporated into the exploration framework instead. A scoping report is in the interest of both the Authority and the contractors and should be mandatory and subject to public review, and is an integral part of the environmental impact assessment process. Bifurcation is not helpful. If this requirement is to be moved to the exploration framework, will this involve amendment of the exploration regulations? If so, are there other changes to the explorations regulations that should be considered, including increased clarity around the process for submitting and reviewing Environmental Impact Assessments (EIA) for equipment and component testing under and exploration contract? If not, what mechanism does the Authority propose using to establish scoping reports as a mandatory requirement under the exploration framework, and integrated with the environmental impact assessment process?

### *Environmental Impact Assessment (EIA) and Environmental Impact Statement (EIS):*

The term ‘environmental impact assessment’ (EIA) is still not defined, and while the EIS must be based on an EIA (see DR 46 bis) but other than that there is no detail as to what the EIA entails and what procedure it must follow: the purpose of the EIS is stated to document and report the results of the EIA process, but that process has yet to be detailed, together with the public comment provisions including provisions for public comments to be taken into account, and integrated with the scientific and technical advice . This is part and parcel of the scoping issue discussed above with respect to DR 12(5)(b). Also lacking is specific requirement to take results of any EIAs undertaken during exploration into account in the Environmental Documents. DR 19 Impact Areas.

The current draft regulations no longer include the term “impact area.” We are left with “contract area”, “mining area” and “Project Area”, which is now subject to delimitation in Annex IV, but it is still not clear whether the Project Area includes impact reference zones. It is important for contractors to identify their zone of reference including predicted impact area as it will allow the Commission to assess whether environmental harm is fully contained within the mined area, or if not, what the reference area is. Such a determination will also inform the Commission’s review of the Environmental Impact Assessment (EIA), Environmental Monitoring and Management Plan (EMMP), and the site’s Closure Plan as well as the effectiveness of the REMP.

## **DR 49 Compliance with the Environmental Management and Monitoring Plan**

DR 49 should specify to whom the report is made.

## **DR 40: Annual Reports**

Regular reporting is a vital element of any regulatory framework. In keeping with the Authority's commitment to transparency, and in support of the Council's oversight role, contractors' annual reports, set out in DR 40, should be made public, with any confidential information redacted. The Authority should also be specifically empowered to request more frequent reports as required.

The annual report required under DR 40 should include a statement disclosing whether effective control has changed.

## **DR 46 *ter* Environmental Management and Monitoring Plan**

The EMMP is detailed in a new DR 46 *ter*, but lacks integration with public comment provisions, lacks specific provision for independent scientific and technical advice and provision for review and revision of the EMMP, which is stated to be prepared by the Contractor or Applicant. The new Annex VII contains matters which must be contained in the EMMP, but not procedures for review and revision of the plan.

## **DR 52 Environmental Liability Trust Fund**

The incorporation of the Environmental Liability Trust Fund in DR 52, recommended by the Seabed Disputes Chamber and its incorporation into the latest draft regulations is a welcome development. It is appreciated that this is a 'placeholder', but we note that some of the activities proposed to be supported through this fund (e.g., research and training) are not appropriate uses of a liability fund. The Liability Trust Fund should be designed specifically to address the liability gap identified by the Seabed Disputes Chamber.

## **DR 55 Modification of a Plan of Work by a Contractor**

While a contractor may propose minor or material changes to a Plan of Work during this period, the Authority has a much more limited ability to either recommend or require changes. The amended provisions under DR 55-56 are currently unbalanced. The Secretary-General should be able to recommend changes, and the Commission should have a review role: currently it is only 'informed' by the Secretary-General.

## **DR 56 Review of activities under a Plan of Work**

DR 56 should provide for the full review of activities to be made public and for public comment. There should also be independent reviews of activities under a Plan of Work, as was provided for in earlier draft regulations, including independent scientific assessment. These are implemented in regional fisheries management organizations to good effect. The list of triggers in DR 56(1) was usefully expanded by the Commission to include changes in Best Available Scientific Evidence.

The review should be able to result in changes being made: in the current draft, under DR 56(3), the only result is “Where as a result of a review the Contractor wishes to make any changes to a Plan of Work.” The report should result in an organ such as the Secretary-General recommending changes to the Plan of Work to the LTC and Council.

### **DR 87 Confidentiality of information**

The provision in 87.2(f) that the Secretary General may agree that certain information is confidential for “bona fide academic reasons” should be deleted. Academic considerations should not be grounds for keeping environmental data and information confidential. This exemption could also be subject to abuse; i.e. as a reason to withhold information.

The 30 day period for the Secretary-General to intervene in DR 87(5) is likely to prove to be too short. The issue may not arise for months or years. There should a provision for States or stakeholders to have access to a procedure to assess a claim of confidentiality.

### **DR 92 Adoption of Standards and DR 93 Issue of guidance documents**

DR 92 provides that the Commission, “taking into account the views of recognized experts”, shall recommend standards which the Council shall consider and either approve or return to the Commission for reconsideration, and the Commission added “and relevant existing internationally accepted standards”.

DR 92 does not indicate whether this process will be transparent or broadly inclusive. The term “recognized experts” is not defined. DR 93 provides that the Commission or the Secretary General shall issue guidelines and that these guidelines shall be “reported” to Council. It does not provide for an inclusive or transparent process of guideline development, nor does it offer the Council an opportunity to approve or reject guidelines; just to request that the guideline be modified or withdrawn. The regulations should do both. The Commission added that the Commission or the Secretary-General shall keep under review such Guidelines in the light of new knowledge or information.

Both DR 92 and 93 would benefit from inclusion of a mechanism for soliciting stakeholder feedback on draft standards and guidelines before these are presented to the Council for review and approval as well as a mechanism for reviewing and updating standards and guidelines as appropriate to ensure they reflect the Best Available Scientific Evidence, Best Available Techniques, Good Industry Practice, and Best Environmental Practice as those standards evolve.

The regulations should also be clear on which standards and guidelines are legally binding. It is worth noting the use of the phrase “reasonably practicable” throughout may affect the binding nature of any Guidelines. This phrase should be eliminated as it introduces uncertainty and makes it difficult to enforce. For example, Annex X states that contractors are required to “observe, as far as reasonably practicable, any guidelines which may be issued by the Commission or the Secretary General.” What does this mean? Who decides the meaning of “reasonably practicable”?

There is no specific provision for standards to be binding or requiring they be in place before contracts are approved. There should be.

## Definitions

“Serious Harm” is defined in Schedule 1 as “any effect from activities in the Area on the Marine Environment which represents a significant adverse change in the Marine Environment determined according to the rules, regulations and procedures adopted by the Authority on the basis of internationally recognized standards and practices informed by Best Available Scientific Evidence.” This is an improvement on earlier definitions. However, this definition will require further elaboration of “significance” and what the Authority considers as applicable internationally recognized standards and practices. For example, would these include the FAO Guidelines for VMEs and Significant Adverse Impacts? Criteria need to be developed.

The Commission draft continues with the broader category of “Stakeholders” instead of the more restrictive “Interested Persons” (Schedule 1). That is welcomed.

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<sup>1</sup> These comments reference and are based on the draft regulations (ISBA/24/LTC/WP.1/Rev.1), the Commission cover note (ISBA/24/C/20), the President’s Statement (ISBA/24/C/8/Add.1), Secretariat cover note (ISBA/24/LTC/6), and the report of the March 2018 Commission meeting (ISBA/24/C/9).

<sup>2</sup> 1994 Agreement, Annex, Section 1.3. “The setting up and the functioning of the organs and subsidiary bodies of the Authority shall be based on an evolutionary approach, taking into account the functional needs of the organs and subsidiary bodies concerned in order that they may discharge effectively their respective responsibilities at various stages of the development of activities in the Area.”

<sup>3</sup> Article 145 Protection of the Marine Environment

Necessary measures shall be taken in accordance with this Convention with respect to activities in the Area to ensure effective protection for the marine environment from harmful effects which may arise from such activities. To this end the Authority shall adopt appropriate rules, regulations and procedures for inter alia:

- (a) 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, particular attention being paid to the need for protection from harmful effects of such activities as drilling, dredging, excavation, disposal of waste, construction and operation or maintenance of installations, pipelines and other devices related to such activities;
- (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.

<sup>4</sup> UNCLOS Art 194.5. The measures taken in accordance with this Part shall include those necessary to protect and preserve rare or fragile ecosystems as well as the habitat of depleted, threatened or endangered species and other forms of marine life.

<sup>5</sup> The term used in Art 145.

<sup>6</sup> The term is from the CBD and should be defined according to Art. 2 of the CBD: ““Biological diversity” means the variability among living organisms from all sources including, inter alia, terrestrial, marine and other aquatic ecosystems and the ecological complexes of which they are part; this includes diversity within species, between species and of ecosystems.”

<sup>7</sup> CCAMLR preamble “the importance of safeguarding the environment and protecting the integrity of the ecosystem of the seas surrounding Antarctica”. CBD Decision VII/28 notes that the parties should “[e]stablish and implement measures for the rehabilitation and restoration of the ecological integrity of protected areas. Aichi Biodiversity Target 10 of the Strategic Plan for Biodiversity 2011–20: ‘By 2015, the multiple anthropogenic pressures on coral reefs, and other vulnerable ecosystems impacted by climate change or ocean acidification are minimized, so as to maintain their integrity and functioning.’

Possible definition: “biodiversity and ecosystem processes (functions) that characterize the area at a given point in

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time”

See Peter Bridgewater, Klaus Bosselmann and Rakhyun Kim, “Ecological Integrity: A Relevant Concept for International Environmental Law in the Anthropocene?”. January 2014.

<sup>8</sup> See CBD Art 8 on in-situ conservation, Aichi Target 11, “effectively and equitably managed, ecologically representative and well-connected systems of protected Areas”, and see COP Decision X/33.

The 10th Conference of the Parties (COP) to the Ramsar Convention: the ‘conservation and wise use of wetlands enables organisms to adapt to climate change by providing connectivity, corridors and flyways along which they can move.”

<sup>9</sup> “[T]he management of human activities, based on the best understanding of the ecological interactions and processes, so as to ensure that ecosystems structure and functions are sustained for the benefit of present and future generations”

<https://www.cbd.int/doc/publications/ea-text-en.pdf>

The South Pacific RFMO (SPRFMO) Convention defines ecosystem approach as follows in its Article 2:

An ecosystem approach shall be applied widely to the conservation and management of fishery resources through an integrated approach under which decisions in relation to the management of fishery resources are considered in the context of the functioning of the wider marine ecosystems in which they occur to ensure the long-term conservation and sustainable use of those resources and in so doing, safeguard those marine ecosystems.

<sup>10</sup> Article 18 Penalties

1. A contractor's rights under the contract may be suspended or terminated only in the following cases:

(a) if, in spite of warnings by the Authority, the contractor has conducted his activities in such a way as to result in serious, persistent and wilful violations of the fundamental terms of the contract, Part XI and the rules, regulations and procedures of the Authority; or

(b) if the contractor has failed to comply with a final binding decision of the dispute settlement body applicable to him.

2. In the case of any violation of the contract not covered by paragraph 1 (a) or in lieu of suspension or termination under paragraph 1(a), the Authority may impose upon the contractor monetary penalties proportionate to the seriousness of the violation.

3. Except for emergency orders under article 162, paragraph 2(w), the Authority may not execute a decision involving monetary penalties, suspension or termination until the contractor has been accorded a reasonable opportunity to exhaust the judicial remedies available to him pursuant to Part XI, section 5.

Article 19 Revision of contract

1. When circumstances have arisen or are likely to arise which, in the opinion of either party, would render the contract inequitable or make it impracticable or impossible to achieve the objectives set out in the contract or in Part XI, the parties shall enter into negotiations to revise it accordingly.

2. Any contract entered into in accordance with article 153, paragraph 3, may be revised only with the consent of the parties.

<sup>11</sup> DR 12.4. The Commission shall, in considering a proposed Plan of Work, apply the Rules of the Authority in a uniform and non-discriminatory manner, and shall have 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, and in particular to the extent to which the proposed Plan of Work contributes to realizing benefits for mankind as a whole.