

ISA Mining Code: Draft Mineral Exploration Regulations

Offshore and Deep Sea Mining
Conference
London, 28 November 2016

Background: The Convention

- The Convention sets out basic governing principles for the management of the seabed resources of the Area - Articles 150-152, 153.
- Authority is exercising the powers contemplated by Articles 153 and 157 of the Convention.
- Developing a Mining Code in the exercise of its responsibility under the Convention to regulate the exploration and exploitation of resources in the Area.

Background: Development of the Working Draft

- Work on the Draft Exploitation regulations commenced in July 2015 following consideration a draft framework and action plan.
- Development of the Working Draft reflects the unique nature of the Area and the regime under development.
- Regulation of commercial extractive activity in areas beyond the jurisdiction of any State.
- Requires consideration of a diverse range of legal, commercial and operational issues.
- Aspects of public international law, comparative analysis of regional management arrangements, national laws, regulatory practice in the extractives and commercial considerations.
- Significant progress has been made. Result is contained in the Report to the LTC released for consultation in July 2016.

Draft Regulations: Fundamental Principles

- The Area and resources are the common heritage of mankind and activities to be carried out consistent with this principle: Article 136 and 139.
- Minerals in the Area may only be alienated in accordance with the Convention and regulations: Article 137.
- States have responsibility to ensure activities in the Area are conducted in accordance with the requirements of the Convention: Article 139.
- Measures are required to protect the marine environment from harmful effects of activities in the area: Article 145.

Draft Regulations: Management Principles

- Article 150 of the Convention requires that Activities in the Area are carried out with a view to ensuring:
 - the orderly, safe and rational management of the resources of the Area;
 - efficient conduct of activities in the Area; and,
 - in accordance with sound principles of conservation and the avoidance of unnecessary waste.

Draft Regulations: Financial Principles

- The following principles concerning the financial terms of contracts are set out in Section 8 of the Annex to the Agreement Relating to Part XI:
 - The system of payments shall be fair to the Authority and to the contractor;
 - The rates of payments shall be within the range of those prevailing in respect of land-based mining of the same or similar minerals;
 - The system should not be complicated;
 - The system should not impose major administrative costs on the Authority or on a contractor;
 - Consideration should be given to the adoption of a royalty system or a combination of a royalty and profit-sharing system; and,
 - The system of payments may be revised periodically in the light of changing circumstances.

Draft Regulations: Responsibilities and Obligations

- Under Part XI of the Convention, Sponsoring States have specific responsibilities and obligations concerning activities in the Area.
- The nature and content of these obligations were examined by ITLOS in its Advisory Opinion of 2011.
- Sponsoring States have two types of obligations.
- A due diligence obligation to ensure compliance with the obligations under the Convention.
- Direct obligations in respect of sponsored contractors.

Exploitation Regulations: Object and Purpose

- Exploitation Regulations will form part of a comprehensive Mining Code covering the exploration and exploitation of seabed mineral resources in the Area.
- Working Draft is intended to establish the *basic elements* of the regulatory framework for exploitation consistent with the Convention and the Agreement for the Implementation of Part XI of the Convention.
- Additional regulations, guidelines, recommendations and plans of work would be developed to complement and implement aspects of the Working Draft.
- Matters relating to financial aspects and dispute settlement are highlighted for further attention, and the topic of separate discussion papers commissioned by the Authority.

Draft Regulations: Content

- Draft Regulations provide for the exploitation of the resources of the Area.
- Intended to operate subject to the provisions of the Convention, the Agreement Implementing Part XI and rules of public international law not inconsistent with the Convention.
- Are to be supplemented by additional regulations, rules and procedures.
- Draft comprises 11 Parts, together with Annexes.

Draft Regulations: Administration and Applications

- Part II deals with administrative matters, focusing on application processes and procedures relating to applications by States, sponsored entities and the Enterprise (Regs. 2-12)
- This includes provisions concerning the documents required to be submitted by an applicant as part of a Plan of Work (Reg.4).
- Also includes provisions regarding the assessment of applicants by the Commission (Reg.8)

Draft Regulations: Exploitation Contracts

- Part III deals with exploitation contracts (Regs. 13-17)
- Provides that exploitation contracts shall be approved for an initial term of 20 years, renewable for further periods of 10 years upon application (Reg. 14).
- A template contract is contained in an Annex.
- Sets out rules concerning the approval by the Authority of the transfer of rights under an exploitation contract (Reg.17).
- Elaborates rules concerning the use of an exploitation contract can be used as security for financing (Reg. 16).

Draft Regulations: Financial Terms

- Part V contains provisions on the financial terms of the exploitation contract (Regs.20-45)
- At an early stage of development and to be refined following further discussion of fiscal elements and the payment mechanism to be applied.
- Provides for the payment of royalty, with the rates and method of calculation yet to be determined (Regs.23-24).
- Provisions concerning returns, information, records, inspection and audit of financial records (Regs. 31-35).
- Provisions concerning arms length, anti-avoidance and penalties included.
- Provisions on dispute settlement through the use of expert determination also included (Reg. 44).

Draft Regulations: Inspection and Enforcement

- Part VIII would create an inspection regime (Reg. 54).
- Provides for the establishment by the Authority of an Inspectorate to monitor compliance.
- Includes provision for boarding of vessels and installations by inspectors and the use of observers.
- To provide for the monitoring of contractors activities and the effects of activity on the marine environment and human health.
- Part IX contains provisions on enforcement and penalties (Regs. 55-56).

Draft Regulations: Further Elements

- No provisions concerning the protection of the Environment.
- Separate Environment Regulations under development to meet international best practices.
- Seabed Mining Directorate Regulations also to be developed to address the day-to-day operations of the Authority as a regulator.
- Further consideration being given to Dispute Settlement, confidentiality and financial provisions.
- Discussions Papers circulated in 2016.