International Seabed Authority ISBA/12/C/2 (Part I)

Council

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Analysis of the draft regulations on prospecting and exploration for polymetallic sulphides and cobalt-rich ferromanganese crusts in the Area

Part I: Provisions relating to prospecting, overlapping claims and the anti-monopoly provision

Prepared by the secretariat

I. Introduction

1. During the eleventh session of the International Seabed Authority in 2005, the Council completed a first reading of the draft regulations on prospecting and exploration for polymetallic sulphides and cobalt-rich ferromanganese crusts in the Area (hereinafter "the draft regulations"). At the conclusion of that first reading, the Council considered that further explanation and elaboration was required with respect to certain aspects of the draft regulations (ISBA/11/C/11, para. 14). In particular, it requested the Secretary-General to provide the Council with more detailed analysis and elaboration of the following aspects of the draft regulations:

(a) With respect to prospecting, the Council requested further clarification of the relationship between prospecting and exploration and the justifications for the specific changes proposed by the Commission;

(b) With respect to the size of areas for exploration, the Council requested that further information be provided on the proposed system of allocating exploration blocks and the way in which it might operate in practice, as well as on the proposed schedule for relinquishment and its consistency with the provisions of the Convention;

(c) With respect to draft regulations 16 and 19 relating to the proposed system for participation by the Authority, the Council requested a more detailed analysis of how the draft provisions might operate in practice in the light of the comments and opinions expressed in the Council.

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2. The issues referred to in paragraphs 1 (b) and (c) above are dealt with in part III of the present study and in document ISBA/12/C/3. The present part of the study (part I) responds to the request for clarification of the relationship between prospecting and exploration. At the conclusion of its discussions at the eleventh session, the Council further noted that it would be necessary for the draft regulations to include appropriate provision, consistent with the United Nations Convention on the Law of the Sea and the 1994 Agreement relating to the Implementation of Part XI of the Convention for resolving overlapping claims made by different applicants and that the draft regulations did not appear to reflect fully the anti-monopoly provisions contained in annex III of the Convention (ISBA/11/C/11, para. 16). Those issues are also addressed in the present document.

II. Prospecting

3. "Prospecting", in the broad sense of undertaking a general survey of a large area with a view to collecting data on the basis of which a determination can be made as to specific areas meriting evaluation, is widely recognized as an essential phase in the development of mineral resources, whether on land or at sea. The term "prospecting" appears in annex III of the Convention, but is not defined. Prospecting is envisaged as a phase preliminary to but distinct from exploration. The negotiating history of annex III of the Convention suggests that there was a link between the regime for prospecting and the regime for marine scientific research under part XI (article 143) and part XIII (article 256) of the Convention.[1] Indeed, most non-invasive prospecting in the Area may be carried out on the basis of marine scientific research, which, pursuant to article 87 of the Convention, is a freedom of the high seas, to be exercised subject to parts VI and XIII of the Convention. Thus, the extent to which States Parties may, through the Authority, organize and control prospecting in the Area is, compared to exploration and exploitation, strictly limited. To the extent that prospecting may constitute "activities in the Area", the only requirements of the Convention are that the prospector notify the Authority of the approximate area or areas in which prospecting is being conducted and provide a written undertaking that it will comply with the Convention and the rules, regulations and procedures of the Authority on certain specific matters.

4. Recognizing that relationship, the Convention and the Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area (hereinafter "the nodules regulations"), adopted by the Authority in 2000,[2] attempt to strike a balance between the interests of the Authority and those of would-be prospectors. On the one hand, prospecting is unlimited in duration and there is no requirement for a contract between the Authority and the prospector, while on the other, a prospector has no exclusive rights, no rights to resources, nor recourse to the Seabed Disputes Chamber. The only way to gain exclusive rights, and security of tenure, is to enter into a contract for exploration with the Authority.

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[1] See Lodge, M. W., Nandan, S., Nordquist, M. H. and Rosenne, S. (eds.), *United Nations Convention on the Law of the Sea 1982: A Commentary*, vol. VI, Martinus Nijhoff Publishers, 2003.

[2] ISBA/6/A/18.

A. The regime for prospecting under the Convention

5. Prospecting is dealt with in annex III, article 2, of the Convention. Article 2 provides that prospecting (which is not defined) may be conducted only after the Authority has received a written undertaking from the proposed prospector that it will comply with the provisions of the Convention and the relevant rules, regulations and procedures of the Authority concerning cooperation in the training programmes referred to in articles 143 and 144 and the protection of the marine environment. Prospecting may be conducted simultaneously by more than one prospector in the same area or areas. Prospecting confers no rights on the prospector with respect to resources. A prospector may, however, recover a reasonable quantity of minerals to be used for testing.

B. Prospecting under the nodules regulations

6. In the nodules regulations, "prospecting" is defined in regulation 1 as:

> "the search for deposits of polymetallic nodules in the Area, including estimation of the composition, sizes and distributions of polymetallic nodule deposits and their economic values, without any exclusive rights".

To give effect to annex III, article 2, paragraph 1, of the Convention, the nodules regulations contain detailed procedures for the deposit of notifications of prospecting with the Authority, including details of the form of the undertaking required by paragraph 1 (b). The regulations also add to the requirements of annex III by requiring a prospector to submit to the Secretary-General of the Authority an annual report on the "status of prospecting and of the results obtained" (see regulation 5). This would also assist the prospector should it decide in the future to claim the cost of prospecting as part of the development costs incurred prior to exploitation under any subsequent contract with the Authority. In addition, the prospector is required to notify the Authority of "any incident arising from prospecting which causes serious harm to the marine environment" (see regulation 7) and of any finding in the Area of an object of an archaeological or historical nature. The regulations also clarify what is meant by the words "a reasonable quantity of minerals to be used for testing" in annex III, article 2, paragraph 2, by providing that "a prospector may, however, recover a reasonable quantity of minerals, being the quantity necessary for testing, and not for commercial use" (see regulation 2).

C. Prospecting under the draft regulations

7. With respect to prospecting for polymetallic sulphides and cobalt-rich crusts, the draft regulations (regulations 2 to 4) follow the language of the nodules regulations. However, the Legal and Technical Commission recommended the insertion of two additional requirements. Firstly, as part of their undertaking to the Authority, prospectors are required to:

> "… make available to the Authority, as far as practicable, such data as may be relevant to the protection and preservation of the marine environment".

While in terms of the disclosure of potentially commercially valuable information, this clearly goes beyond what is required by annex III of the Convention, it can be argued that the provision is justified by the broader community interest in achieving greater knowledge of the marine environment in areas where polymetallic sulphides and cobalt-rich crusts are found.

8. The second provision introduced by the Legal and Technical Commission is an entirely new regulation 5 dealing with protection and preservation of the marine environment during prospecting. The new draft regulation imposes the same general obligation to prevent, reduce and control pollution and other hazards to the marine environment on prospectors as applies to contractors under draft regulation 33, paragraph 3. In addition, prospectors are required to minimize or eliminate any adverse environmental impacts of prospecting and any actual or potential conflicts or interference with existing or planned marine scientific research activities. Prospectors are also required to cooperate with the Authority in the establishment and implementation of programmes for monitoring and evaluating the potential impacts of the exploration and exploitation of polymetallic sulphides and cobalt-rich crusts on the marine environment.

9. These provisions clearly introduce new obligations that are not contained in annex III of the Convention. Nevertheless, it can be argued that, at least as far as States parties to the Convention are concerned, they are obligations that are fully consistent with the general obligation to ensure effective protection for the marine environment from the harmful effects of activities in the Area, pursuant to article 145 of the Convention. They may also be considered to be consistent with (albeit a substantial elaboration of) the Convention requirement (annex III, article 2, paragraph 1 (b)) that prospectors undertake to comply with the provisions of the Convention and the relevant rules, regulations and procedures of the Authority concerning the protection of the marine environment.

III. Overlapping claims

10. The nodules regulations made no reference to the problem of overlapping claims, because it was not necessary to deal with that issue in the context of polymetallic nodules, since all overlapping claims to potential mine sites had in fact been dealt with under resolution II of the third United Nations Conference on the Law of the Sea or by arrangements reached during the work of the Preparatory Commission. Clearly, this would not be the case with polymetallic sulphides and cobalt-rich crusts. The basic principle in dealing with overlapping claims is “first-come, first-served”. However, recognizing that initial applications may be submitted for overlapping areas, the model clauses prepared by the Secretariat (ISBA/7/C/2) at the outset of discussions on the proposed draft regulations contained a procedure, similar to that contained in resolution II, for resolving such claims on a fair and equitable basis. This procedure has been retained in the draft regulations proposed by the Legal and Technical Commission (draft regulation 24, para. 2).

11. Draft regulation 24 (2) provides that, in the event of an overlapping claim, the Secretary-General will notify the applicants before the matter is considered by the Council. Applicants would then have the opportunity to amend their claims. In the event of a conflict, the Council shall determine the area or areas to be allocated to each applicant on an equitable and non-discriminatory basis. It is clear that the

intent of the Convention and the 1994 Agreement is that the Legal and Technical Commission is a technical body that should not be required to make qualitative decisions between one applicant and another. If the Commission were to find that there are overlapping claims, it would refer the matter to the Council.

12. The question that remains is whether any additional procedure is required for resolving overlapping claims. Such a procedure was included in resolution II, paragraph 5 of which laid out a procedure for binding arbitration. Such arbitration was to be conducted in accordance with United Nations Commission on International Trade Law (UNCITRAL) arbitration rules, taking into account a number of factors specified in 5 (d) of resolution II.

IV. Anti-monopoly provision

13. The so-called "anti-monopoly" provision appears in annex III, article 6, paragraph 3 (c), of the Convention and in regulation 21, paragraph 6 (d), of the nodules regulations. In summary, the provision is designed to prevent a single State from gaining control of a localized area of the seabed or a certain overall percentage of the Area. No such provision appears in the draft regulations, one reason being that, unlike other provisions of annex III, article 6, paragraph 3 (c), is expressly limited to contracts for polymetallic nodules and not other resources.

14. Nevertheless, the need to limit individual States from assuming a dominant role in the exploitation of the seabed was recognized from the earliest stages of negotiations at the Third United Nations Conference on the Law of the Sea. Early proposals submitted in 1974 proposed upper limits on the number of contracts that may be awarded to applicants for each category of resources. The present wording in annex III stems from an informal proposal made by France in 1979, albeit substantially amended in the process of negotiation and compromise. As it stands, the provision is complex and presents practical difficulties in its application (not least in calculating the overall size of the Area). Even if those practical difficulties could be overcome, the existing formula is unlikely to be of use in the case of polymetallic sulphides and cobalt-rich crusts. The Council may therefore need to consider the issue further in the context of discussions on the size of areas for exploration.

15. In the mining industry, other commonly applied methods used to counter monopolistic practices include the application of performance standards through due diligence clauses and the use of a variable exploration fee rather than a fixed fee. The fixed fee approach, which is reflected in the regulations governing polymetallic nodules, tends to act as an incentive to claim the maximum permissible area. A variable fee, on the other hand, based on the size of the area under licence, operates as an incentive to keeping claims as small as possible and discourages speculative ventures.

16. In the case of polymetallic nodules, under resolution II, pioneer investors were limited to one exploration site each. For that reason, the draft model clauses for sulphides and crusts prepared by the secretariat in 2001 (ISBA/7/C/2) contained a provision designed to prevent multiple applications by affiliated applicants. Applicants were considered affiliated if they were, directly or indirectly, controlling, controlled by, or under common control with one another.