



MODULE EIA, LESSON 3

REGULATION OF ACTIVITIES IN THE AREA

LECTURE NOTES

Regulation

- **WHO** - Article 162 (2) (o) (ii) provides that the Council shall adopt and provisionally apply RRP's based on recommendations of the Legal and Technical Committee (LTC) and the Finance Committee (FC) as appropriate. Final approval of RRP's rests with Assembly (Article 160 (f) (ii)) based on the Council's provisional adoption thereof.
- **WHAT** - RRP's should regulate prospecting, exploration and exploitation, as part of "activities in the Area". The content of the phrase "activities in the Area" was considered in the Seabed Dispute Chamber of International Tribunal of the Law Advisory Opinion on *Responsibilities and Obligations of States Sponsoring Persons and Entities with respect to Activities in the Area* (paras 82-96)
- **WHY** - The Common Heritage of Mankind (Humankind) (CHM), article 137(2) is a fundamental principle of the Convention. The rights to the resources in the Area belong to humankind for the present and future generations. The resources cannot be sold, while minerals recovered from the Area can only be disposed of in accordance with RRP's made under Part XII. The Authority acts on behalf of humankind. In addition, all activities in the Area are to be carried out for the benefit of humankind, considering the particular interests of developing states, and those peoples who have not attained full independence.
- **HOW** - Through the Convention and the 1994 Agreement relating to the Implementation of Part XI of UNCLOS (primary legal instruments) and rules, regulations and procedures (RRP's) of the Authority. RRP's are subsidiary instruments that must be consistent with primary legal instruments. RRP's comprise the MINING CODE.

Mining Code: Exploration Regulations

The set of 3 exploration regulations **are in force**. These regulate the resources in the Area from which minerals **may** be extracted pursuant to article 137 (2) *when the Authority permits such activities*.

Exploration is defined as *the searching for Resources in the Area with exclusive rights, the analysis of such resources, the use and testing of recovery systems and equipment, processing facilities and transportation systems, and the carrying out of studies of the environmental, technical, economic, commercial and other appropriate factors that must be taken into account in Exploitation*.

Minerals of interest per resource:

Polymetallic Sulphides – copper, zinc, lead, silver, gold

Polymetallic Nodules – nickel, cobalt, manganese, Rare Earth Element (REE)

Ferromanganese Crusts – cobalt, platinum, REE, nickel, manganese,

- **Legally Binding Nature of RRP's** – The RRP's of the Authority are binding on Contractors, the Authority and States Parties. Article 162 (2) (o) (ii) empowers the Council to make and provisionally apply RRP's for prospecting, exploration and exploitation. These RRP's on the recommendation of the Council, are approved by the Assembly, as the supreme organ of the Authority, under article 161 (f)

(ii). The Regulations sets out specific obligations for the contractors, States Parties including sponsoring states and the Authority. e.g., Regulation 31(5) Nodules Regulations. Contractors are bound by RRP by virtue of the terms of the contracts with the Authority.

Exploration Regulations

Common features of Regulations – Annex III Article 17(1) (2) indicates some elements to be included in regulations.

- **Procedure for applications** - prospecting or exploration:
- **Prospecting** - (Part II of Regulations), requires notification to SG, doesn't confer exclusive rights on Contractors) Regulation 2, Nodules Regulations) (also Annex III article 2)
- **Exploration** – (Part III of Regulations) Application of approval of plan of work. Contents of application form are found in regulations. e.g. (Annex II, Crusts Regulations)

Article 153 (2) (a) (b) establishes who may apply. The Enterprise, (the organ of the Authority designated to carry out activities in the Area under article 170), or state parties, or state enterprises or natural or legal persons who have the nationality of states or who are effectively controlled by them or their nationals and who have been sponsored by the state or states.

(The Enterprise is not functioning as a separate entity currently. Instead, the Secretariat of the Authority performs that function, section 2 (1) Annex to the 1994 Agreement)

If an application is successful, and the plan of work of is approved by the Council, then it is prepared in the form of a contract between the Contractor and the Authority. (e.g., Regulation 25, Sulphides Regulations)

- **Area for exploration** – The Application must specify the total area being applied for, clearly defining the boundary and providing coordinates. (e.g., regulation 12, Sulphides Regulations)

There is a limit on the area depending on the resource. This is linked to the method of exploitation, and commercial viability. Under the Nodules Regulations, the area is 75,000 square kilometres. Under the Sulphides Regulations that figure is 10, 000 square kilometres, consisting of 100 blocks with each block being no greater than 100 square kilometres. The area allowed under the Crusts Regulations is 3000 kilometres, consisting of 150 blocks with no block being greater than 20 square kilometres.

Each **developed** country applying must present 2 sites of approximately equal commercial value to allow mining operations with their application. Data about the sites and their resources must also be submitted. The sites don't have to be adjacent. If the applicant meets all the other requirements, the Authority will approve the application for one of the sites as part of the plan of work. The other site will be designated as a **reserved area**. ***Reserved areas are set aside for activities by the Enterprise or developing states or entities sponsored and effectively controlled by developing states.***

Applicants seeking exploration contracts under the sulphides or crusts regulations, found it difficult to collect data to identify 2 areas of equal commercial value. So, they were given the option of offering a future equity interest in a joint venture with the Enterprise or contributing a reserve area. Most have opted for the latter. The reserve area system gives developing states an equal opportunity to engage in DSM other than through the Enterprise. (Annex III articles 7-8)

- **Duration of Contract.** The initial length of an exploration contract is 15 years. On expiration, the contractor should apply for plan of work for exploitation unless an extension has been obtained. The exploitation regulations are not in place consequently, contractors have sought extensions.

Extensions are for maximum period of 5 years. These are done on an application by the contractor, based on the recommendation of the LTC and approved by the Council. Grounds for extension are that contractor has made a good faith effort to comply with plan of work but for reasons beyond their control is unable to complete the necessary work to proceed to exploitation or that the economic conditions don't justify moving to exploitation stage (e.g., regulation 26 Nodules Regulations)

- **Protection of the marine environment:** (Part V) The regulations in this Part support implementation of Convention obligations in this area. These include the protection and preservation of the marine environment (incorporating concept of serious harmful effects on vulnerable marine ecosystems), environmental baselines and monitoring, (includes the submission of an annual report on the environmental baseline data collected, and on environmental baselines, against which is measured the likely effects of the annual programme of activities under the plan of work, and results of a programme to monitor and report on these effects), emergency orders and rights of coastal states.
- **Confidentiality of Data and Information –** (Part VI) Data and information transmitted or transferred to the Authority or to persons working in a programme with the Authority under the Regulations, or through a contract approved under the Regulations, and designated as confidential after discussions between the SG and the contractor, will be treated as such. There are certain exceptions to this rule. These include data and information that is publicly available from other sources, that the owner previously submitted to the Authority without a requirement for confidentiality and that which the Authority already holds with no obligation of confidentiality.

Data and information submitted to the Authority which is needed for the development of RRP's for the protection of the marine environment and safety is not treated as confidential unless it concerns proprietary equipment design data.

Confidential data and information only can be used by SG, Secretariat staff and LTC as necessary and relevant for their functions. The SG is responsible for authorizing this use in a limited way based on functions and powers of the relevant bodies.

The SG is responsible for maintaining the confidentiality of all data and information so classified and can't disclose it to any person external to the Authority without the prior written consent the contractor. Procedures have been developed by Authority to handle confidential data.

- **LTC consideration –** (Regulation 21 Nodules Regulations) The LTC must consider each application in the order they are received. Applications must comply with Regulations e.g.; applicants must be qualified. Regulations also list other factors that must be considered e.g., effective protection of human and safety, environmental protection, if the required undertakings have been given. The LTC must also take into account the grounds for denying an application including where there is *substantial evidence* that the plan will cause harm to the marine environment or where the application is made for a reserve area, unless the applicant is a developing country, or the Enterprise on its own or in a joint venture. If the LTC does not support an application, the applicant

must be notified in writing and be given 45 days to amend the application. If the LTC still disagrees, the applicant is to be notified and given another 30 days to respond.

If the LTC is satisfied that the application meets all the requirements, it should submit its report and recommendations to the Council. The LTC's recommendations are considered according to section 3 paragraph 11 and 12 of the Annex to the Agreement (Regulation 22 Nodules Regulations).

- **Undertakings:** (Regulation 15 Crusts Regulations) Every applicant for a plan of work is required, as a part of its application, to provide a written undertaking to the Authority that it will do certain things. As noted above, the LTC consideration of the application includes whether the undertaking has been provided.

The 3 undertakings are that (a) It will accept as enforceable and comply with the *applicable* obligations under the provisions of the Convention and the RRP's of the Authority, the decisions of the organs of the Authority and the terms of its contract with the Authority, (b) accept the Authority's control of activities in the Area as mandated by the Convention, (c) Give the Authority a written assurance that its obligations under the contract will be performed in good faith.

Undertakings are also included in the Standard Clauses of Contract (Annex IV) between the Authority and the Contractor. *The Contractor has accepted among other things, applicable obligations with respect to the Mining Code, decision of the organs of the Authority through its contract with Authority, including this provision on undertakings.*

- **Periodic Reviews of Implementation of Plan of Work** – (Regulation 28 Nodules Regulations): Reviews of the implementation of the plan of work are done jointly every 5 years by the SG and the Contractor. The SG may ask the contractor to submit additional data and information necessary for the review. Based on the review the Contractor must indicate its programme of activities for the following five-year period, with any adjustments from its previous programme of activities. (the programme of activities is a 5-year schedule of activities, subject to annual monitoring and reporting and periodic reviews and adjustments as part of the plan of work/ contract which is lasts last 15 years initially.)

The SG advises the LTC on the periodic reviews. A mechanism has been developed which allows the LTC to provide feedback to the SG on individual periodic reviews. The SG may (and in practice usually does, although not obliged to) take account of these comments in providing a report to the Council. The report to the Council should indicate any comments from states as to how well the contractor has been performing their obligations under the Convention relating to the protection of the marine environment.

In practice, the comments tend to be generated by the Authority. The purpose of periodic reviews is to monitor compliance by the Contractor with obligations under the contract. Along with the annual reporting requirement, this is another mechanism to ensure that obligations are being met. Given the length of the contract, the 5-year reviews and adjustments of programme of work are useful tools.

- **Annexes** – Each Regulation has 4 Annexes which are part of thereof. The Annexes include documents that are prescribed by the Regulations and consequently must be used in the manner specified in order to obtain to obtain the required approval from the Authority. **Annex I** contains a notice of intention to engage in prospecting. **Annex II** lists the information to be included in the application for a plan of work. **Annex III** contains basic terms of Exploration Contract, while **Annex IV** has the Standard Clauses for the same. Annexes III and IV contain the main provisions of the exploration contract, although additional schedules are negotiated by the parties (Regulation 23 Nodules Regulations).

Exploration Regulations Other Aspects

- **Rights of Contractors** – There is an exclusive right to explore the area covered by plan of work (e.g., sulphides). The Authority must ensure that no other entity operates in the same area for same resource so as to affect the contractor's operations. (e.g., Regulations 26 (1) Sulphides Regulations).

If the Contractor finds any resource other than the one approved under the plan of work, exploration of such resource is not permissible unless it complies with the RRP's of the Authority. This activity will require a new application for a plan of work for exploration. The Contractor or prospector must also notify the Authority of the find.

These requirements are consistent with the objective of monitoring and preserving the CHM and protecting the marine environment. Any activity of this kind must be agreed to and monitored by the Authority. (Regulation 43 Sulphides Regulations)

A Contractor who has an approved plan of work for exploration only will have preference and priority among applicants submitting plans of work for exploitation for the same resource. This preference and priority are only for the application process and does not guarantee the outcome of any application, which must meet the relevant requirements.

This preference can be withdrawn by the Council if the applicant fails to meet the requirements for the approved plan of work within a specified period. The procedure for considering such a withdrawal is set out in (e.g., Regulation 26 (2) Sulphides Regulations).

- **Training** – Each contractor is required to include a schedule of practical training programmes for *developing countries and personnel of the Authority* in the contract. The schedule is developed in consultation with the Authority and focuses on practical training in relation to exploration activities. The LTC has issued Recommendations on training to assist contractors in matters such as duration of courses and to guide the selection of candidates. There is also an agreed minimum number of training courses to be provided by each contractor. But this can be adjusted by agreement.
- **Annual Reporting** – The Standard Clauses of the Contract found in Annex IV, includes a reporting obligation in section 10. This is requirement for the contractor to provide an **annual** report to the LTC with sufficient detail on the matters listed in the section (section 10 (1) (2) Annex IV Crusts Regulations). These include information on exploration work done during the calendar year, including maps, charts illustrating the work done, and results obtained, the results obtained from environmental monitoring programmes and information on the implementation of training programmes.

The LTC reviews the annual reports and advises the SG about matters that need to be brought to a contractor's attention. The LTC's Chair report to the Council also provides an overview of the assessment exercise. The SG may require that the contractor provide additional information concerning the areas set out subsections (1) and (2) of section 10, to assist the Authority in carrying out its functions. More information may also be requested, to meet the requirements of 10 (1) and

(2) where the Contractor has not met the minimum requirement, to provide information with sufficient detail in order to allow a technical assessment of the work done.

Recommendations and Procedures

- Regulation 39 of the Nodules Regulations provides that LTC may periodically issue recommendations of technical or administrative nature to assist contractors in implementing RRP.

To date four Recommendations have been issued; There are 2 administrative ones dealing with the format for reporting of expenditure for the annual report and the content, form and structure of the annual reports.

Another recommendation provides guidance to contractors re the implementation of training programmes under the plan of work.

The other recommendation, which was updated in 2019, is on assessing the possible environmental impact of exploration activities. This is a very detailed and technical document, intended to guide contractors as to necessary actions e.g., when activities require an environmental impact assessment.

Although not binding, because the Recommendations are intended to support the implementation of the Regulations, compliance with them can be and is used as a mechanism for assessing the adherence to the Regulations, e.g., by the LTC in the contractors' annual reporting. Contractors are consulted in the development of the Recommendations and are urged to comply with them by the LTC, or to explain why there was a departure from the provisions.

- ***Procedures and criteria for the extension of an approved plan of work for exploration pursuant to section 1, paragraph 9, of the annex to the Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982*** – The procedure is a decision of the Council that sets out the framework for reviewing an application for an extension to a plan of work. This includes the content of the application, the processing thereof and the factors to be considered by the LTC in making a recommendation to the Council for the extension. The way the Council should consider the application is also addressed as it is the latter body that makes the final determination. The decision has an important transitional provision. It provides that if an application for renewal of contract is properly submitted but expires on a date **after** the next scheduled meeting of the LTC (this is based on the premise that the LTC has made a recommendation) but **before** the next meeting of the Council, that contract is deemed to remain in effect until the Council can meet and review the LTC's recommendations.

Exploitation Regulations

- Exploitation is defined as *the recovery for commercial purposes of Resources in the Area, with exclusive rights and the extraction of Minerals therefrom. including the construction and operation of mining, processing and transportation systems in the Area, for the production and marketing of metals as well as decommissioning and closure of mining operations.*
- The Regulations are still in draft form. They were prepared by the LTC and delivered to the Council in 2018. They were developed based on technical studies done by the Authority, the results of workshops and stakeholder consultations.

- The Regulations are intended to create a robust, balanced, enabling, flexible regime for deep seabed mining (DSM) where, among other things, the CHM is safeguarded, the marine environment is protected, and the rights of other stakeholders are also maintained in a stable and rational system.
- In that regard it is comprehensive in scope, with 13 Parts, 10 Annexes and 4 Appendices covering the gamut of issues required to regulate DSM.
- The draft regulations will deal with all 3 resources. However, the LTC noted that there were some resource specific issues, (concerning e.g., methods of exploitation) that will need to be addressed with specific provisions.
- Coherence with the exploitation regulations, particularly with respect to continuing obligations is an objective, so that the 2 regimes operate seamlessly. This will make monitoring more effective and assist the Contractors with implementation efforts.
- The Council is now reviewing/refining provisions of the draft Regulations with stakeholder input.

Key Issues

- **Provisions on protection of the marine environment** are found in Parts IV and VI as well as Annexes IV, VII and VIII. The discussion surrounds developing a regulatory system that provides strong protection for the marine environment by e.g., establishing specific measurable thresholds to determine whether certain mining activities should be permitted. For many states, this aspect of the regulations is essential, and refinement of the provisions is a vital part of the overall work.
- **Financial model/ payment system for nodules exploitation** – Pursuant to article 161 (2) (f) (i), the Council is mandated to develop RRP's on a financial model that allows for the equitable sharing of financial benefits from activities in the Area, while ensuring that the Contractors who would be the main contributors through royalty payments, can operate in a commercially sustainable manner. The payment model must also ensure that the rate set will cover the administrative costs of the Authority, as well as contributions to a separate fund designed to provide adequate compensation for environmental damage where a contractor cannot meet this obligation.

An open-ended Working Group was established in 2018 to make recommendations on a model to the Council. With the help of consultants, 3 options have been identified but there has been no agreement on which one or which combination should be chosen.

In addition, the regime needs to address payments for the other 2 resources.

- **Monitoring** - By their nature most DSM activities will occur thousands of miles from the nearest land. This will pose special challenges for monitoring, both in terms of physical inspections when required, and regular monitoring and enforcement. The experiences of the offshore sector of the oil industry (as the closest operational model) are being looked at. Remote monitoring will also be required and there are provisions on this area. Questions/discussions about remote monitoring include the level of implementation required for effective monitoring and the development of the relevant standards and guidelines. The related enforcement provisions are also being reviewed. Strong enforcement provisions accompanied by an independent inspectorate are among the key objectives of Part XI for many states.

Standards and Guidelines

- Standards and Guidelines (S&G) support the implementation of the Exploitation Regulations and concern the regulation and conduct of activities in the Area.
- Key S&Gs are being developed on a phased basis along with the Regulations. *These are Phase I S&G.* Other S&Gs will be done in later stages, based on schedule set by Council. e.g., prior to the first application for a plan of work.
- S&Gs can be developed by Authority or adopted from an existing entity if considered suitable, e.g., the IMO
- Standards are legally binding on contractors and the Authority, while Guidelines are not. The latter is intended to support implementation of administrative and technical aspects of the Regulations.
- The LTC prepares/reviews a standard and after stakeholder consultations recommends it the Council for adoption. Regulation 94 (2).
- Guidelines can be prepared either by the LTC or by the SG, considering stakeholder views. The process for the approval of Guidelines is like that for the approval of Recommendations under the Exploration regulations. The Guidelines should be reported to the Council. They will take effect unless the Council finds that is inconsistent with the Rules of the Authority, in which case it may request that the Guideline be modified.