Sixth Report of the CODE PROJECT

EIA Procedure in ISA Draft Exploitation Regulations

7 February 2020

Preface:
The Mining Code and the Code Project

The Code Project is a cooperative enterprise of 17 scientists and legal scholars from 11 nations. The project's mission is to provide analyses of the latest drafts of the rules and regulations that together will comprise the Mining Code of the International Seabed Authority (ISA). This month marks the fourth year of Code Project publications.

This sixth and most recent Code Project Report examines the ISA's draft exploitation regulations of 25 March 2019 <ISBA/25/C/WP.1>.

Following is a short paper focused on the environmental impact assessment (EIA) provisions of the draft exploitation regulations. The paper includes some proposed language changes designed to improve the regulations' treatment of EIA.

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EIA Procedure in ISA Draft Exploitation Regulations[1]

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Part 1: EIA Essentials

The United Nations Convention on the Law of the Sea and customary international law require the International Seabed Authority (ISA) and sponsoring States to exercise due diligence in preventing significant harm to the marine environment.[2] Environmental impact assessment (EIA) is fundamental to this obligation. An EIA enables decision makers to identify potential impacts and to fashion requirements to minimize or mitigate harmful effects before they occur.[3]

The EIA is also a means by which sponsoring States and the ISA can meet their parallel obligations to cooperate and consult with one another in relation to the protection of the marine environment[4], as well as the obligation to promote public participation in environmental decision-making (as reflected in Principle 10 of the Rio Declaration).[5] EIA processes generate the environmental information that forms the basis of consultations, and meaningful public participation requires that stakeholder concerns be taken into account.[6]

Proponents conducting EIAs, or regulators evaluating them, must themselves meet international legal standards.[7] For the ISA, this means managing the entire EIA process, not simply the resulting environmental impact statement (EIS), to ensure that it is sufficiently rigorous and incorporates "best environmental practices" and "best available techniques."

At a minimum, the following elements are required in an ISA EIA process:

1) Screening
2) Scoping
3) Assessment
4) Consultation
5) Decision-making
6) Post-decision monitoring and adaptive management

International obligations of cooperation further require sponsoring States and the ISA to ensure that consultation with stakeholders occurs early in the EIA process[8] (typically at the scoping stage) and that the resulting EIS addresses any concerns raised in the consultation process in good faith, preferably through written responses.[9]

Part 2: Current Draft Regulations

What is there?

EIAs are introduced in the present draft regulations via DR 47, which requires applicants for an exploitation contract to submit an EIS to "*document and report the results of the EIA process.*" [10]

The draft regulations state that the EIA process "*identifies, predicts, evaluates and mitigates the biophysical, social and other relevant effects of the proposed mining operation*" and "*identifies measures to manage such effects within acceptable levels*." In terms of process, DR 47 indicates that the EIA includes a "*screening and scoping process, which […] should include an environmental risk assessment,"* and that the EIA should lead to the development and preparation of an EIS and an environmental management and monitoring plan (EMMP). DR 11 requires the ISA to publish a copy of the EIS and EMMP for a 60-day consultation period, once they have been submitted by the applicant.

What is missing?

Screening and scoping

Screening is the process by which a decision is taken whether an EIA is required for a particular activity.

Scoping is the process of identifying the content and extent of the information to be submitted to the approval authority under an EIA procedure.

- As currently drafted, DR 47 requires that a screening and scoping exercise be documented, without identifying the specifics of what either element should entail and without creating a clear distinction between the two phases. Improved language would better convey the mandatory, and separate, nature of these two processes.
- The only screening requirement in the draft regulations is that an EIA must be conducted in order to submit an application for a Plan of Work for mining. This omits other potential triggers for an EIA; for example, a contractor's proposed "material change" to a Plan of Work (as envisaged under DR 57).
- A separate scoping document should be required to detail the anticipated content and scope of the proposed EIA. A scoping report should be published and opened for comments (for 60 days). Due diligence requires that the ISA's Legal and Technical Commission (LTC) review the scoping document and provide guidance to the proponent before they move ahead with the EIA. This serves to ensure the adequacy of the resulting EIA and EIS.

Conduct and content of the EIA

- DR 47 should be amended to specify the different steps of an EIA process and expressly to require applicants/contractors and relevant ISA organs to adhere to that process.
- The draft regulations should also confirm the ISA's responsibility (together with the sponsoring State) to oversee the EIA process and ensure that it meets requisite procedural standards and produces relevant information.
- DR 47 concerns an EIS submitted in the pre-contract application stage, based on a prior EIA. The regulations do not appear to address EIAs that should be required at other times during the term of an exploitation contract term (e.g., where mining is planned in phases at different times or sites).

- The draft regulations should, in line with the precautionary approach, require applicants to assess any knowledge gaps and uncertainty in their EIA, seek to quantify those gaps and the potential risks that they present, and identify proposed methods to address uncertainty.
- Identification and assessment of alternatives should be a fundamental requirement of any EIA, to enable the regulator to determine whether the least harmful approach has been identified. DR 47 does not yet require such an assessment (e.g., different technological solutions or different mining areas, or durations of activities). It is also unclear whether an applicant is required to assess a "no action" alternative.

Consultation

- The draft regulations contain no requirements for consultation to be conducted by the proponent during an EIA, nor for publication of a draft report, allowing a specified time period for public responses—before submission of an EIS.[11]
- Once an application for exploitation has been submitted to the ISA, DR 11(2) requires the applicant to "consider" any comments on its EIS that are made by members of the public to the ISA. DR 11(2) further notes that the applicant "may" choose to amend its EIS at this stage. There is no specific obligation for an applicant to respond to those comments, or to justify choices taken in light of comments, in amending (or choosing not to amend) its EIS.
- The 60-day publication period for a submitted EIS and EMMP appears short given the technicality, scientific uncertainty and novelty of deep-sea mineral exploitation.
- The publication of the submitted EIS and EMMP together does not appear to allow for an iterative process more typical of environmental assessments in extractive industries, in which the EIS evolves through consultations and produces an EMMP that is reflective of stakeholder input.
- Under DR 89(3)(e), an applicant may designate information confidential save where it is "*necessary for the formulation by the ISA of rules, regulations and procedures"* concerning the marine environment or safety. This raises the possibility that portions of the EIS, not related to rule-making, might be deemed confidential. Typically, confidentiality exceptions are very narrow for EIAs.

Decision-making:

- The regulations do not guide the LTC's response to an EIS that is incomplete or inadequate against the requisite ISA standards. The LTC should be empowered, or indeed obligated, not to recommend approval of the corresponding Plan of Work or to remit the plan to the applicant for further work.
- The regulations should contain a clear decision-making process, criteria and power for the Council to approve or reject a Plan of Work based on its EIS (taking into account the recommendation of the LTC). This should apply at other points during an exploitation contract (for example, upon a proposed material change to the Plan of Work, or at contract extension), not only at application stage.
- The regulations do not provide for the LTC to seek independent scientific advice (for example, in disciplines not covered by the LTC membership) to inform its EIS review.

- The operative decision-making provision in DR 13(4)(e) incorporates no requirement for the LTC to issue reasons for its recommendations, particularly in response to stakeholder comments.

Part 3: Language Recommendations for the Regulations

[NB: The text below captures many of the proposed edits reflected in the collation of specific drafting suggestion by members of the Council (ISAB/26/C/CRP.1) while also proposing new language in bold italics]

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

1. The Secretary-General shall, within seven Days after determining that an application for the approval of a Plan of Work is complete under regulation 10:

> (a) Place the Environmental Plans on the Authority's website for a period of ***90*** days, and invite members of the Authority and Stakeholders to submit comments in writing, taking account of the relevant Guidelines; and
>
> (b) Request the Commission to provide its comments on the Environmental Plans within the comment period***. The Commission's comments shall include an initial determination as to whether the EIS was prepared in accordance with the requirements of Regulation 47.***

2. The Secretary-General shall, within seven Days following the close of the comment period, provide the comments submitted by members of the Authority, Stakeholders, the Commission and any comments by the Secretary-General to the applicant for its consideration. The applicant shall consider the comments and may provide responses in reply to the comments. The applicant may revise the Environmental Plans and, in such an event, it shall submit any revised plans or responses within a period of ***60 Days*** following the close of the comment period. […]

5. (1) The Commission shall prepare a report on the Environmental Plans. The report shall include:
   a) details of the Commission's determination under regulation 13(4)***, including***
      a. ***a detailed rationale, and***
      b. ***an indication of any uncertainties associated with the Environmental Plans***,
   b) a summary of the comments or responses made under regulation 11(2),
   c) any amendments or modifications to the Environmental Plans recommended by the Commission under regulation 14.

   (2) Such report on the Environmental Plans or revised plans shall be published on the Authority's website and shall be included as part of the reports and recommendations provided to the Council pursuant to regulation 15.

Revised DR 12(4) **General**

In considering the proposed Plan of Work, the Commission shall take into account:

a) Any reports from the Secretary-General;
b) Any advice or reports sought by the Commission or the Secretary-General from independent competent persons in respect of the application to verify, clarify or substantiate the information provided, methodology used or conclusions drawn by an applicant;
c) The previous operating record of responsibility of the applicant; and
d) Any further information supplied by the applicant ***or stakeholders*** prior to, and during the period of, the Commission's evaluation. ***This may include independent scientific advice, or any other information that the Commission invites or arranges to be provided orally or in writing.***

Revised DR 13(4) **Assessment of Applicants**

4. The Commission shall determine if the proposed Plan of Work:
(a) Is technically achievable and economically viable;
(b) Reflects the economic life of the project;
(c) Provides for the effective protection of human health and safety of individuals engaged in Exploitation activities;
(d) Provides for Exploitation activities to be carried out with reasonable regard for other activities in the Marine Environment, including navigation, the laying of submarine cables and pipelines, fishing and marine scientific research, as referred to in article 87 of the Convention; and
(e) Provides under the Environmental Plans, for the effective protection of the Marine Environment in accordance with the Convention, and the rules, regulations and procedures adopted by the Authority;
(f) Was prepared in accordance with the rules of the ISA regulations; and
(g) Upholds the fundamental principles contained in Regulation 2.

4. ***bis Where the Commission determines that the proposed Plan of Work does not meet any one of the criteria listed in paragraph 4, the Commission shall either make recommendations to the applicant for amendments to the proposed Plan of Work pursuant to Regulation 14, or shall not recommend approval of the proposed Plan of Work***. …

Revised DR 47 **Environmental Impact Assessment and Environmental Impact Statement**

1. Before submitting a proposed Plan of Work, or proposing any other activity that requires an environmental impact assessment under the rules of the ISA, an applicant or contractor, as the case may be, shall undertake an environmental impact assessment. The purpose of the environmental impact assessment is to identify, predict and evaluate the biophysical, socio-economic and other relevant effects of the proposed activity and to identify appropriate mitigation measures to avoid, minimize and manage such effects within acceptable levels.

2. An environmental impact assessment undertaken by an applicant or contractor shall include the following elements:

a) A scoping process, which identifies and prioritizes the main activities and impacts associated with the potential mining operation, in order to focus the environmental impact assessment on key environmental issues. The scoping process should propose baseline data to be collected and justify their adequacy in assessing whether the applicant or contractor provides for the effective protection of the marine environment. Where appropriate, the scoping process shall identify practical alternative means of carrying out the proposed mining operation and evaluate the environmental effects of those alternatives;

b) A scoping report, which shall be submitted to the Authority in accordance with relevant standards. The Authority shall make the report available on its website for a period of at least 60 days and invite members of the Authority, the Commission and stakeholders to submit comments in writing, taking account of the relevant guidelines. The Secretary-General shall, within seven days following the close of the comment period, provide the comments submitted to the applicant or contractor for its consideration before it proceeds with the EIA;

c) An impact analysis to describe and predict the nature and extent of the environmental effects of the mining operation;

d) An analysis identifying mitigation measures to manage the relevant environmental effects of the proposed activity, which will inform the development and preparation of an environmental management and monitoring plan;

e) An assessment of data quality/integrity, gaps or deficiencies in knowledge, and any other uncertainties regarding anticipated impacts and identified mitigation measures, and an analysis of methods to address those gaps, deficiencies or uncertainties;

f) A consultation process with members of the Authority, coastal States and other stakeholders undertaken pursuant to the relevant standards, which will inform the development and preparation of an environmental impact statement; and

g) An environmental impact statement prepared in accordance with this regulation ***and the relevant standard***. ***The purpose of the environmental impact statement is to document and report the results of the environmental impact assessment.***

3. The Environmental Impact Statement shall be in the form prescribed by the Authority in annex IV to these regulations and shall be:
    a. Inclusive of a prior environmental risk assessment;
    b. Based on the results of the environmental impact assessment;
    c. In accordance with the objectives and measures of the relevant regional environmental management plan;
    d. Prepared in accordance with the applicable ***standards and*** guidelines, Good Industry Practice, Best Available Scientific Evidence, Best Environmental Practices and Best Available Techniques;
    e. ***Inclusive of a description of any consultations undertaken as part of the environmental impact assessment, and a description of how comments received under consultation have been taken into account, or why they have not been taken into account***.

Revised DR 57(3) **Modification of a Plan of Work by a Contractor**

3. Where a proposed modification under paragraph 2 constitutes a Material Change***, a contractor shall undertake an environmental impact assessment of the proposed modification and shall prepare an environmental impact statement for the proposed modification in accordance with Regulation 47***. The Environmental Impact Statement and any revisions to the Environmental Management and Monitoring Plan or Closure Plan shall be dealt with in accordance with the procedure set out in regulation 11, prior to any consideration of the modification by the Commission.

Revised DR 89(3)(e) **Confidentiality of information**

[…](e) Are necessary for the formulation by the Authority of rules, regulations, procedures ***and decisions*** concerning the protection and preservation of the marine environment and human health and safety, other than equipment design data. …

Annex IV **Environmental Impact Statement**

2.5 National Processes

Describe any national processes followed and permits received from the sponsoring State in relation to the environmental impact assessment.

Endnotes

[1] International Seabed Authority, Draft Regulations on Exploitation of Mineral Resources in the Area (unedited advance text), ISBA/25/C/WP.1 (2019), https://www.isa.org.jm/document/isba25cwp1.

[2] International Tribunal for the Law of the Sea (ITLOS), "Advisory Opinion on the Responsibilities and Obligations of States Sponsoring Persons and Entities With Respect to Activities in the Area," paragraphs 145 and 148 (2011).

[3] The Pew Charitable Trusts, "Fifth Report of the Code Project, Part One" (2019), https://www.pewtrusts.org/-/media/assets/2019/08/fifth_report_of_the_code_project_p1.pdf.

[4] United Nations Convention on the Law of the Sea (UNCLOS), Article 197, and reflected in Draft Regulation 3; UNCLOS, Article 205; and see also United Nations Conference on Environment and Development: Rio Declaration on Environment and Development, Principle 19, *International Legal Materials* 31, no. 4 (1992): 874-80. The duty to cooperate is recognized as a customary rule of international law that is triggered by an activity that has the potential to cause significant environmental harm. See, for example, International Law Commission, "Draft Articles on Prevention of Transboundary Harm From Hazardous Activities," U.N. Doc. A/56/10, Article 8; International Court of Justice, Gabcikovo-Nagymaros Project (Hungary v. Slovakia) Judgment (1997); International Court of Justice, Pulp Mills on the River Uruguay (Argentina v. Uruguay) Judgment (2010); International Court of Justice, Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua) (2010) and Construction of a Road in Costa Rica Along the San Juan River (Nicaragua v. Costa Rica) Merits (2015). The link between EIA and cooperation was identified by the International Tribunal for the Law of the Sea in its advisory opinion on activities in the area, paragraph 142.

[5] This duty is reflected in Draft Regulation 2(e)(vii) and is implemented in Draft Regulation 11 in relation to EIAs.

[6] Rio Declaration, Principle 10, has been further expounded in regional treaties, such as the Aarhus and Escazu Conventions.

7 Key international documents include: United Nations Environment Programme (UNEP) Goals and Principles of Environmental Impact Assessment, UNEP Resolution GC 14/25 (1987), endorsed by U.N. General Assembly, Resolution 42/184, U.N. Doc. A/Res/42/184 (1987); Convention on Environmental Impact Assessment in a Transboundary Context, Espoo, Finland (Espoo Convention, Feb. 25, 1991), *International Legal Materials* 30: 802 (in force Jan. 14, 1998); Protocol on Environmental Protection to the Antarctic Treaty, Madrid (Oct. 4, 1991), *International Legal Materials* 30: 1461 (in force Jan. 14, 1998); World Bank, *Operational Manual: Operational Policies 4.01—Environmental Assessment* (January 1999); International Finance Corp., *IFC Performance Standards on Environmental and Social Sustainability*, Performance Standard 1 (2012).

8 See, for example, United Nations Conference on Environment and Development, Rio Declaration, Principle 19 (requiring notification and consultation "at an early stage and in good faith"); see also the Espoo Convention, Article 3(1) ("as early as possible").

9 United Nations Environment Programme, Environmental Impact Assessment Goals and Principles, Principle 9; Espoo Convention, Article 6.

[10] Regulation 47, Environmental Impact Statement.

[11] The draft regulations do provide for publication applicant's environmental plans, by the International Seabed Authority, prior to approval of a Plan of Work (Draft Regulation 11). This is not the same as the proponent holding consultations during the EIA, before the EIS is finalized. Annex IV Environmental Impact Statement to the draft regulations does require applicants to "describe the nature and extent of consultation(s) that have taken place with parties identified who have existing interests in the proposed project area and with other relevant stakeholders." But requiring description of consultations is not tantamount to requiring that proponents conduct consultations (nor stipulating when, with whom, in what manner, or how any consultation responses should be handled, etc.).