

Draft regulations on exploitation of mineral resources in the Area

Note by the Legal and Technical Commission

I. Introduction

1. In July 2018, the Commission issued revised draft regulations for consideration by the Council (ISBA/24/LTC/WP.1/Rev.1) alongside a commentary setting out matters on which the Commission sought the Council's guidance and identifying key items that remain under consideration by the Commission (ISBA/24/C/20). In response to this the Council provided comments to the revised draft (contained in the statement of the President of the Council for the twenty-fourth session (ISBA/24/C/8/Add.1, annex I)) as well as inviting members of the Council to provide written comments to the revised draft by 30 September 2018. An overview of these comments, including those from other stakeholders, and discussion of the common themes arising in the submissions was provided in document [ISBA/25/C/2](#). The secretariat, as part of its review of the stakeholder submissions, identified eight critical areas which benefited from a discussion in the Council during its meetings of Part I of the 25th session of the Authority (ISBA/25/C/17). This discussion, to help advance the work of the Council and Commission in a number of areas, was supported by several discussion papers (prepared by the secretariat).¹

2. At its March 2019 meetings the Commission advanced its consideration of the draft regulations as a matter of priority and based its discussion on the recent submissions to the draft regulations from members of the Authority and other stakeholders as well as matters arising in the discussion papers presented to the Council and feedback from the Council. Discussion in the Commission was facilitated by the review of a revised working paper of the draft regulations prepared by the secretariat which captured suggested revised text and comments on specific regulations from recent submissions, as well as a presentation by the secretariat to the Commission outlining comments from Council members in respect of the above-mentioned discussion papers.

3. The present note provides the Council with an overview of the key matters considered by the Commission as they relate to the fine tuning of the regulatory text, as well as highlighting specific areas where further work will be required with the support of the secretariat and external consultants. The Commission also took note of the Council's views that the regulations should be adopted as a matter of urgency (see [ISBA/24/C/8/Add.1](#) and [ISBA/25/C/17](#)). To this end the Commission has provided a revised regulatory text as document ISBA/25/C/WP.1 for the Council's consideration.

II. General observations

4. The Commission welcomed the comprehensive submissions from members of the Authority and other stakeholders to the draft regulations, which noted that the overall content and structure of the draft regulations provides a workable solution for user needs. During its discussions, the Commission was mindful of not overburdening the regulations with content that is more suited to standards and guidelines, including interpretative guidance for key terms and phrases, recognizing that development of these standards and guidelines will become a primary focus of the Commission's work going forward.

5. A working group of the Commission finalised the terms of reference for the forthcoming workshop on standards and guidelines to be held in Pretoria in May 2019. The terms of reference include workshop objectives and desired output, together with an indicative list of standards and guidelines presented to the Council in the annex to document ISBA/25/C/3. The workshop will focus on the

¹ ISBA/25/C/3; ISBA/25/C/4; ISBA/25/C/5; ISBA/25/C/6; ISBA/25/C/8; ISBA/25/C/10 and ISBA/25/C/11.

delivery of a prioritised list of documents, with suggested reference sources and an indicative timeframe for individual development, as well as outlining an inclusive process for the development of standard and guidelines documentation. Workshop output will be invaluable in helping the Commission, in conjunction with the secretariat, design an appropriate work programme for standard and guideline delivery.

6. The Commission was also conscious during its deliberations to the issue of timelines under the regulatory framework. The Commission noted a number of valid concerns across the stakeholder base that some timelines envisaged by the regulations may be potentially too long or, given the potential complexity of documentation review processes, whether certain prescribed periods are in fact too short. These concerns are particularly valid in the case of an application for the approval of a plan of work for exploitation, where a balance must be struck between certainty in the approval process and allowing the Authority, as regulator, sufficient time to review potentially complex plans of work. This issue, together with a number of other regulatory consents envisaged by the draft regulations, is compounded by the current scheduling of meetings of the Commission and the Council. This matter should be kept under review by the Council and the Commission.

7. The Commission is aware that the respective roles and responsibilities of the Council, the Commission and the Secretary-General as they relate to decision-making and the institutional functioning of the Authority within the framework of the Convention remains under consideration by the Council (see [ISBA/25/C/6](#)). Following a review of the comments contained in the annex to [ISBA/25/C/6](#), the Commission has addressed some of the suggestions in the revised regulatory text. The Commission concurred that the development of an operational policy document by the Council outlining the Authority's risk-based approach to regulation, including guidance for delegated decision-making and a clearer understanding as to the roles and responsibilities of sponsoring States and flag States, will provide further clarity to the regulatory text and implementation.

8. The present note does not address matters relating to the development of an economic model for mining activities in the Area and associated financial terms for future exploitation contracts. Save for minor amendments to the regulatory text contained in Part VII to the draft regulations, the Commission understands that the second meeting of the open-ended working group of the Council will progress discussion over an economic model, the system of payments and the rates of payment under such mechanism.

III. Commission's comments on revised regulatory text

9. The Commission presents the following comments in support of the revised regulatory text presented to the Council in document [ISBA/25/C/WP.1](#).

Part I

10. *Regulation 2 (formerly Fundamental principles now Fundamental policies and principles):* the Commission revisited the structure and content of regulation 2, not least the reproduction of parts of article 150 of the Convention. In response to stakeholder concerns that reproducing only part of the text of article 150 could be misleading, the Commission now presents such text in full. Given that the regulation reflects a mix of policy and principles, the heading and text of this regulation has been amended accordingly. In addition to other text changes to mirror accurately the language of the Convention, the Commission has also modified the language of the final paragraph to reflect that the implementation of the regulations and associated decision-making are to be in conformity with these fundamental policies and principles. The Commission also reflected on the request by the Council to maintain the distinction between "conservation" and "preservation" in the regulations, noting that the Authority's mandate under article 145 is limited to the adoption of rules, regulations and procedures including the protection and conservation of the natural resources of the Area. Additionally, the reference to "if any" in association with regional environmental management plans has been deleted at paragraph (e).

11. *Regulation 4 (formerly Rights of coastal States, now Protection measures in respect of coastal States):* the Commission noted that the text of this regulation was drawn largely from an equivalent

provision in the exploration regulations. In examining the text, and suggestion of including consultation with relevant coastal States in the application process, the Commission observed, in the context of article 142 of the Convention that consultation, including a system of prior notification, is limited to resource deposits that lie across the limits of national jurisdiction. The Commission noted that the procedural measures contained in this regulation do not flow from article 142 per se, as the regulation is without prejudice to the rights of coastal States under article 142, including the rights of coastal States to take measures consistent with the provisions of Part XII of the Convention. The Commission did take note of stakeholder comments in connection with the role of the Commission and the Council in the implementation of this regulation and has modified the text accordingly. In addition, the Commission noted that some stakeholders raised the issue of establishing the evidential standard for “clear grounds”. In this regard, the Commission recommended that guidelines can be put in place to address this issue, as well as the question over any appropriate consultation and notification protocols.

Part II

12. *Regulation 10 (Preliminary review of application by the Secretary-General):* the Commission believes that, as a matter of process, the determination of whether an applicant has a preference and priority in accordance with article 10 of annex III to the Convention is made by the Secretary-General as part of the preliminary review of an application, and prior to the Commission’s consideration of an application.

13. *Regulation 11 (Publication and review of the Environmental Plans):* considering the potential complexity of an application, regulation 11 has been modified to provide for an earlier review mechanism of the environmental plans by the Commission. This will allow for the Commission’s comments to be presented earlier to an applicant. Such timing will also provide opportunity for the Commission to determine whether recourse to external expertise to the Commission is required, and prior to the consideration of the environmental plans. On the latter, the content of what was previously draft regulation 14 has been moved earlier under regulations 11, 12 and 13 as part of the information that the Commission shall take into account in considering the proposed Plan of Work. The annex to this note contains a flowchart showing this revised step in the application approval process.²

14. As part of its discussions, and the linkages between regulations 11, 12 and former draft regulation 14, the Commission reflected on document ISBA/25/C/10 relating to the consideration of a mechanism and process for the independent review of environmental plans and performance assessments (regulation 52). The Commission took note of the discussion in the Council on this matter, and in particular that any such review mechanism be aligned with the provisions of the Convention, and should neither replace nor undermine the roles and responsibilities of the Commission under article 165 of the Convention. The Commission recognised the merit of engaging with external experts in supplementing its work and expertise of the Commission, but that this should be discretionary and not mandatory. The Commission noted that such recourse would also be related to the composition of the Commission at the particular time, and its constituent expertise.

15. The Commission noted further that external expertise may be sought as and when required, in particular from specialised agencies and international organizations contemplated by article 163(13) of the Convention. Such mechanism is also reflected in the Commission’s Rules of Procedure.³ While the Commission sees merit in seeking inputs from external experts to complement the expertise within the Commission, the Commission was conscious to avoid establishing a mechanism that would be overly bureaucratic and formalistic. At the same time, the Commission noted the importance of ensuring equal treatment for all applicants in the consideration of their application. The Commission noted that the draft regulations also provide for a public review and comment process at regulation 11.

Part III

16. *Regulation 18 (Rights and exclusivity under an exploitation contract):* the Commission reflected further on the regulation of exploration activities within the Contract Area, and considered, in

² The flowchart was presented originally in document ISBA/24/LTC/6.

³ Rule 15, Rules of Procedure of the Legal and Technical Commission.

the light of stakeholder comments, that clarity as to which components of the exploration regulations remain applicable should be set out clearly in relevant guidelines.

17. *Regulation 20 (Term of exploitation contracts)*: the Commission took note of stakeholder comments of the need for a greater level of scrutiny at the time of a renewal application, including the submission of a revised plan of work. This regulation proposed originally that guidelines be put in place for the renewal process, including required documentation. The Commission has now strengthened the regulation by requiring that where there is a material change, a revised plan of work, together with a review of contractor performance, will be considered, while recognising that a plan of work may have been updated under a recent review process under regulation 58.

18. *Regulation 21 (Termination of sponsorship)*: the Commission discussed further the rationale for increasing a sponsoring State's termination notice period to 12 months (compared to 6 months under the exploration regulations), and stakeholder concern if such termination is due to non-compliance by a contractor of its arrangements with a sponsoring State or States. This regulation has now been modified to provide for a maximum termination period of 12 months, possibly reducing to 6 months in cases of non-compliance.

19. *Regulation 22 (Use of exploitation contract as security)*: the Commission noted the comments of the secretariat that this matter remains under review. The Commission has requested that the secretariat deliver a paper with its findings on matters to be considered under this regulation to the Commission at its July 2019 meetings.

20. *Regulation 24 (Change of control)*: given the significance of a contractor's financial capability to meet its obligations under an exploitation contract, the Commission has modified this regulation to include a role for the Commission in providing appropriate recommendations to the Council.

21. *Regulation 26 (Environmental Performance Guarantee)*: noting the request of the Council to elaborate on the requirements of such guarantee, the Commission considers that further discussion with relevant stakeholders is required to advance the content of this regulation, and in particular the objectives and requirements under a closure plan. Following this, the regulatory text can be updated, and guidelines developed.

22. *Regulation 29 (Reduction or suspension in production due to market conditions)*: the Commission considered, in the light of stakeholder comments that there should not be an indefinite term of non-production. This regulation has been modified so that the Council may terminate an exploitation contract where production has been suspended for more than 5-years. What was paragraph 4 of the former draft regulation has been moved up to regulation 28 as it is currently misplaced in the context of a reduction or suspension due to market conditions.

23. *Former draft regulation 31 (Optimal Exploitation under a Plan of Work)*: the Commission discussed general stakeholder concerns over both the content and challenges in the enforcement of this former draft regulation, including the possible impact on an approved plan of work, and that the draft regulation potentially modifies proper procedures for the review and modification of such plan. At this stage, what would constitute "inefficient mining or processing practices" is not entirely clear. There is however a general contractual obligation to implement the plan of work according to good industry practice (GIP). The concept of GIP could be extended to encompass good mining practices and minimizing waste (for further discussion), and these elements of GIP may be included and expanded upon in the development of a relevant guideline. That said, a contractor should conduct mining operations under an approved plan of work (including the approved mining workplan) and this should reflect commercial and good mining practices. The Commission has deleted this regulatory provision.

24. *Regulation 30 (Safety, labour and health standards)*: in reviewing this regulation and stakeholder comments, the Commission notes the possible inadequacy of its content, particularly in connection with safety matters e.g. the need for a safety management system, monitoring and continuous improvement. While the regulation has been modified slightly, further discussion with the International Maritime Organization is required in particular a better understanding of the supplementary rules, regulations and procedures envisaged by article 146 of the Convention, and clarity on the "applicable

international rules and standards” (regulation 30(2)) to be complied with. The Commission has requested that the secretariat continue to explore these issues, and to report to the Commission in July 2019.

25. *Regulation 36 (Insurance)*: while the Commission has made some text changes to this regulation, no further action can be taken until the review being undertaken by the secretariat on insurance requirements and availability in the market place has been completed. While international maritime practice should determine typical insurance policies relating to normal ship operations and loss, what types of additional insurance will be required is less clear i.e. what are the causalities and contingencies that any insurance should be providing for? As with a number of issues under the draft regulations, there also needs to be a level playing field for insurance obligations. The Commission has requested that the secretariat conclude its findings on insurances as a matter of priority.

Part IV

26. *Regulation 44 (General obligations)*: the Commission has modified this regulation, noting that paragraph (e) was misplaced under this regulation. In order to put this regulation into effect, a clearer picture of the roles and responsibilities of the Authority and sponsoring States is required.

27. *Regulation 45 (Development of Environmental Standards)*: this new regulation sets out the subject areas for environmental standard development. The Commission considers this a placeholder pending further discussion at the Pretoria workshop in May 2019.

28. *Regulation 46 (Environmental Management System)*: the Commission has included the requirement for an environmental management system (EMS) to be put in place. The detail for such EMS, together with relevant benchmarks and principles should be detailed in guidelines.

29. *Regulation 47 (Environmental Impact Statement)*: in response to a number of stakeholder requests, the Commission has reintroduced the requirement for an environmental scoping stage although the need for a specific environmental risk assessment as part of the environmental impact assessment (EIA) process to focus the environmental impact statement on important impacts is retained. Also following stakeholder submissions which indicated some confusion around the various EIA elements, the text has been revised to further clarify the process. The detailed requirements for such scoping stage, including associated processes, should be detailed under the exploration regime.

30. *Regulation 52 (Performance assessments of the Environmental Management and monitoring Plan)*: while the text of this regulation has been largely retained, changes have been made to reflect that the frequency of performance assessments which will now be determined by reference to the period specified in the environmental management and monitoring plan. The regulation now reflects a reporting obligation to the Council, including any recommendations by the Commission.

31. *Section 5: Environmental Compensation Fund, formerly Environmental Liability Trust Fund*: the Commission noted general stakeholder sentiment that the purpose of the fund be restricted to that articulated in regulation 55(a). The Commission believes that further discussion is warranted on the range of financial instruments that should be put in place to both incentivise environmental performance as well as providing mechanisms for adequate compensation under article 235(3) of the Convention. The Commission considered that while the principal (capital) of a compensation fund could be ring-fenced and restricted to any environmental liability gap that may arise at a future date, investment income could be directed at other purposes listed in regulation 55. The Commission has asked that the secretariat reflect on the discussions around this topic, with a view to advancing the rationale, purpose and funding of such fund, and how to ensure the adequacy of such fund through its funding.

Part VI

32. *Regulation 60 (Closure Plan: cessation or suspension of production)*: this regulation has been modified by the Commission to reflect the role of the Council in the adoption of a final closure plan.

Part VIII

33. *Regulation 85 (Annual fixed fee)*: the Commission continued its examination of the purpose, rationale and function of this annual fixed fee. The context of this fee under the 1994 Agreement suggests that the annual fixed fee should be considered part of a transition phase to bridge the period of

funding prior to the receipt of royalties from commercial production. The annual fixed fee forms part of the financial terms of contracts and is to be established by the Council. The Commission's preliminary views are that such fee should be a fixed fee, rather than an area-based fee as originally envisaged in the former draft regulation. The Commission considers that this matter would benefit from continued discussion in July 2019.

Part IX

34. *Regulation 89 (Confidentiality of information)*: in light of stakeholder comments in respect of former draft regulation 87(2)(e) and the possibility of a differential treatment between contractors, and a need to ensure a level playing field, the Commission has deleted this specific regulatory text.

Part X

35. *Regulation 94 (Adoption of standards) and regulation 95 (Issue of Guidelines, formerly Issue of guidance documents)*: the Commission, noting that the Pretoria workshop will advance further thinking on the issue of standards and guidelines, considered there should be a starting presumption that standards adopted by the Council are mandatory, whereas guidelines provide clarification and should be recommendatory in nature. Regulations 94 and 95 have been modified to reflect this. These regulations now make provision for relevant stakeholder involvement in the development of standards and guidelines, with the process for such involvement to be determined.

Part XI

36. In connection with Part XI, the Commission took note of document ISBA/25/C/5 in relation to the implementation of an inspection mechanism in the Area and of discussions in the Council. Due to time constraints, the Commission did not have opportunity to consider this matter in detail and will do so at its subsequent meetings, following which it will present recommendations to the Council. That said, regulations 96 and 97 have been modified to reflect the set-up of an inspection mechanism, and appointment of inspectors. The Commission acknowledged the value and significance in the use of remote monitoring technology and understands that the secretariat will advance a study on this topic, including proposals on how such technology will be reflected in the draft regulations and relevant guidelines.

37. *Regulation 103 (Compliance notice and termination of exploitation contract)*: the Commission reflected on the questions presented in the annex to document ISBA/25/C/6 relating to the role of the Secretary-General, the Commission and the Council and the issuance of compliance notices. While the Commission noted that the issue of delegated authority remains under consideration by the Council, it is recognised that certain events will require urgent action, and that the Secretary-General should be empowered in such circumstances to issue compliance notices. The Commission also noted that the nomenclature used in this regulation could be further revised. In the meantime, the Commission considers that, in the context of this regulation, a clear distinction needs to be made between the issue of such notices by the Secretary-General requiring action to be taken by a contractor, and the imposition of sanction (monetary penalties) by the Council. The regulation has been reworded accordingly.

Part XIII

38. *Regulation 107 (Review of these Regulations)*: a number of stakeholders have made reference to the issue of uncertainty and instability in connection with any amendment to the regulations (as well as in the adoption (and update) of standards and guidelines under regulations 94 and 95). Recognising the importance of relevant stakeholder involvement, and mirroring the approach taken in regulations 94 and 95, the Commission has made provision for the involvement of relevant stakeholders in any future amendments to the regulations. The process for such participation will need to be outlined in guidelines.

Annexes

39. Annexes IV, VII and VIII relating to the environmental impact statement, environmental management and monitoring plan and closure plan respectively drew much comment from stakeholders. Many of these were editorial in nature, but also pointed to a number of issues of content and clarity between the various plans. Guidelines will need to be prepared for these documents, and the Commission

considers it a more efficient process to deal with the matters raised in these submissions at the time of such guideline development. That way, in a single process, it can be ensured that the template, standards, and guidelines are consistent, coherent, and integrated.

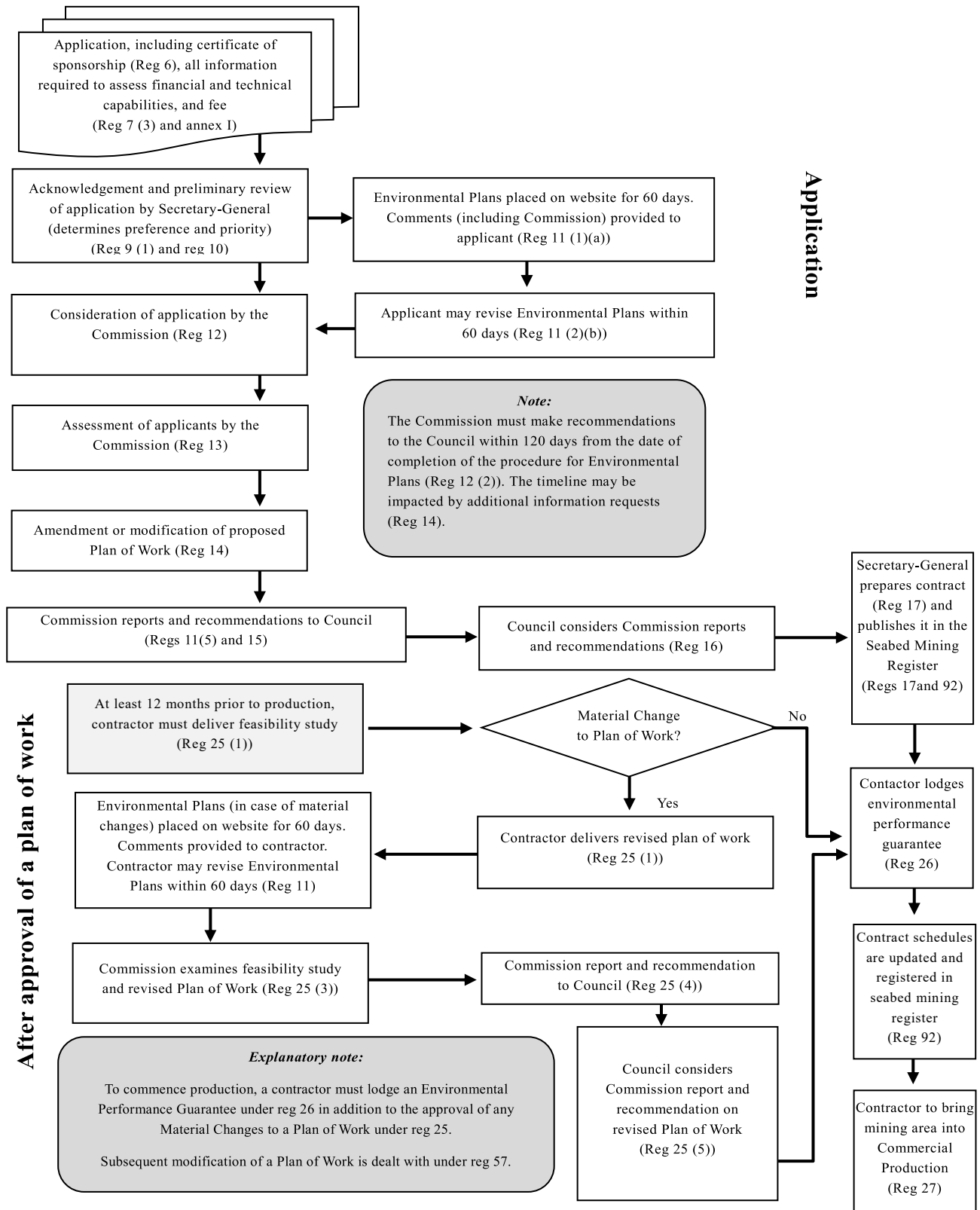
Schedule 1

40. The Commission discussed the use of key terms under the draft regulations based on document ISBA/25/C/11 and discussion in the Council. As to the incorporation of best environmental practices into the definition of good industry practice, the Commission saw some merit in this approach. However, the Commission decided that a better approach would be to develop the concepts of best environmental practices and good industry practice independently and for the Council to revisit this issue at a later stage. As to the concept of good industry practice, the Commission considers that a more conceptual approach is appropriate under Schedule 1, supported by relevant guidelines. The Commission also re-examined the definition of best environmental practices, re-iterating the dynamic nature of this term.

IV. Other matters for consideration by the Council

41. As highlighted in document ISBA/25/C/2, it was suggested by stakeholders that the Commission might consider a more informal mechanism for certain categories of disputes or that the Authority explore with the International Tribunal for the Law of the Sea the possibility of establishing special rules of procedure to expedite hearings on specific categories of disputes or diverging views. While the Commission considers that this has some merit, it is also conscious that a previous regulation (draft regulation 92 in document [ISBA/23/LTC/CRP.3*](#)) was deleted in view of member State comments in particular, that such a review mechanism could undermine the finely crafted dispute mechanism in the Convention. In light of recent comments by members of the Authority and other stakeholders, the Council may wish to reflect on the efficacy of an expedited administrative review process.

Annex



Abbreviation Reg, Regulation per ISBA/25/C/WP.1