



Draft Standards & Guidelines on Exploitation of Mineral Resources: Stakeholder Comments Due July 2021

The International Seabed Authority (ISA) has released seven additional draft standards and guidelines to support the implementation of its draft regulations for the exploitation of mineral resources in the international seabed area. The drafts are open for consultation until 3 July 2021.¹

Key issues for small/developing States (SDS) are at stake in this round of consultations. Stakeholders participating in the consultations will need to develop a position on the **balance between exploitation and economic development** of the international seabed on the one hand and **environmental protection** on the other. This most recent set of drafts contains guidelines and standards on environmental protection and risk management issues, including methodologies for establishing environmental baselines and approaches to environmental monitoring and management. This set of drafts also affects the **role that different categories of States (sponsoring, flag, coastal, and port) will play** in the development and consideration of applications for the exploitation of resources in the international seabed area. Moreover, the drafts raise the issue of whether the consultation of coastal States, in particular, should be mandatory for environmental impact assessments and the extent to which coastal States should directly participate in the preparation of emergency response and contingency plans.

The inputs of SDS are essential to developing the ISA's standards and guidelines on exploitation activities in the international seabed area. Deep seabed mining poses significant **commercial uncertainty**, especially for developing countries that are **land-based producers** of minerals produced from the seabed. The technology and scientific knowledge required for exploitation activities in the seabed also raise important questions about **technology transfer** and **capacity-building** for developing States.

Background: The Mining Code

Established under the United Nations Convention on the Law of the Sea (UNCLOS) and the 1994 Implementation Agreement, the ISA is the organization through which State Parties to UNCLOS organize and control all activities in the international seabed area (the Area).²

Among other things, the ISA is mandated to develop a 'Mining Code,' i.e., a comprehensive set of rules, regulations, and procedures to regulate the prospecting, exploration, and exploitation of minerals in the Area. Once

¹ The draft standards and guidelines as well as instructions for comment submission are available here: <https://isa.org/jm/mining-code/standards-and-guidelines>

² Article 1 of UNCLOS defines the Area as "the seabed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction." The Area covers around 54% of the world's ocean.



finalized, the Mining Code will govern two phases: (i) mineral exploration; and (ii) mineral exploitation.

Regulations governing mineral exploration were adopted between 2000 and 2012. Since 2014, the ISA has been working to develop regulations on exploitation activities in the Area. The most recent draft Regulations on Exploitation of Mineral Resources in the Area (the DER) were published in March 2019.³ Stakeholders were subsequently invited to provide comments and re-drafting suggestions, which were discussed in the first part of the ISA's most recent 26th session (ISA-26) in February 2020.⁴

Three key issues emerged from these discussions of the DER at ISA-26:

- a. Four options for a *financial model or payment mechanism* were considered. Although none were eliminated, some delegations criticized existing proposals for failing to adequately consider risks posed to biodiversity, marine genetic resources, and intergenerational equity.
- b. The *protection and preservation of the environment* were discussed with a focus on issues such as how to operationalize the polluter pays and precautionary principles. The discussions also addressed questions of liability as well as the modalities and legal status of an environmental compensation fund.
- c. The rights, obligations, and responsibilities of actors in *inspection activities* were discussed in addition to questions on the scope and criteria for triggering such inspections, and the sharing of inspection costs.

The ISA has already entered into 30 exploration contracts, several of which are due to expire in 2021. Pressure from contractors to finalize the Mining Code and proceed to the exploitation phase is thus growing. Some observers at the first part of ISA-26 forwarded an interpretation of the 1994 Implementation Agreement that would allow nationals of sponsoring States to still secure approval of an exploitation plan under an incomplete Mining Code. Stakeholders concerned about the environmental impact of deep seabed mining, however, voiced their opposition. The business case for deep seabed mining also requires greater regulatory certainty. Despite some of the delays brought on by the COVID-19 pandemic, it is therefore unlikely that any mineral exploitation will be undertaken in the Area until the Mining Code is finalized.

³ The most recent draft Regulations on Exploitation of Mineral Resources in the Area (ISBA/25/C/WP.1) are available at: <https://www.isa.org.jm/node/19311>

⁴ The main issues raised in these written stakeholder submissions on the draft exploitation regulations are summarized in this note by the ISA's secretariat (ISBA/26/C/2): <https://www.isa.org.jm/node/19472>



The Standards and Guidelines on Mineral Exploitation

The DER require that certain standards and guidelines be developed by the ISA to support their implementation. The standards will be legally binding on contractors and the ISA, whereas the guidelines will be recommendatory and of a more technical and administrative nature.

Since 2019, the ISA's Legal and Technical Commission (LTC) has been following a three-phased process to develop these standards and guidelines; each phase corresponding to a key stage in the development, adoption, and implementation of the DER. Phase I must be completed by the time the final regulations on exploitation are adopted.⁵ Phase II and III will develop standards and guidelines deemed necessary to be in place before receipt of the first application for a plan of work for exploitation and before commercial mining activities in the Area commence, respectively.

All ten draft standards and guidelines corresponding to Phase I have already been released. These drafts would guide the initial development and consideration of applications of a plan for exploitation. The first three have completed the stakeholder consultation process, and comments are currently under consideration by the LTC.⁶ The remaining seven drafts (further discussed below) are open for stakeholder submissions until 3 July 2021.

The latest set of standards and guidelines under Phase I supports the implementation of various draft regulations on environmental protection and risk:

1. Draft guidelines for the establishment of baseline environmental data
2. Draft standard and guidelines for environmental impact assessments
3. Draft guidelines for the preparation of an environmental impact statement
4. Draft guidelines for the preparation of environmental management and monitoring plans
5. Draft guidelines on tools and techniques for hazard identification and risk assessment
6. Draft standard and guidelines for the safe management and operation of mining vessels and installations
7. Draft standard and guidelines for the preparation and implementation of emergency response and contingency plans

⁵ The target for completing the standards and guidelines under Phase I was set at July 2020 by the ISA's secretariat (ISBA/25/C/19/Add.1). Work on Phase II would have commenced immediately thereafter. The COVID-19 pandemic disrupted these timelines. No new targets have been published to date.

⁶ Stakeholder comments received for this first set of standards and guidelines under Phase I are available here: <https://www.isa.org.jm/submissions-received-respect-stakeholder-consultations-standards-and-guidelines>



Key **stakes and issues** that are likely to re-emerge in discussions of this latest set of draft standards and guidelines on mineral exploitation include:

- a. *Requirements for stakeholder consultations in the preparation of environmental impact assessments (EIAs):* the DER recommend but do not require stakeholder consultations during the preparation of EIAs. The recommendatory, draft guidelines on EIAs similarly address stakeholder involvement but the mandatory standards do not. This flexibility is likely to be further contested. At ISA-26, for example, some delegations emphasized that coastal States, in particular, should be directly represented in the EIA process rather than only consulted.
- b. *The legal status and mechanics of environmental management and monitoring plans (EMMPs):* Regulation 48 and Annex VII of the DER require applicants to prepare EMMPs including details on how mitigation measures will be implemented and monitored. Issues related to EMMPs that were raised at ISA-26 but not settled included their legal status, mechanisms for review and control, as well as updates to plans based on emerging technology or knowledge.
- c. *The scope of hazard identification and risk assessments:* the draft guidelines offer tools and techniques for hazard identification and risk assessments, which the DER recommend but do not require applicants to conduct. Although the current draft guidelines on risk assessments refer to the protection of the environment, some delegations at ISA-26 argued that, where applicable, restoration of the environment should also be included.
- d. *The role of coastal States in the preparation and implementation of emergency response and contingency plans:* Regulations 33 and 53 of the DER require contractors to prepare emergency response and contingency plans. This set of draft guidelines and standards lay out the mandatory requirements for preparing and implementing such plans. The drafts, however, also raise the issue of stakeholder participation. During ISA-26, for example, some delegations called for the inclusion of coastal States in the preparation of emergency response and contingency plans.



Next steps in the LTC's development process

Stakeholder consultations are only the second step in the preparation and adoption of the ISA's standards and guidelines on exploitation. The LTC will then have to incorporate comments submitted by 3 July 2021 as appropriate and recommend a final version for adoption by the ISA's Council. The standards and guidelines must then be adopted by the ISA's Assembly.

The overarching regulations on exploitation are similarly still at the drafting stage. Three informal working groups were set up at ISA-26 in February 2020 to advance discussions on the DER:

- a. the protection and preservation of the marine environment;
- b. inspection, compliance, and enforcement; and
- c. institutional matters (including the role and responsibilities of ISA's various organs, timelines, recourse to independent expertise, and stakeholder participation).

The results of these working groups have yet to be discussed. Face-to-face meetings for the second part of ISA-26 were scheduled to take place in July 2021 but then postponed as a result of the COVID-19 pandemic. As at the time of writing, no new date has been fixed.

How IILA Can Support SDS

Given the importance of these issues, IILA can work with SDS delegations in the following suggested ways:

1. *Most immediately*, before the 3 July 2021 deadline, assess and advise on legal issues and options arising in relation to the remaining seven of the draft standards and guidelines under Phase I.
2. *In the medium term*, provide ongoing support in any process of formulating State positions on the DER, and supporting SDS in preparing for, attending and negotiating at the second part of ISA-26 once rescheduled.

Should you require any further details or wish to discuss how IILA can help your government to engage with these substantive and procedural issues going forward, please do not hesitate to write to us at info@independentILA.org.