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Draft regulations for exploitation of mineral resources in the Area

Recommendations on legal liability

Submitted by the African Group

1. The African Group supports the prioritization by the International Seabed Authority of a legal liability regime for seabed mining activities in the Area. Before exploitation commences, it is important that legal responsibility for compensation or other remedy for damage be clearly delineated and that relevant procedures be operationalized. The aim should be to assist with the peaceful resolution of disputes and to ensure equitable, expeditious and cost-effective compensation to any injured party.

2. The African Group, in previous meetings of the Authority, has raised the potential for seabed mining activities in the Area to have adverse transboundary impacts on coastal States. The issue is related to and underlines the importance of having clear and fair liability rules.

3. The African Group welcomes the commitment of the secretariat to providing, before July 2019, matrices of responsibilities to show the interfaces between the Authority and the sponsoring States, and between the Authority and flag States (ISBA/25/C/CRP.1, para. 19). The African Group requests that those matrices incorporate liabilities.

4. The African Group acknowledges with gratitude the work and the publications of the Legal Working Group on Liability for Environmental Harm from Activities in the Area, convened jointly by the secretariat of the Authority, the Centre for International Governance Innovation and the Commonwealth Secretariat.

5. The African Group, mindful of the relevant provisions of the United Nations Convention on the Law of the Sea (in particular arts. 139, 235 and 304 and annex III, arts. 4 and 22) and the advisory opinion issued by the Seabed Disputes Chamber of the International Tribunal for the Law of the Sea in 2011, would like to submit the following recommendations to the Authority for its consideration as part of deliberations on the legal liability regime for seabed mining activities in the Area:

(a) The Authority should take the lead at the international level in setting rules and mechanisms that govern compensation for harm arising from seabed mining activities carried out beyond national jurisdiction. If liability rules are left to the discretion of individual sponsoring States, there is a risk of inconsistent treatment, "sponsor-shopping" and barriers to access to justice. Nevertheless, the African Group recognizes that national regimes and court procedures will have an important role to play. Where matters do more properly fall to domestic laws and procedures, the Authority should seek to provide guidance and support to States in order to facilitate effective and harmonized rules at the national level.

(b) The Authority should have the discretion to invite sponsoring States to share details about the recourse available in their legal systems for prompt and adequate compensation or other relief from harm that may arise from the activities of their sponsored contractors. When designing its own rules, having such details would enable the Authority to take into account what is already covered by domestic legal regimes.

(c) The Authority, at the application stage, should scrutinize the relationship between a contractor and a sponsoring State in terms of "effective control" to ensure that the sponsoring State is able in practice to exercise effective regulation, including with regard to compensation measures. Such scrutiny may include consideration of where the contractor's assets and management are located, or what financial security or guarantees are held by the sponsoring State.

(d) The Authority's regulations should assign liability to the party conducting the seabed mining activities (the contractor) to facilitate the claim process for injured parties in recognition of the fact that the contractor is the party obtaining the greatest benefit from the activities and that it is in the best position to prevent harm from arising.

(e) The Authority's regulations should include a strict liability standard for contractors. A causation-based standard, as opposed to a fault-based standard, will help to ensure that remedy is available, should any harm be caused. It can also incentivize risk reduction efforts, which is important in a context where the harm may be irreversible.

(f) The Authority's regime should include mechanisms to avoid any unfair burden on the contractor and to address the possibility of insolvency on the part of the contractor. Such measures, some of which are already being envisaged in the draft regulations for exploitation of mineral resources in the Area, may include mandatory insurance, liability caps, exemptions for extreme events outside the contractor's control and enabling contractors to lodge claims directly against subcontractors or other actors that may have contributed to the harm caused.

(g) The Authority's rules should expressly set out the types of loss for which claims can be lodged and the ways in which damage is to be assessed and quantified. The African Group suggests that recoverable damage might include the cost of reinstatement, lost profits, the cost of reasonable measures to prevent further harm and payouts in lieu of actual reinstatement. The regime should also include measures to compensate for pure ecological loss and harm to the resources in the Area.

(h) The environmental compensation fund referred to in the draft regulations should be given further substance. The purpose of the fund should be to fill liability gaps, including the lacuna identified in the advisory opinion issued by the Tribunal in 2011, and any situation in which harm has occurred but the contractor in question is not able to pay the full amount of the damage identified. The rules for the fund should clarify that contractors will be responsible for making financial contributions to the fund irrespective of other fees and payments due to the Authority. Rules should also

be established for the manner in which the fund monies are held and administered, and when disbursements may be made.

6. To avoid any misunderstanding, it is recommended that the regime outlined above, insofar as it relates to contractors, apply in parallel and without prejudice to sponsoring States' due diligence obligation.