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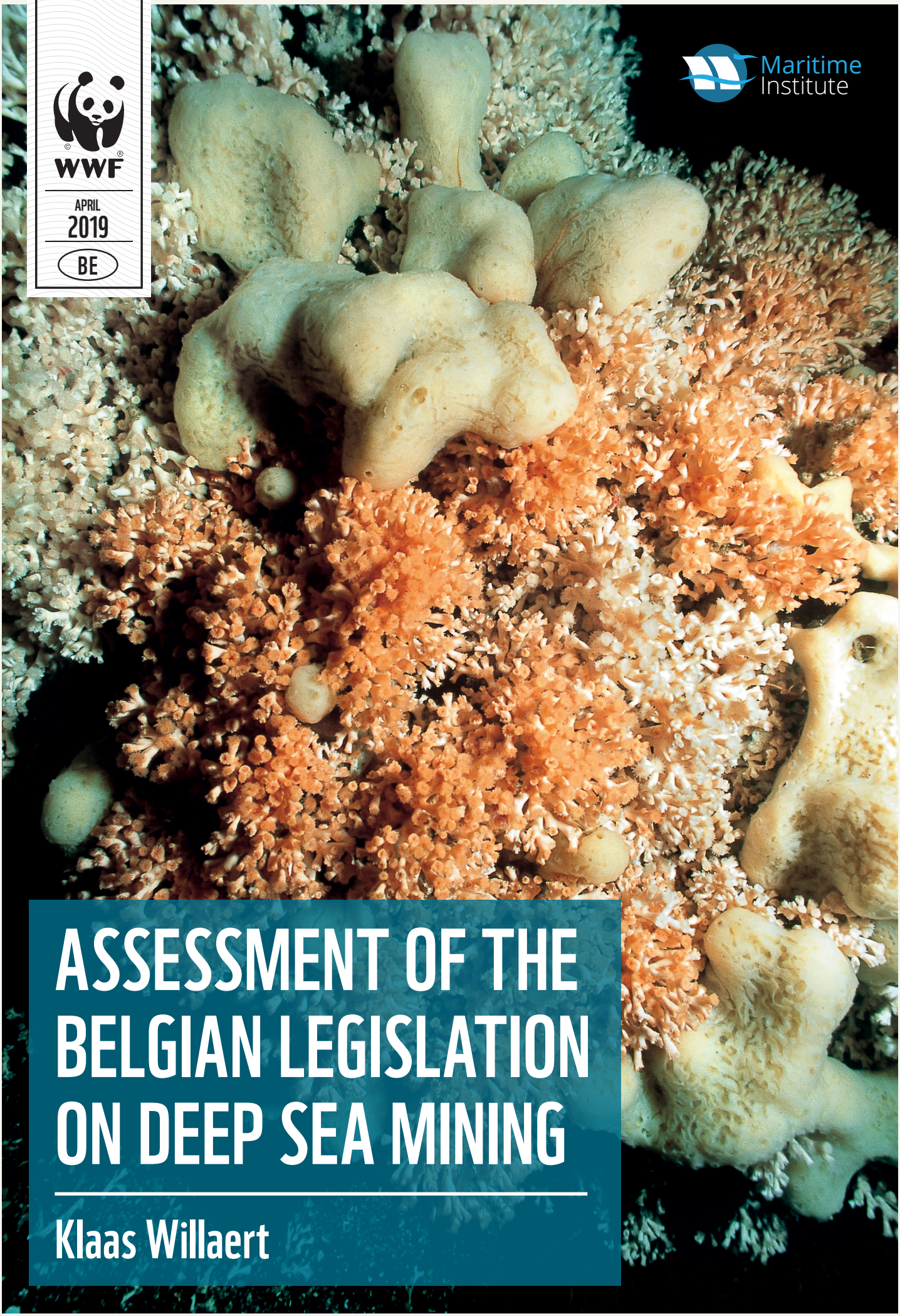

Maritime Institute

ASSESSMENT OF THE BELGIAN LEGISLATION ON DEEP SEA MINING

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SUMMARY

Beyond the boundaries of national jurisdiction, the ocean floor and its resources escape sovereignty claims and are governed by a complex regime, which determines by whom and under what conditions these natural resources can be mined. This regime is formed by part XI and some annexes of the United Nations Convention on the Law of the Sea, the 1994 Implementation Agreement and detailed regulations of the International Seabed Authority (ISA). An important principle is that state-owned enterprises, private companies and natural persons wishing to pursue activities in the Area must be sponsored by the state of which they are nationals. Belgium therefore adopted legislation with regard to deep sea mining in 2013, implementing the international rules and issuing conditions for the granting of a sponsor certificate by the Belgian government. The Belgian legislation sets out a clear procedure and correctly implements the international principles, but there is room for improvement in various areas.

AIM

This assessment aims to present a general overview of the Belgian legislation on deep sea mining, identify the strengths and weaknesses of both the Belgian law and the royal decree and offer legally underpinned suggestions to improve these.

Cold- or Deep-water coral (Lophelia pertusa); Norway : © Erling Svensen / WWF

1. OBJECT OF THE ANALYSIS

- Law of 17 August 2013 concerning the prospection, exploration and exploitation of the natural resources of the seabed and the subsoil beyond national jurisdiction, *BS* 16 September 2013, 65612.

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Wet van 17 augustus 2013 betreffende de prospectie, de exploratie en de exploitatie van de rijkdommen van de zee- en oceaanbodem en de ondergrond ervan voorbij de grenzen van de nationale rechtsmacht, *BS* 16 september 2013, 65612.

- Royal Decree of 4 October 2013 concerning the prospection, exploration and exploitation of the natural resources of the seabed and the subsoil beyond national jurisdiction, *BS* 15 October 2013, 73061.

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Koninklijk besluit van 4 oktober 2013 betreffende de prospectie, de exploratie en de exploitatie van de rijkdommen van de zee- en oceaanbodem en de ondergrond ervan voorbij de grenzen van de nationale rechtsmacht, *BS* 15 oktober 2013, 73061.

2. GENERAL OVERVIEW

Background

The gradual depletion of land resources and the increasing demand for precious metals as nickel, copper and cobalt have led to great interest from governments and commercial entities in the deep seabed, one of the few places on our planet where human interference has so far been minimal and which thus contains valuable ecosystems and interesting organisms. Beyond the boundaries of national jurisdiction, which extend to the outer limits of the continental shelf, the seabed and the subsoil are labeled as 'the Area'[1]. The Area and the resources that are located there are qualified as 'common heritage of mankind' and are not susceptible to appropriation[2]. A significant part of the ocean floor thus escapes sovereignty claims and is governed by a complex regime, which determines by whom and under which conditions these natural resources can be mined. This regime is formed by part XI and some annexes of the United Nations Convention on the Law of the Sea, the 1994 Implementation Agreement[3] and detailed regulations of the International Seabed Authority (ISA)[4], which is tasked to manage the Area and its natural resources. Declaring the available resources to be '*res nullius*' would indeed instigate far-reaching international competition and potential conflicts and would prove a huge disadvantage for developing countries, who will not be able to exploit these materials when other countries will.

According to the Law of the Sea Convention, state-owned enterprises, private companies and natural persons wishing to pursue activities in the Area must be sponsored by the state of which they are nationals[5]. This state bears the responsibility to ensure that the companies or persons they are sponsoring act in accordance with the terms of their contract and their obligations under the Law of the Sea Convention[6], and one of the principal ways to do that is the enactment of specific legislation with regard to deep sea mining. Belgium adopted such legislation in 2013, implementing the international rules and principles on deep sea mining and issuing procedures and conditions for the granting of a sponsor certificate by the Belgian government[7].

1 Preamble and article 134 United Nations Convention on the Law of the Sea of 10 December 1982, *United Nations Treaty Series*, vol. 1833, 3 (hereinafter referred to as "LOSC").
2 Article 136-137 LOSC.
3 Agreement of 28 July 1994 relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea, *United Nations Treaty Series*, vol. 1836, 3.
4 Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area (22 July 2013), ISA Doc. ISBA/19/C/17 (2013); Regulations on Prospecting and Exploration for Polymetallic Sulphides in the Area (15 November 2010), *ISA Doc.* ISBA/16/A/12/Rev.1 (2010); Regulations on Prospecting and Exploration for Cobalt-rich Ferromanganese Crusts in the Area (22 October 2012), *ISA Doc.* ISBA/18/A/11 (2012); Draft Regulations on Exploitation of Mineral Resources in the Area (25 March 2019), *ISA Doc.* ISBA/25/C/WP.1 (2019).
5 There are some nuances to this principle: if the applicant constitutes a consortium of entities of different nationalities, all states concerned will have to sponsor the application, and if an entity is effectively controlled by another state or its nationals, both this state and the state of official nationality must act as sponsor (article 153, §2, b) LOSC; article 4, §1 and §3 Annex III LOSC).
6 Article 139, §1 LOSC.
7 Law of 17 August 2013 concerning the prospection, exploration and exploitation of the natural resources of the seabed and the subsoil beyond national jurisdiction, BS 16 September 2013, 65612 (hereinafter referred to as "Law of 17 August 2013"); Royal Decree of 4 October 2013 concerning the prospection, exploration and exploitation of the natural resources of the seabed and the subsoil beyond national jurisdiction, *BS* 15 October 2013, 73061 (hereinafter referred to as "Royal Decree of 4 October 2013").

Structure

After clarifying the used terms and repeating the main principles concerning the status and rules that apply to the deep seabed, the Belgian law regarding prospection, exploration and exploitation of the natural resources of the deep seabed includes a concise article about prospection in the Area, demanding a notification to the Belgian authorities in that case[8]. This is followed by a longer section on exploration and exploitation, detailing which persons or entities are eligible to apply for sponsoring and offering an overview of the main requirements[9]. The law also contains an article stressing the responsibility and liability of the contractor and introducing a duty to get appropriate insurance[10], a provision listing the documents the contractor needs to provide to the Belgian authorities during its activities[11], a clause determining the fees that need to be paid[12] and a section formulating sanctions in case of illegal actions[13]. This law is accompanied by an implementing decision in the form of a royal decree, mainly specifying the application procedure and the decision-making process with regard to the sponsor certificate[14] and explaining the audit regime after a sponsor certificate has been issued[15].

Rules and procedure

Natural and juridical persons who possess the Belgian nationality (or are under the supervision of the Belgian state) and meet the conditions laid down in the rules, regulations and procedures of the International Seabed Authority shall be eligible for a sponsor certificate by the Belgian state[16]. The application file, which is submitted to the *Dienst Continentaal Plat of the FOD Economie, KMO, Middenstand en Energie*, needs to contain all the listed documents, including a sound environmental impact study prepared in accordance with the relevant recommendations of the Legal and Technical Commission of the Authority, and each applicant undertakes to fulfil his obligations in good faith[17]. The *Dienst Continentaal Plat* verifies if all documents and information included in the application file are complete and admissible and requests the opinion of the *Dienst Marien Milieu of the FOD Volksgezondheid, Veiligheid van de Voedselketen en Leefmilie*u with regard to the completeness and admissibility of the environmental impact study[18]. If everything is deemed complete and admissible, the Minister of Economy grants the sponsor certificate, which is transferred to the International Seabed Authority by the *FOD Buitenlandse Zaken, Buitenlandse Handel en Ontwikkelingssamenwerking*[19]. An audit system is still in place after the award of the sponsor certificate, as the prospector or contractor must submit all annual reports and other relevant documents to the Minister of Economy[20]. All information is considered confidential, except for data regarding the protection and preservation of the marine environment[21]. The Minister of Economy transfers the documents to the *Dienst Continentaal Plat*, which immediately forwards a copy of the documents relating to the protection and preservation of the marine environment to the *Dienst Marien Milieu*, and both government agencies check whether the contractor still meets the requirements for a sponsor certificate by the Belgian government[22]. Apart from the fee to apply for the sponsor certificate, which amounts to € 10.000, every contractor is obliged to pay an annual charge of € 40.000 to cover the costs of these audit activities[23]. If the contractor no longer satisfies the conditions, the *Dienst Continentaal Plat* informs the Minister of Economy, who may decide to terminate the sponsoring, but only after the contractor has been heard[24].

8 Article 6 Law of 17 August 2013.
9 Article 7-8 Law of 17 August 2013.
10 Article 9 Law of 17 August 2013.
11 Article 10 Law of 17 August 2013.
12 Article 11 Law of 17 August 2013.
13 Article 12-15 Law of 17 August 2013.
14 Article 3-7 Royal Decree of 4 October 2013.
15 Article 8 Royal Decree of 4 October 2013.
16 Article 8, §1 Law of 17 August 2013.
17 Article 8, §2 and §4 Law of 17 August 2013 en article 3, §1-2 Royal Decree of 4 October 2013.
18 Article 4-5 Royal Decree of 4 October 2013.
19 Article 6 Royal Decree of 4 October 2013.
20 Article 10, §1 Law of 17 August 2013.
21 Article 10, §2 Law of 17 August 2013.
22 Article 8, §1-3 Royal Decree of 4 October 2013.
23 Article 11 Law of 17 August 2013.
24 Article 8, §4 Royal Decree of 4 October 2013.

3. STRENGTHS

The Belgian legislation is characterized by a few strengths:

- The Belgian legislation outlines a simple procedure to grant sponsor certificates to its nationals: the law and the royal decree explicitly state which documents need to be submitted in order to apply for a sponsor certificate and which criteria apply in the assessment by the Belgian authorities.
- The Belgian legislation correctly implements the international rules and principles of the Law of the Sea Convention, the 1994 Implementation Agreement and the regulations of the International Seabed Authority in the Belgian legal order.
- After a sponsor certificate is awarded, a monitoring system is in place: the Belgian authorities keep tabs on the contractor by requesting copies of annual reports and other relevant documents[25].
- The Belgian law imposes sanctions on persons or entities conducting activities in the Area in breach of the international rules or without sending the necessary reports to the Minister of Economy in timely fashion[26].

25 Article 10 Law of 17 August 2013; article 8 Royal Decree of 4 October 2013.
26 Article 12-13 Law of 17 August 2013.

4. WEAKNESSES

The Belgian legislation however shows a number of flaws and gaps that should be noted:

- Looking at the specific content of the Belgian law on the one hand and the royal decree on the other, there's a lack of harmony and logic. The different parts are not clearly arranged and rules and principles originating from ISA regulations should not be embedded in the Belgian law, as these rules are more prone to changes.
- Applications for Belgian sponsor certificates are subject to a mere admissibility test, without any review on the merits[27].
- Apart from the brief mention that information and data regarding the protection of the marine environment are not considered confidential, the Belgian law and the royal decree do not include any form of transparency or public participation, denying third party stakeholders the possibility to assert any rights.
- The Belgian law defers all responsibility to the contractor[28], but it needs to be noted that a sponsoring state bears the responsibility to ensure that companies or persons they are sponsoring act in accordance with the terms of their contract and their obligations under the Law of the Sea Convention[29]. Although there can be no state liability if the state has adopted legislation and has taken measures which are, within the framework of their legal order, reasonably appropriate to secure effective compliance by persons under its jurisdiction (which is arguably the case here), it must be stressed that this has to be evaluated on a case-by-case basis and the responsibility of the sponsoring state cannot be formally precluded by one article in a national law.
- As the specific function of the monitoring regime and the added value in comparison to the supervision by the International Seabed Authority is not very clear at the moment, the annual fee can be questioned[30].
- The meaning and interpretation of the phrase 'under the supervision of the Belgian state' ('onder toezicht van de Belgische Staat'), which is important to determine who is eligible to apply for a Belgian sponsor certificate, is not completely clear[31].
- The mere enumeration of applicable environmental principles in the Belgian law does not provide a big impact in practice[32].
- Looking at the minimum fine and the amount of jail time, which is respectively higher and equal for seemingly lesser offenses like the lack of timely or correct reporting, the sanctions appear disproportionate[33].

27 Article 3-6 Royal Decree of 4 October 2013.
28 Article 9 Law of 17 August 2013.
29 Article 139 LOSC; article 4, §4 Annex III LOSC.
30 Article 11, §2, 2° Law of 17 August 2013.
31 Article 6, §2 and article 8, §1 Law of 17 August 2013.
32 Article 4, §3 Law of 17 August 2013.
33 Article 12-13 Law of 17 August 2013.

5. RECOMMENDATIONS

To overcome the mentioned weaknesses and to implement additional improvements, a few suggestions can be made:

- The Belgian legislator should create a good and logical balance between the content of the Belgian law and the royal decree. Rules and principles derived from the Law of the Sea Convention or the 1994 Implementation Agreement should be embedded in the Belgian law, while more detailed provisions originating from ISA regulations should be included in the royal decree. A clear thematic layout of both legal acts is of course also desirable.
- There is a strong need for more transparency and public participation in the discussed Belgian legislation, as regards both the exploration and the exploitation phase. The legislator should introduce a clearly defined procedure that provides for the publication of all information regarding environmental impact and third party stakeholders need to be offered the opportunity to submit remarks and objections, both as an element of the review of an application and within the context of the monitoring of the submitted documents and reports. The transparency and public participation model of the Belgian legislation concerning exploration and exploitation activities on the continental shelf can provide some inspiration[34] and it will in any case be necessary to align these national rules with the ISA regulations. The Draft Exploitation Regulations introduce a public participation regime[35], but the prospection and exploration regulations do not include such procedures. The latter does however not pose a problem, as the sponsoring state is free to adopt more stringent measures with regard to the protection of the marine environment[36]. There is a definite need for public participation procedures in Belgian legislation and it would even be desirable to go a step further and grant third party stakeholders a right of appeal against the issue of a sponsor certificate in specific circumstances, taking into account the objective of the protection of the marine environment and the status of the Area and its natural resources as common heritage of mankind[37].

34 Article 12 Royal Decree of 21 October 2018 regarding the rules concerning the environmental impact assessment in application of the Law of 13 June 1969 regarding the exploration and exploitation of non-living resources of the territorial sea and the continental shelf, BS 29 October 2018, 82314.
35 Article 11 Draft Regulations on Exploitation of Mineral Resources in the Area (25 March 2019), ISA Doc. ISBA/25/C/WP.1 (2019).
36 Article 5 Law of 17 August 2013.
37 Article 136 and 145 LOSC.

- Depending on the level of monitoring and the relevant capacity of the International Seabed Authority, the Belgian legislator should clearly define the additional monitoring regime it wants to install as a sponsoring state, as the current model does not appear to provide much added value[38]. The Belgian legislator could assign monitoring responsibilities to the *Beheerseenheid van het Mathematisch Model van de Noordzee en het Schelde-estuarium (BMM),* which has built up significant expertise and experience in such matters while conducting environmental assessments within the context of exploration and exploitation activities on the continental shelf[39].
- The Belgian legislator should remedy potential confusion with regard to the provision on the responsibility of the contractor, which cannot be interpreted as precluding any responsibility for the sponsoring state and must be read in conjunction with article 139 LOSC[40].
- It seems preferable to provide additional justification for the levy of the annual fee and to adjust this sum to reflect the actual costs, depending on the monitoring regime the Belgian authorities want to install[41]. It should indeed be noted that contractors will have to pay similar fees to the Authority and double costs for the same services must be avoided.
- The Belgian legislator should clearly define the eligible candidates for a sponsor certificate by the Belgian state. There can be no discussion about corporations or natural persons possessing the Belgian nationality, but 'under the supervision of the Belgian state' ('onder toezicht van de Belgische Staat') requires more explanation.
- The Belgian legislator should introduce more logical and proportional sanctions for the two listed categories of offenses: the minimum fine for untimely or incorrect reporting should not be higher than the one for unauthorized activities in the Area and the possible jail time for the latter offense should preferably be increased[42].

38 Article 10 Law of 17 August 2013; article 8 Royal Decree of 4 October 2013.

39 Article 9-17 Royal Decree of 21 October 2018 regarding the rules concerning the environmental impact assessment in application of the Law of 13 June 1969 regarding the exploration and exploitation of non-living resources of the territorial sea and the continental shelf, BS 29 October 2018, 82314.

40 Article 9 Law of 17 August 2013; article 139 LOSC; article 4, §4 Annex III LOSC.

41 Article 11, §2, 2° Law of 17 August 2013.

42 Article 12-13 Law of 17 August 2013.

6. CONCLUSION

Apart from some minor defects that can easily be corrected, the Belgian legislation on deep sea mining should provide for more transparency and public participation in both the exploration and the exploitation phase, consisting of a mandatory publication of all information and data regarding environmental impact and a subsequent opportunity for third party stakeholders to submit remarks and objections. The model of the Belgian legislation concerning exploration and exploitation activities on the continental shelf can serve as an example, but it is recommended to equally include such procedures during the assessment of ongoing exploration or exploitation activities. The content of the Belgian law and the royal decree should be rearranged and the envisaged monitoring regime, which could provide a key role for the *Beheerseenheid van het Mathematisch Model van de Noordzee en het Schelde-estuarium (BMM)*, should be aligned with ISA regulations, in order to avoid duplication of work or undesirable gaps.

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