TRANSLATION

Response to questions relating to the draft regulations on exploitation of mineral resources in the Area

China Ocean Mineral Resource R&D Association(COMRA)

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China Ocean Mineral Resource R&D Association ("COMRA") is deeply impressed by the positive attitude and full efforts of the International Seabed Authority ("ISA"), particularly the Legal and Technical Commission ("LTC"), in developing the draft regulations on exploitation of mineral resources in the Area. We also notice that the ISA has not only fully involved stakeholders in the process of regulation development, but also made continuous improvements of regulatory provisions based on survey feedback. COMRA has actively participated in the ISA's previous stakeholder surveys regarding the development of exploitation regulations and provided serious response. With full knowledge and analysis of the LTC's working draft exploitation regulations and standard clauses in 2016, we study the draft regulations on exploitation of mineral resources in the Area (ISBA/23/LTC/CRP.3*) released by the ISA on August 10, 2017, and provide the following comments and suggestions concerning the questions relating to the draft regulations on exploitation of mineral resources in the Area as provided in the note by the Authority Secretariat (ISBA/23/C/12).

I. General questions

1. Do the draft regulations follow a logical structure and flow?

Some improvements still need to be made.

For example, Part V stipulates “Obligations of the Contractor”, but there isn't any corresponding part of the "Rights of the Contractor", except for some rights to exploitation activities under the contract as stated in Annex X Standard Clauses for Exploitation Contract. Given the parity between the "rights" and "obligations" of the contractor, the contractor's rights should also be reflected in the regulations. It needs to be further pointed out that the rights of the contractor have been expressly stated in the exploration regulations. For example, Regulation 24, Part IV of the Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area, is entitled Rights of the Contractor, according to which the contractor shall "have the exclusive right to explore an area covered by a plan of work for exploration in respect of polymetallic nodules" and "have a preference and a priority among applicants submitting plans of work for exploitation of the same area and resources". These rights of the contractor should be fully reflected in the structure and texts of the draft exploitation regulations.

There are also some inconsistencies in the draft regulations. For example, Annex II to the draft regulations is concerning Pre-Feasibility Study, but in the part of "Use of terms and scope" (Schedule 1), only the definition of "Feasibility Study" is given, rather than the definition of “Pre-Feasibility”.

2. Are the intended purpose and requirements of the regulatory provisions presented in a clear, concise and unambiguous manner?

The exploitation regulations should be intended to encourage, promote and guide the activities of exploitation of mineral resources in the Area so as to truly accomplish the value of the "common heritage of mankind" and protect the marine environment from damage. In our opinion, the draft regulations make detailed provisions on environmental protection, even to a greater extent compared with land mining practices, but reveal a lack of efforts to encourage and promote the development and

utilization of resources. Particularly, the protection of developers' rights is not guaranteed.

3. Is the content and terminology used and adopted in the draft regulations consistent and compatible with the provisions of the United Nations Convention on the Law of the Sea and the 1994 Agreement relating to the implementation of Part XI of the Convention?

Some content in the draft regulations is inconsistent with the provisions of the 1994 Agreement. For example, according to the Agreement, "the royalty system alone or the combination of royalty and profit distribution shall be considered". But Part VII of the draft regulations states that "the contractor shall pay a royalty" and completely deprives the contractor of the right to adopt a "system combining royalty and profit distribution"; no explanation or statement is made for this. It should be noted that, according to Regulation 16 of the Regulations on prospecting and exploration for Polymetallic Sulphides in the Area and the Regulations on prospecting and exploration for cobalt-rich ferromanganese crusts in the Area, the applicant can elect either to contribute a reserved area or offer an equity interest in a joint venture arrangement.In the latter scenario, a combination of royalty and profit distribution can work better.

4. Do the draft regulations provide for a stable, coherent and time -bound framework to facilitate regulatory certainty for contractors to make the necessary commercial decisions in relation to exploitation activities?

Draft Regulation 30 requires the contractor to maintain commercial production and states in 13.1(e) of "Standard Clauses for Exploitation Contract" that, if the Contractor is not recovering Minerals in commercial quantities at the end of five years from the expected date of Commercial Production, save where the Contractor is able to demonstrate to the Council’s satisfaction good cause, which may include adverse

economic conditions, the Authority may suspend or terminate this Contract. But there are some concerns. For example, in land mining practices, when commercial exploitation is not a good option for some mines given the overall market or for economic reasons, the usual solution is to reduce output or even shut down the mines over a period of time. The national mining authorities not only say yes to such approach but also grant tax exemption during the suspension period. The draft regulations on exploitation of mineral resources in the Area should also take full account of this situation and develop appropriate rules and exploitation contract clauses with reference to the land mining practices.

5. Is an appropriate balance achieved between the content of the regulations and that of the contract?

We note that the 2017 draft regulations have made significant adjustments to the content of the regulations and that of the contract, and the Secretariat also states that "every effort has been made to avoid overlapping between the regulations and the contract". It should be noted that the regulations and the contract do not have equal legal effect. The contract applies between the Authority and the contractor, while the legal effect of the regulations comes from the Convention and the Agreement. The important content of the exploitation contract shall first be reflected in the regulations. But so far, some content of the standard clauses is not reflected in the draft regulations, particularly some important content, such as the rights of the contractor. with reference to the usual practice in the land mining industry, the contractor's being granted the property right alone of mineral resources under exploitation is not sufficient. The land mining laws also grant the developer the package rights, including the right to exploit, transport and sell minerals, which should be highly valued.

6. Exploration regulations and regime: are there any specific observations or comments that the Council or other stakeholders wish to make in connection

with their experiences, or best practices under the exploration regulations and process that would be helpful for the Authority to consider in advancing the exploitation framework?

Some good and bad experiences in the development of exploration regulations can be beneficial. As we are known, the development of exploration regulations for cobalt-rich ferromanganese crusts and polymetallic suphides experienced a laborious process from "jointly" (despite ongoing opposition from member states) to "separately". The underlying reason is that the two resources have different characteristics, posing different exploration area and other requirements. Indeed, the land mining laws of various countries are usually not specific to a single type of mineral. But an objective fact is that the exploration regulations for the Area have already been formulated by mineral type. In the current draft regulations, it's not expressly stated whether they are specific to polymetallic nodules or all mineral resources, but there are many rules and parameters related to areas, such as the size ofapplication area, mining area, and contract area, area-based yearly payment, among other things. For the three resources already in the exploration stage, namely polymetallic nodules, cobalt-rich ferromanganese crusts, and polymetallic sulphides, the size of the area required for commercial exploitation vary greatly. Nodule exploitation may require an area of tens of thousands of square kilometers, while sulphides exploitation may require a few square kilometers only. On this basis, it is hardly reasonable to charge by area based on the same rules and standards.

II. Specific questions

1. Role of sponsoring States: draft regulation 91 provides for a number of instances in which such States are required to secure the compliance of a contractor. What additional obligations, if any, should be placed on sponsoring States to secure compliance by contractors that they have sponsored?

In light of the principles of the Convention, the sponsoring States should assume corresponding obligations for the regimes and activities in the Area, on which the draft exploitation regulations provide for detailed provisions. We also notice that, with regard to the subject of the activities in the Area, the current draft regulations grant the Authority a lot of power, but give limited elaborations on its obligations. For example, Draft Regulation 26 requires the contractor to "ensure that it does not cause damage to cables or pipelines in the Contract Area". However, whether the contractor has the right to require other organizations and entities not to lay down cables and pipelines in the contract area, on one hand, and whether the Authority should have the obligation to coordinate matters with other international organizations in light of mutual understanding and other Convention principles so as to secure and protect the interests of the contractor, on the other, should both be reflected in the draft regulations.

2. Contract area: for areas within a contract area not identified as mining areas, what due diligence obligations should be placed on a contractor as regards continued exploration activities? Such obligations could include a programme of activities covering environmental, technical, economic studies or reporting obligations (that is, activities and undertakings similar to those under an exploration contract). Are the concepts and definitions of “contract area” and “mining area(s)” clearly presented in the draft regulations?

For areas within a contract area not identified as mining areas, if some of these areas are designated for special purposes (such as the establishment of impact reference zones or preservation reference zones) in the feasibility study report and approved, the feasibility study report may apply. The contractor of other areas not identified as mining areas shall have the exploration right.

3. Plan of work: there appears to be confusion over the nature of a "plan of work" and its relevant content. To some degree, this is the result of the use of terminology from the 1970s and 1980s in the Convention. Some guidance is needed as to what information should be contained in the plan of work, what should be considered supplementary plans and what should be annexed to an exploitation contract, as opposed to what documentation should be treated as informational only for the purposes of an application for a plan of work. Similarly, the application for the approval of a plan of work anticipates the delivery of a pre-feasibility study: have contractors planned for this? Is there a clear understanding of the transition from pre-feasibility to feasibility?

The current draft regulations do not define the specific content of "plan of work". Although it is speculated that the contents of Regulation 4(3), Annex II, III, V, VI, VII and VIII, "Health, Safety and Maritime Security Plan", and "Training Plan" are included in the "Plan of Work", but it is not clear whether the "Feasibility Study", "Revised EMMP" and the like are the content of "Plan of Work".

With regard to the information to be submitted, in land mining, the EMMP can sometimes be submitted within a specified period after the mining right is obtained, and the 2016 draft exploitation regulations provide for similar provisions. The current draft regulations require the EMMP to be submitted simultaneously with the application, to a very detailed extent, in opposition to the extremely general requirements of the pre-feasibility study.

As to the transition from pre-feasibility study to feasibility study, the draft regulations provide for a template for "pre-feasibility study" rather than "feasibility study" and fail to list the indicators defining "pre-feasibility study" and "feasibility study". So, it's hard to require a contractor to have a clear idea of the transition between the two.

The elements, standards and the like in the annexes to the plan of work have a direct impact on commercial exploitation and environmental management. Therefore, it's necessary to clarify which annexes should be included in the plan of work and examine whether the technical and environmental requirements and standards proposed in the plan of work are scientific, reasonable and feasible in industrial applications.

4. Confidential information: this has been defined under draft regulation 75. There continue to be diverging views among stakeholders as to the nature of "confidential information", with some stakeholders considering the provisions too broad, and others too narrow. It is proposed that a list that is as exhaustive as possible be drawn up identifying non-confidential information. Do the Council and other stakeholders have any other observations or comments in connection with confidential information or confidentiality under the regulations?

Moreover, on one hand, "confidential" and "non-confidential" information should be determined in a scientific and reasonable manner; and on the other hand, the ISA should cautiously exercise its mandate in managing and disclosing such information as already identified as "non-confidential". Particularly, the disclosure of public information provided by a contractor should be made based on specific procedures and principles, to respect the efforts and contributions of the contractor and scientists.

According to the practice of the international scientific community, the original data and information provided by a contractor should be protected for a period of time, and should not be freely used for scientific analysis until the expiry of such period. The environmental guidance states that the original data and information provided by a contractor should not be freely used for scientific analysis until four years after the completion of offshore inspection, and the exploitation regulations shall have the relevant provisions.

The data provider should be entitled to priority use of the provided information, while others' use of such information should be restricted to some extent, e.g., the user is required to indicate the original source of the information, to recognize and respect the intellectual property rights of the original data provider.

It's advisable to prepare a list of environmental parameters to be submitted, and if there is an update, especially in the case of a new parameter, the stakeholders should be consulted.

5. Administrative review mechanism: as highlighted in Authority discussion paper No. 1, there may be circumstances in which, in the interests of cost and speed, an administrative review mechanism could be preferable before proceeding to dispute settlement under Part XI, section 5, of the Convention. This could be of particular relevance for technical disputes and determination by an expert or panel of experts. What categories of disputes (in terms of subject matter) should be subject to such a mechanism? How should experts be appointed? Should any expert determination be final and binding? Should any expert determination be subject to review by, for example, the Seabed Disputes Chamber?

The administrative review mechanism is set up to provide an effective and easy way to resolve disputes. Therefore, despite the setup of the administrative review mechanism, whether a specific dispute should first be subject to such a mechanism, whether the approach engaging an expert or panel of experts is adopted, how should experts be appointed, among other things, should be determined through negotiation with, for example, the contractor.

6. Use of exploitation contract as security: draft regulation 15 provides that an interest under an exploitation contract may be pledged or mortgaged for the purpose of obtaining financing for exploitation activities with the prior written

consent of the Secretary-General. While this regulation has generally been welcomed by investors, what additional safeguards or issues, if any, should the Commission consider?

The use of an exploitation contract as security can facilitate the contractor's financing and other activities. We are expecting more detailed and definite rules and guidelines in the regulations.

7. Interested persons and public comment: for the purposes of any public comment process under the draft regulations, the definition of "interested persons" has been questioned as being too narrow. How should the Authority interpret the term "interested persons"? What is the role and responsibility of sponsoring States in relation to public involvement? To what degree and extent should the Authority be engaged in a public consultation process?

For the purpose of public comment, "interested persons" refer to not only persons that are relevant in interests but also persons that are relevant in specialties and activities. Deep-sea mining and its environmental impact assessment are highly specialized. The "interested persons" for the purposes of any public comment process under the draft regulations should be preferably selected from those persons with working experience in mining or environmental-related industries.

Contractors themselves are "interested persons", with relevance in interests on one hand and proven expertise on the other in relation to the development of exploitation regulations. They should be fully involved to facilitate the development of exploitation regulations for the Area with their first-hand information and rich experience.

III. Supplementary question

1. Roadmap and timeline for the development of exploitation regulations

We notice that the Authority has proposed a roadmap and timeline for the development of exploitation regulations, on which basis, however, is unclear. The exploitation regulations for "the Area", as we believe, should be developed based on market needs, technology maturity, and legal logic.

In terms of market needs, the current global metal finance market does not support the conclusion that mineral resources in the Area can proceed to commercial development within a few years. The future of exploitation of mineral resources in the Area is not clear, and thus it still needs more time to conduct in-depth research for the development of exploitation regulations accordingly.

In terms of technology maturity, the current deep-sea mining systems and technologies can hardly meet the standards for mature commercial production, and little is known about the environmental impact of deep-sea mining. Therefore, the necessary technical basis for the payment mechanism and the environment management system is not available yet, and the development of exploitation regulations within a short term is not technically supported.

As for the legal provisions in the regulations, some issues, such as the rights and obligations of the Authority, sponsoring States and contractors, the liability of the contractors and sponsoring States as well as residual liability, the dispute settlement mechanism, among other things are still in the early discussion stage. Also, the environmental regulations are in the stage of soliciting opinions. Moreover, the opinions on the payment mechanisms differ greatly. All these require further discussion and clarification.

Since the roadmap and timeline for the development of exploitation regulations need to take these factors into consideration, and given the challenging process in which the exploration regulations for cobalt-rich ferromanganese crusts and polymetallic sulphides, it might be a tough challenge to finalize the exploitation regulations by 2020.