Berlin, December 20th 2017

International Seabed Authority's (ISA) Draft Regulations on Exploitation of Mineral Resources in the Area (ISBA/23/LTC/CPR.3*), 8 August 2017
Submission by Germany

This submission is made by the Federal Republic of Germany. The Draft Regulations on Exploitation of Mineral Resources in the Area have been duly noted by the German Federal Government. The Convention aims in Part XI at building a legal framework and regime for recovering minerals in the area as foreseen in Article 137 paragraph 2.
Germany appreciates the significant progress made by the Secretariat and the Legal and Technical Commission (LTC) in evolving the Draft Regulations. We welcome that the draft now contains basic environmental regulations as an integral part of such a regime. Acknowledging that, according to the Convention, all natural resources of the seabed and ocean floor and the subsoil of the Area belong to the common heritage of humankind, and considering (1) the extremely slow geological formation of the mineral resources, (2) the slow recovery of the biological communities impacted by mining, and (3) the uniqueness of the deep-sea environment and its biodiversity, including the rareness of many species, we emphasize the high responsibility of the Authority to meet the provisions of Article 145.

Germany considers the draft as an important step forward towards a comprehensive regulatory regime for mineral exploitation in the Area and appreciates the efforts of the ISA to engage with a broad stakeholder base in a transparent manner. Germany welcomes the extension of the initial deadline for the submission of comments on the Draft Regulation till December 20th to give all interested stakeholders ample time for the preparation of submissions. We have taken note of the "Timeline for the adoption and approval of the regulations on exploitation of mineral resources in the Area" presented by the LTC (ISBA/23/C13) and the revised meeting schedule for 2018 and 2019. They are regarded as guidance for the negotiating and adopting process for the Regulations.

In this context we recall our common starting point being that the adoption of the Regulations will take the time needed and that 'nothing is agreed until everything is agreed'.

Germany recognizes that more work has to be done by the organs of the ISA, namely the Council, the LTC, and the Secretariat till a full set of rules on mineral exploitation in the Area is ready for approval. Important elements of a comprehensive regulatory exploitation code, such as “Seabed Mining Directorate Regulations”, complete “Environmental Regulations” and “Financial Terms”, among others, still need elaboration.

We were disappointed to see that the results of the workshop held by the ISA, the Federal Institute for Geoscience and Natural Resources (BGR) and the Federal Environment Agency (UBA) of March 2017 (ISA Technical Study No. 17) have hardly been included in the draft - despite the fact that the workshop was specifically designed to foster the development of the environmental regulations in this first draft.

Germany sees a need for an increased involvement and engagement of State Parties in order to ensure full ownership of the State Parties and secure the acceptance of the regulations. To this end, Germany suggests to install dedicated Council working groups for specific thematic fields notwithstanding the provisions on the procedures of the Council stipulated in UNCLOS and the Implementing Agreement. This approach would help to make full use of the experience and knowledge of the Council Members and to reduce the LTC’s workload.

In addition, Germany asks the Secretariat to allow sufficient time for the development and negotiation of the additional elements of the Regulations, while - at the same time – to organise the process in a time- and cost-effective manner.

Germany would moreover welcome if the Authority (and here mainly the Finance Committee) were to begin preliminary and conceptual consideration of criteria for equitable sharing of financial and other economic benefits derived from activities in the Area. We consider this an important and necessary addition and discussion on it ought at least to start.

Germany calls upon the Secretariat to work as transparent as possible and to supply Members and stakeholders with revised versions of the Draft Regulations and drafts of any relating documents well in advance of scheduled meetings of the ISA. For States Parties at least three months are necessary to engage with national stakeholders in preparation of substantive input and comments on future versions of the Draft Regulations.

The comments provided below constitute a non-exhaustive input regarding the questions raised in the annex to the note by the Secretariat (ISBA/23/C/12) and the Draft Regulations. Since not all regulations are finalised at present the comments presented can at this stage only be regarded as provisional. Additional detailed input will follow once the Draft Regulations are developed further. Germany will remain engaged in the drafting process and reserves the right of further submissions of any kind and at any time throughout the negotiation and decision-making process.

Responding to the **general questions** as posed in the annex to the note by the Secretariat, Germany submits the following observations:

1. The working draft in its current structure at large follows a logical structure and flow. At the same time, a significant number of topics, details and criteria have to be incorporated subject to further discussions.

   For reasons of transparency and clarity, we propose to add a table of contents of the regulations and annexes to the regulations as well as an overview and a flow-chart of the envisaged overall application and approval process in the introductory note of a revised draft. In this first chapter, the hierarchy of all documentation required from the contractor should be clarified, including the Plan of Work, the Scoping Report, the Environmental Impact Statement, the Environmental Management and Monitoring Plan, the Regional Environmental Management Plan as well as the Closure Plan.

2. In general, we regard the regulatory provisions as presented so far clear, concise and unambiguous. We see the need for substantial further development and for the addition of essential elements that are so far missing.

   Germany acknowledges that the main procedural steps regarding **environmental considerations**, ranging from the environmental scoping study, the EIA/EIS, the EMMP and the CP, have been addressed in principle. However, for all of these procedural steps more detailed requirements need to be developed. We emphasize the necessity for a dedicated process within the ISA to steer this development. The following points highlight some examples:

   The Environmental Impact Assessment (EIA) / Environmental Impact Statement (EIS) requirements, as laid out in Annex V, lack

   - specific assessment criteria including quantitative environmental thresholds (e.g. for harmful effects) or, alternatively, methodologies to develop thresholds. The Art. 154 report recommended clear and measurable requirements, not least because agreed thresholds ensure a level playing field for contractors. Examples where thresholds are needed are impacted seabed habitat and sediment plumes (operational plume at the seafloor; discharge plume at mid-water depths or deeper); in our view, some of the necessary requirements and further specifications for the Exploitation Regulations, that still need to be performed, can only be developed during and after an effective test mining;
   - a concept of the ISA to foster the development of Best Available Technology for exploitation activities; common standards for environmental surveys, such as guidelines as in ISBA/19/LTC/8 regarding exploration activities; and
   - specific requirements regarding environmental data to be provided.

   The Environmental Management Plan (EMMP) requirements, as laid out in Annex VII, lack

   - a requirement for the designation of sufficiently large protected areas serving the long-term conservation and protection of representative

seafloor habitats (e.g. "LCZs", as opposed to PRZs, the latter serving as reference zones during the operation period), if not clearly covered by an established REMP (which would be preferable);

- requirements for further spatial protection measures on a smaller scale;
- predefined and standardized mitigation measures to be applied as part of the management plan; and
- predefined and standardized monitoring requirements and protocols (e.g. sampling methodologies, arrays, frequencies and overall time spans).

A severe potential impact of a mining activity would be the unintended extinction of a whole species. Therefore, one essential aim of the above-mentioned setting of environmental standards should be the preservation of marine biodiversity on all relevant levels.

In schedule 1 - Use of terms and scope, the precise meaning of the **term "Good Industry Practice"** is not clearly defined. A revision is required for the definition of this term, since it is widely used within the Draft Regulations. It needs to be defined which procedures, codes standards or protocols a contractor has to follow when applying Good Industry Practice.

3. Germany takes note of **draft Reg. 82**, which safeguards the rights of coastal states according to the Convention. It is our understanding that this mainly refers to Art. 142 (3) UNCLOS. Is it the intention to refer solely to a (potential) infringement of rights from pollution? Is a prior consent of a coastal state (according to Art. 142 (2) UNCLOS) envisaged?
   Furthermore, draft Reg. 82 safeguards the rights of coastal states according to the Convention. In Germany's view, this is an important consideration. At the same time, UNCLOS provides for rights in the water column and / or the high seas in general. One of the Convention's main provisions in this regard is Art. 135 which provides for taking into consideration the "legal status of the waters superjacent to the Area or that of the air space above those waters". Germany would like to enquire whether a regulation similar to current draft Reg. 82 is

envisaged which would take into consideration instances where rights in the high seas superjacent to the Area are being exercised.

4. To achieve **regulatory certainty**, notably the rules on financial terms of an exploitation contract (Part VII of the Draft Regulations) and on Environmental Matters (Part IV of the Draft Regulations) have to be specified.
   Contractors have a vested interest in legal security (i.e. planning certainty and security of tenure) under the contract between ISA and the contractor with a period of 30 years. The initial contract term of 30 years is regarded as a fair and adequate time span for taking commercial investments in deep seabed mining projects. However, a legal challenge may arise when the contract is amended by ISA “recommendations“, “decisions“ or “guidelines“ and additional obligations for the contractor are introduced.
   In principle, exploitation contracts should only be amended by agreement and consensus of the contract parties. In cases where unilateral amendments are necessary, these amendments should be binding, but need to be done in a balanced approach. In order to balance the various concerns an effective concept of adaptive management should be established. Criteria and procedures for an adaptive management to modify approved plans of work according to emerging scientific knowledge and technology should be precisely defined in the Draft Exploitation Regulations.

5. -

6. In connection with Germany’s **experiences with exploration contracts**, a **regulation regarding mining activities in the neighborhood of other license areas** is missing in the Draft Regulations. The drift of a suspension plume produced by exploitation activities may cause impacts on exploration activities, the exploitation potential and the environment in a license area of another contractor. Therefore, the spatial extent of a mining area (“Impact Reference Zone”) should be limited to a certain minimum distance with respect to the limits of other license areas.

A licensed and successfully performed **test mining** should be made a legal prerequisite for any application for exploitation in the geographical area concerned. This should be included as a provision in the Exploitation Regulations. The conditions, requirements and procedures under which test mining is to be conducted (e.g. necessity of EIA, monitoring requirements, disclosure of scientific results, certification of equipment etc.) should be regulated under a separate set of regulations with respect to either the exploration phase or a transitional phase. Thus besides exploration rules and exploitation rules, specific rules for such a test mining with adequate standards have to be developed and defined.

Germany recommends an independent and legally binding scientific monitoring strategy, partly or completely conducted by third parties, to validate the environmental impact of such activities. Furthermore, it is recommended that each consortium undertaking mining tests or mining activity allows, by mutual agreement, third parties to conduct parallel environmental impact studies.

Regarding the **specific questions** presented in the annex to the note by the Secretariat, Germany submits the following remarks:

1. The **roles, responsibilities and competences of the ISA and the Sponsoring States**, in the areas of e.g. regulation, approval, inspection and liability, have to be further refined taking into account the guidance given by the Advisory Opinion of ITLOS in case no. 17 (2011). How would liability be shared in cases of “multiple sponsorship“, when two or more sponsoring States are involved and a consortium of entities is based in different countries (Draft Reg. 2 and Draft Reg. 3)? Especially regarding draft regulation 17, the perception of individual roles and functions of ISA, sponsoring states and contractors is not clear enough. There is a lack of hierarchical structure and assignment of roles. Draft regulation 17 should be more substantiated in this respect.

   Draft Reg. 17 has to aim on the overall goal to achieve the highest standards for an effective protection of the Marine Environment in the Area, prevailing for all contractors and creating a level playing field for them.

National legislations of Member States on exploitation has, together with the ISA regulations, to secure a level-playing-field for contractors of different States. National legislations and their enforcement have to be non-competitive and consistent with ISA regulations und the Convention. ISA regulations must be implemented in a uniform way, and shall supersede national legislation with respect to the Area in case of legal conflict.

2. The term **“Contract Area”** should be defined more precisely (e.g., is it the former exploration area or can it be smaller than that; does it include the Preservation Reference Zone; what conditions must be met to receive the Contract Area?) whereas the term “Mining Area” is sufficiently defined in Schedule 1 of the Draft Regulations.
   It is very likely that the exploration for further suitable mining areas will continue in the license area after mining has commenced within the first mining field. Those exploration activities should be regulated according to the “Regulations on Prospecting and Exploration”.

3. -

4. In general, data and information relating to the protection of the marine environment are considered not to be confidential. In the interest of transparency, public access to all data related to environmental issues should not just be “encouraged” – as stated in Draft Reg. 17 – but should be granted and the data and information should be published by the ISA. But in this context industry and business secrets of the contractor have to be protected. The term 'data and information relating to the protection and preservation of the Marine Environment' is unclear and yet to be defined. Instead we recommend to use the term 'environmental information' as for example defined in the Aarhus Convention.

5. Germany welcomes the discussion initiated by the Secretariat regarding possible **provisions for dispute resolution in the Mining Code**. While we welcome the

fact that draft Reg. 92 and Reg. 93 relate to settlement of disputes, it is important to preserve the integrity of the Convention and to complement its rules on dispute settlement where necessary.

While it is noted that according to draft Reg. 92 (3), “any request for a review under this regulation shall be made to the Secretary-General who shall cause the matter to be investigated as he considers appropriate”, an “administrative review mechanism”, as suggested by the Secretariat, is worth considering. At this point not all questions in this context may be answered; however, we would like to highlight certain (non-exhaustive) aspects of such a mechanism:

First, whereas ISA Discussion Paper No. 1 points out that the ITLOS Seabed Disputes Chamber's jurisdiction is neither comprehensive nor universal, Germany would like to stress that we could not support a mechanism that would interfere with or in any way compromise the jurisdiction of the Chamber as set forth under the Convention.

Second, we agree that there might be cases that could be dealt with by experts - as such or as a first step of settling the case - in a more expeditious and cost-efficient manner. For this reason, it would be important to have the appropriate (technical) expertise represented on such a panel and it would have to be discussed whether a system is set up that establishes a dispute settlement “panel” *ad hoc* every time a dispute arises, which might again be more time-consuming than a “standing panel”, i.e., the question of a roster/list of experts.

Third, thought will also need to be given to the question whether parties other than a contractor and the Authority would be able to use the review mechanism and if so, which parties.

Fourth, it would need to be discussed whether the proceedings of this panel would be transparent/public and/or the member states would be informed of the outcome. Finally, “cost and speed” should not prevent considering instituting the Seabed Disputes Chamber as an “appeals chamber” (for a review of factual and legal questions), i.e., decisions of an expert panel might not be final and binding.

However, as mentioned before, any rules of the future Mining Code on dispute settlement in general and on an “administrative review mechanism” in particular need to respect and uphold the existing rights and obligations of States Parties

under the dispute settlement rules of the Convention. Hence, such new rules of the Mining Code might complement the existing mechanisms, but must not bar States Parties from resorting still immediately, as provided and as the case may be, to any dispute settlement procedure according to the Convention.

6. -

7. **Public participation** should not be restricted to the scoping and EIA process (as it seems to be the case according to the Draft Exploitation Regulations) but is to be extended to the application process as a whole. The general public should have the opportunity to comment on all documents submitted by the applicant, except for confidential information.

   The definition of the term **'interested person(s)'** (p. 105) is too narrow as it limits the transparency of the process by restricting the involvement of stakeholders and the public to those persons that are 'directly affected' by an exploitation activity. We would recommend a definition which is wider than in the draft regulations and in substance does not exclude anybody from commenting on submitted applications. At the same time a balance between the effective execution of the application and license process and public participation has to be found.

The following **additional comments and observations** on the Draft Regulations on Exploitation of Mineral Resources in the Area and on the drafting and negotiating process should be taken into consideration:

Regional Environmental Management Plans (REMPs)

The development of Regional Environmental Assessments (REAs) and Regional Environmental Management Plans (REMPs) has repeatedly been considered an important step in the overall process starting with regional planning up to the application phase. However, they have not been mentioned in the current text. Even if we assume that the development of REMPs, as a precondition for

granting exploitation licenses, lies outside the application procedure, we would expect that the relevant REMP should be referenced as a requirement in the approval process, embedded in the relevant regulations. If we see REAs and REMPs as a precondition for mining activities, the possible problem has to be addressed which can occur if no REAs or REMPs are under development and therefore mining licenses could not be granted. A time limit could be set up for ISA to develop REAs and REMPs; after this deadline licenses could be granted regardless of the existence of REAs or REMPs.

Approval and supervisory structure

According to our experience it is sensible to have a detailed approval and supervisory structure since it is impossible to foresee all the details coming up over the running period of a mining project. It is therefore recommended to introduce more detailed approval and supervisory steps and effective instruments which the ISA inspectors can use to keep effective control over mining activities. German national mining law may serve as an example in this regard. German national mining law for land-based mining projects differentiates additional steps to be approved over the lifetime of a project compared to the Draft Regulations. Each of the steps provided for under national law are subject to formal approvals in order to maintain supervision by the regulator over the project. This structure enables a close monitoring of the mining activities and could serve as a possible model for the exploitation regulations.

German national mining law provides for:

- *Bewilligung* (principal license for production).
- *Rahmenbetriebsplan mit Umweltverträglichkeitsprüfung* (Planfeststellungsverfahren) including a public participation (definition of the general frame of the project).
- *Hauptbetriebsplan* (Main Operations Plan to approve practical activities/revised and approved again after 2 years).

- *Sonderbetriebspläne* (Project related Special Operation Plans. Required case by case and approved by the supervisory inspectorate).
- *Abschlussbetriebsplan* (closure plan).

Regulations with regard to ship-based activities

Furthermore, Germany would like to raise some questions which concern the **scope of application of the Draft Regulations with regards to ship-based activities.** These questions concern, in particular, **Draft Reg. 34** and the Inspectorate Regime (Part XI) and Schedule 1.

Deep sea mining activities will involve ship-based maritime activities. Reference is made to both “ships” and “vessels” in Draft Reg. 34 and other draft regulations.

- Is the terminology in Draft Reg. 34 para. 1 and other draft regulations using the words “vessels” and “ships” consistent?
- What is the relationship between the paragraphs of Draft Reg. 34?
- What are the standards on the basis of which the Contractor is to ensure that “all vessels, installations, structures, equipment and other devices operating and engaged in Exploitation Activities are in good repair, in a safe and sound condition and adequately manned” (para. 1 lit. (a)) and that “all ships, platforms and installations used or operating for the purposes of Exploitation Activities have an appropriate class designation and shall remain in class for the duration of the exploitation contract” (para. 1 lit. (b))?
- Does Reg. 34 para. 1 aim at setting such material standards?
- To what kind of services do paragraphs 2 and 3 of Draft Reg. 34 relate?
- Regulation 34 para. 1 uses the term “Exploitation Activities”. This term is explained in Schedule 1 – Use of terms and scope. The definition includes the aspect of transportation “…, and transportation systems”. Would this also include transportation to points on land?

- Could the distinction introduced by ITLOS in its advisory opinion (case no. 17 paras. 92-96) be used to delimit more clearly transportation services that could be included in the notion of “activities in the area” from other transportation services governed by UNCLOS provisions concerning navigation on the high seas?

  ITLOS suggested that transportation to points on land from the part of the high seas superjacent to the part of the Area in which the contractor operates could not be included in the notion of “activities in the Area” (para. 96) but that transportation within that part of the high seas, when directly connected with extraction and lifting, should be included in activities in the Area. Thus, the distinction proposed would be between ships and other units directly connected with the extraction and lifting of deep seabed materials and such ships and units not directly connected, including ships involved in the transportation between land and the exploitation site in the Area, and ships navigating in the proximity of the site (but not involved as such in the exploitation or transport).

  While it seems evident that the UNCLOS rules on navigation and the maritime rules and standards adopted by the International Maritime Organization (IMO) apply to ships which are not directly connected with the exploitation but which are either involved in the transportation chain or which navigate in the proximity, the applicability of this regime is not clear in the context of ships and units which are directly connected with the exploitation of seabed materials, including ship-to-ship-transfer on the exploitation site.
- Is a further consultation with other competent international organizations, in particular IMO and ILO, envisaged in order to check which generally accepted international rules and standards effectively address the specific needs of deep seabed mining and should be made reference to?

Annex VI Emergency Response and Contingency Plan

Germany welcomes the initiative that this plan be further developed (see “Note” at the end of Annex VI) in conjunction with other international organizations, sponsoring States and other entities with relevant jurisdictional competence in order to clarify what chain of rescue will be put in place and to avoid the overstretch of existing search and rescue responsibilities.

A solution could be that Sponsoring States shall, based on emergency plans provided by contractors, prepare external emergency response plans, covering all exploitation activities of mineral resources in factual and potentially affected areas. These external emergency response plans shall be prepared in coordination with ISA and possibly affected Member States regarding trans-boundary effects of potential damage and pollution. Sponsoring states shall specify the role and financial obligation of licensees and operators in the external emergency response plans.

Definition of the term “contractor”

The regulations have to address the case that subcontractors engage in mining activities. Contractors should not be relieved of their duties by the fact that actions or omissions leading or contributing to accidents were carried out by subcontractors. The definition of the term "contractor" needs to be redrafted.

Inspectorate

The Draft Inspectorate Regulations provide for inspections by the Inspectors of the ISA on board of vessels and installations to monitor and enforce the contractor’s compliance. These regulations raise questions relating to the rights and duties of the States involved in their different roles as flag States, Sponsoring States and port States:

- What is the geographical scope of Draft Regulation 85 para. 1 which stipulates “on board vessels and installations whether off-shore or on-shore”? This provision does not seem to be limited to the Area and that

part of the high seas where exploitation activities are being undertaken. What other off-shore areas are envisaged? Are inspections by Inspectors of the Authority to be undertaken in ports? If so, how would the Inspector align ISA procedures with that of the (sovereign) port State?

- While Draft Reg. 88 provides for copies of inspection reports to be send to the Sponsoring State, what is the role of flag States in the context of the draft inspectorate regime given the fact that even when ships are directly connected with extraction and lifting in the Area, they still fly flags of their flag States?
- Germany suggests amending the administrative fees listed in Appendix II. This list should be complemented with “inspections (regulation 65)” in order to reflect the idea of covering the Authority’s costs as stated in Draft Reg. 83 while adhering to the “General Provision” on Inspectors in Draft Reg. 84.

Germany would like to **raise the following questions** and remarks **regarding individual Draft Regulations**:

- Draft Reg. 7 Nr. 4a: How should the LTC determine whether the Contractor sufficiently optimizes the recovery and extraction of minerals according to its Plan of Work?
- Draft Reg. 44: All license areas within the Clarion-Clipperton-Zone include hundreds of seamounts, some of which are covered by more or less thick manganese crusts. This kind of resource, that is different from manganese nodules, would need to be notified to the ISA according to Draft Reg. 44 Nr. 1. However, a notification would only be reasonable in case the contractor plans to mine the resource, which is unlikely regarding seamounts. Draft Reg. 44 Nr. 2 seems to be sufficient for this purpose.
- Draft Reg. 51: The weight of the nodules cannot be properly determined onboard a vessel at sea. Instead, the weight could be estimated from the

volume. The nodule weight can then be determined onshore with sufficient precision for the calculation of the royalty rate. Therefore the valuation point should be the point of the first sale of the mineral-bearing ore.

- Draft Reg. 54: The value of manganese strongly depends on the degree of purity and hence the metallurgical processing method. For example, the price per metric ton varied between 6.4 US$/t for manganese ore index 44 % and 1912 US$/t for 99.7 % electrolytic manganese flakes in October 2017. Therefore, it needs to be determined which price should be adopted for all contractors, since not every contractor will have the same metallurgical processing technique.

Confidentiality

Germany hereby consents to making the contact details and this submission publicly available on the ISA website.

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