



INTERNATIONAL MARINE MINERALS SOCIETY

Secretary General
International Seabed Authority
14-20 Port Royal Street,
Kingston, Jamaica

28 September 2018

Dear Secretary General,

IMMS Comments on the Draft Regulations for the Exploitation of Mineral Resources in the Area

The International Marine Minerals Society (IMMS) commends the ISA on the progress it has made to date on the draft exploitation regulations. IMMS represents a number of marine minerals stakeholder groups from around the world, such as academia including students, government, civil society and industry. Expertise and fields of study of the membership base are diverse and broad reaching, with emphasis on oceanography, ecology and policy, for instance, in addition to mineralogy, shipping and economic geology. IMMS membership comprises members from 26 countries, both developing and developed, with all continents apart from Antarctica represented. IMMS does not represent any one stakeholder group or region of the world, but rather many.

IMMS is committed to providing feedback intended to assist the ISA in developing regulations that achieve both commercial viability and environmental responsibility and IMMS offers the following comments, which we hope you will find to be constructive.

IMMS understands the critical role marine minerals are likely to play in the development of clean energy infrastructure and a low carbon future for our planet. The commercial development of marine minerals promises to unlock large resources of, for example, copper, nickel, manganese, cobalt – all of which will play a key role in tackling climate change (World Bank, 2017). Many marine minerals also contain

rare earth metals which are also important for climate change solutions. Moreover, metals are needed for basic infrastructure development, clean water distribution systems, technology, and to meet the development desires and demands of the world's growing population, along with the needs of developing societies transitioning to urbanisation.

IMMS is supportive of the industry progressing to commercial development, which is in line with one of UNCLOS's foundational principles to increase the world's supply of minerals. IMMS membership contains a wide range of environmental expertise and all members generally are very environmentally aware and understand the need for ensuring that even as the industry progresses, it is important to ensure ecosystem health and function are maintained. Thus, IMMS is also supportive of ensuring the regulations that govern the emerging industry are environmentally sound.

Members suggest the following as critical general concepts that should continue to guide the ISA in its regulatory development:

1. The ISA's mission to serve the common heritage of mankind requires it to support responsible exploitation of ocean minerals, rather than a code that discourages investment.
2. The ISA should provide sufficient tenure of the license to incentivize investment (30 years seems reasonable).
3. Contractors need a clear and timely schedule for permit acquisition to make it possible for them to commit funds towards continued development (the total time required for the permit acquisition process should take on average no more than 12 months – the process currently proposed in the draft regulations appears to take much longer than this, which is too long and not competitive with land-based regimes).
4. The ISA should maintain a strict adherence to the regulatory principles of predictability and stability. This is of utmost importance to encourage investment.
5. The ISA regulatory development must recognize and be mindful of the interdependency of regulatory decisions made in the mining code. The different parts and sections of the code will not stand alone. A decision on environmental requirements applied to the collector vehicle, for instance, will cascade into areas affecting efficiency, speed, volume, and, ultimately, economic viability of the entire collector system.
6. The ISA should focus on facts in the deliberation, analysis, and drafting of the mining code, and strongly resist the speculative hyperbole and non-factual assertions made by certain outside interest groups who seek to raise issues about environmental consequences of potential mineral collection without solid, empirical data to support their assertions.

While IMMS recognises important advances have been made since the previous versions of the draft regulations, there remain some concerns within the IMMS membership, in particular around regulatory certainty and stability and commercial viability. IMMS members also feel there are some key terms in need of further definition in order to avoid future conflicts due to differences in interpretation between the ISA and its stakeholders, including Contractors.

Certainty, Stability and Commercial Viability

One of UNCLOS' foundational principles is to increase the world supply of minerals. To ensure the emerging seabed minerals industry has the opportunity to help fulfil this principle, the ISA must ensure the regulations – indeed, all elements of the Code - reflect sound commercial principles and practices. Members also encourage the ISA to incorporate a broader representation of the foundational principles of UNCLOS in the Fundamental Principles section of the Draft Regulations, for example those that also reflect UNCLOS' positive commitment to exploitation and increasing the world supply of minerals.

Below are some concerns raised by the IMMS Membership:

Changing Regulations. Members are concerned that the current draft regulations may be subject to frequent change, along with the standards and guidelines which have yet to be fully developed. Frequent change brings uncertainty to any industry, nascent or mature. This is of particular concern to an emerging industry which entails a great deal of up front capital for research and development, equipment design and build, etc. In order to commit the levels of expenditure required, Contractors and their investors need comfort that the rule book will not change frequently, which may result in the need to make changes to technology and plans, which could be extremely costly. Where changes are deemed necessary, it needs to be recognised that material changes to regulatory requirements can cause significant commercial viability issues. Therefore, material changes should be made only by mutual agreement with the affected Contractor(s), or otherwise if the change results in the Contractor incurring significant additional costs, there may need to be a compensation mechanism for affected Contractors. Members further note that it would be unreasonable to change the rules on a Contractor acting in compliance with their Plan of Work and Contract.

Timely decision-making. IMMS is pleased that both the LTC and Council have taken on additional sessions each year to help accommodate workload and facilitate the development of regulations in a timely manner. Due to the roughly 6-monthly nature of the sessions, however, members continue to be concerned that as the industry moves towards the exploitation phase, that the regulator (ISA) will still struggle to respond in real time to applications, the various stages of the application process, and to issues that may arise during that process and/or during operations. This is a critical issue and real-time decision-making is normal practise in other regulatory regimes, including land-based mining. If it is not realistic for the Council to make real-time decisions, or decisions between sessions, one solution may for more power to be given to the Secretary General to make certain decisions on behalf of the Council during times between sessions. For example, in relation to Draft Regulation

23(2) which deals with Contract as Security – it may be more appropriate for the Secretary General to issue his/her consent on behalf of Council and that approval not to be unreasonably withheld. There is concern that the requirement for Council approval may substantially delay the registration of the security interest, especially if its meetings are several months apart. The rationale for this proposed change is that such arrangements may need to be made swiftly, especially in times of adverse economic conditions, and the change reflects normal land-based mining practise and seabed operations should be treated similarly so as to ensure there is no disadvantage.

Production Limits. Provided Contractors are compliant with their approved Plan of Work, there should be no limit placed on production rate, unless there is a risk that the environmental impacts will exceed that which were approved by the ISA or if there is a need to protect human health and safety.

Total Cost. As the conversation around the distribution of benefits and the potential uses of financial payments to the ISA continues, IMMS members note the need to be mindful of the ‘total cost’ being asked of Contractors. The total cost must not result in creating a commercially unviable situation for the industry. To do so would create a disadvantage to the seafloor minerals industry compared to the mature land-based mining industry.

Definitions

Best Available Techniques and Best Environmental Practise. It is important that these two terms are defined in such a way as to ensure the associated requirements are commercially viable and practical.

Environmental Effect: It is recommended that the word “material” be inserted between “any” and “consequences”.

Stakeholder. One definition that appears to have resulted in much discussion is that of “stakeholders”, and how broadly it should be defined and who should be included within the definition. Some have argued that everyone living on this planet should be an ISA stakeholder. IMMS is concerned that, on a practical level, if everyone and anyone can be a “stakeholder” that the ISA may be inundated with speculative hyperbole and non-factual assertions made by, for example, certain outside interest groups who may lack the solid, empirical data to support their assertions. To avoid this situation, IMMS suggests that the stakeholder definition should only include persons or an association of persons with a direct interest or who may be directly affected by the proposed or existing exploitation activities under a Plan of Work in the Area. It is also proposed that, where possible, these persons or an association of persons be made known so that the general public may approach them should they wish to have their input included in submissions made by those identified persons or groups. This should at least help prevent some run-away and potentially unhelpful commentary and the ISA having to deal with potentially hundreds of thousands (if not more) submissions.

Feedback on Specific Regulations

Draft Regulation 2.2 (a). It would be helpful to understand what is meant by “in accordance with sound principles of conservation”. It is not immediately clear what these sound principles would be.

Draft Regulation 2.2 (d). While members do not object to this (Protection of Developing Countries) in principle, Exploitation Regulations are not the appropriate place to address this issue. Concern is also expressed that paragraph (d) could be misinterpreted to mean that existing land-based mines should be given priority or even a veto over marine mineral projects. It is recommended that this Draft Regulation is removed and that the issue be dealt with elsewhere.

Draft Regulation 6. Members suggest the addition of a new item 5 that would require a statement by the sponsoring state that specifies the reasons for which the sponsorship would be terminated (Draft Regulation 22).

Draft Regulation 23. Members support the inclusion of this Draft Regulation but note that it would be more appropriate for the consent to be issued by the Secretary General (on behalf of Council) with “approval not to be unreasonably withheld”. This reflects normal practise for land-based mining.

Draft Regulation 24.1. Members note that it would be more appropriate for the consent to be issued by the Secretary General (on behalf of Council) with “approval not to be unreasonably withheld”. In instances where it is not appropriate for the Secretariat to make decisions, Members would urge there be a solution that allows the LTC and/or Council to meet as required (e.g. remotely).

Draft Regulation 24.4 (c). It is unclear whether the intention is for the transferee to apply for a new Contract, which does not seem reasonable. Members recommend that the following wording be inserted at the start of paragraph (c): “if the Secretary General considers that the Plan of Work has materially changed,”.

Draft Regulation 24.10. Members recommend that this Draft Regulation be deleted as this removes considerable security and certainty for the transferee, which may make it difficult to reach agreement. This may also contravene Section 14.3 of the Contract (i.e. “The terms, undertakings and conditions of this Contract shall inure to the benefit of and be binding upon the parties hereto and their respective successors and assigns”).

Draft Regulation 30.4. Members seek for the wording to be changed from “is required to protect the Marine Environment or to protect human health and safety” to: “is required to stop or reduce environmental disturbance or impact that exceeds that described in the approved Plan of Work or to protect human health and safety”.

Draft Regulation 37. Members note that in the case of finding human remains or objects or sites of an archaeological or historical nature, the course of actions should be made clearer, to allow for increased certainty, particularly around length of process. Members agree there should be immediate notification by the Contractor of

any such finding and that there should be no exploration or exploitation within a reasonable radius, however “until such a time as Council decides otherwise” is too vague and a timeline of procedures is recommended. Members suggest that additional wording be added to this draft regulation that describes the next steps and their expected timeframes (e.g. Council will inform the relevant and competent international organisation(s) within no more than [for example] 14 days after notification by the Contractor, Council will take into account the views of the competent international organisation(s) and issue a decision to the Contractor no later than [for example] 3 months after the initial notification, etc.).

Draft Regulation 41.3. Members note it may not always be possible to keep and preserve samples, particularly biological samples given the analyses are often destructive. IMMS suggests the wording “To the extent practical” be inserted at the beginning of the regulation.

Draft Regulation 46. It is important that the terms “Best Available Techniques” and “Best Environmental Practise” are defined in such a way as to ensure the associated requirements are commercially viable and practical.

Draft Regulation 50.6. It seems reasonable that the independent competent person should be mutually agreed by the ISA and the relevant Contractor.

Draft Regulation 63.1. Members submit that the calculation of the royalty should be fixed at the time the exploitation contract is signed and should not be able to be changed through Guidelines.

Draft Regulation 80.1. Five years is a very short time to allow the Authority to review and change the rates of payments and will add a potentially unacceptable risk for potential investors in the project. At least 10 years should be set during which the initial rates will be applied.

Draft Regulation 96(g). It seems unreasonable for inspectors to be empowered to seize samples and assays without a clear cause for such activities. Seizure of representative sub-samples and copies of assays would be much more reasonable.

Annex IV, Section 3.7 Other alternatives considered. A “No Action” alternative should explicitly be included to document the anticipated general effects of not undertaking the project.

Annex IX, Section D. Entry into force and contract term. The initial period should be specified as 30 years (as specified in Draft Regulation 21), unless a different period is acceptable to both the Authority and the Contractor.

IMMS appreciates the opportunity to provide comment and is pleased to grant its consent to the Authority to disclose the information in this document. IMMS welcomes the opportunity to participate in future aspects of ISA work and looks forward to continued progress and completion of the Mining Code. Only with this work complete can the world truly begin to benefit from the marine minerals of the international seabed area.