Draft Regulations on Exploitation of Mineral Resources in the Area

- Comments by Italy -

In general, the structure of the regulations are well written and is consistent with similar existing codes in national legislations. Notwithstanding, the regulations make continuous references to Guidelines, Codes, etc. that the Authority will have to adopt in the future, relating *i.a.* to the processing of sensitive data, inspection procedures, etc. Many issues remain therefore unresolved and should instead be better defined. We ask to evaluate whether it is appropriate to establish the terms of adoption of these specifications, so as to complete the regulatory framework, before the mining activities are authorized to begin.

Part		
I	**Introduction**	**DR 2**: The inclusion of a regulation that reproduce, but not in full, art. 150 of the UNCLOS may be misleading. As UNCLOS prevails over the regulation, which must be interpreted and applied in accordance with UNCLOS, the usefulness of reproducing a standard already in force is questionable, especially when new elements are introduced (ecosystem approach, for example). It would be better to opt for a reference to art. 150 and then to indicate additional agreed principles so as to make it clear that these are subordinated to those of UNCLOS.
II	**Applications for approval of Plans of Work in the form of Contracts**	With regard to environmental issues, the regulations refer to "good industry practice" and to future guidelines and it does not mention specific rules, which will have to be formulated and finalized in advance of the final adoption of the regulations. Indeed, as an example, **DR 14** provides that: "*The Commission shall determine whether the environmental plans provide for the effective protection of the Marine Environment in compliance with the Article 145 of the Convention, including through the application of a precautionary approach and Good Industry Practice*". While the precautionary approach is recognized as global value* and it is contained in several international and national legal instruments, the “Good Industry Practice” might generally refer to the exercise of the degree of skill and care, diligence, prudence and foresight which would reasonably and ordinarily be expected from a skilled and experienced contractor. We suggest to reconsider the juxtaposition of such different elements. **DR 13.4(d)** establishes that the Plan of Work should provide “for Exploitation activities to be carried out with reasonable regard for other activities in the Marine Environment”. In analogy with Section 3.3(d) of the “Standard clauses for exploitation contract” (Annex X), a mention to the marine environment should also be taken into consideration in DR 13.4(d). Italy therefore proposes that DR 13.4(d) be amended as follows: “Provides for Exploitation activities to be carried out with due regard to the effect of exploitation activities on the Marine Environment and with reasonable regard for other activities in the Marine Environment…” * Principle 15 of the Rio Declaration: “In order to protect the environment, the precautionary approach shall be widely applied by States according to

		their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation"
III	**Rights and obligations of contractors**	In general, Italy has concerns about the regulations, in case of serious harm to the environment, incidents and the deriving costs of remediation, because it is not clear who will cover for these and which instruments will apply. Furthermore, there are concerns about the duration of a license to a single contractor in a specific area. In these regards, the balance of rights and obligations is not satisfactory at the present stage of drafting. Specifically, **DR 21**: The terms of the contract are set at 30 years and the related extensions at 10 years, without defining a maximum number of extensions that can be granted, although they must be motivated according to the provisions of DR 21. Considering the possibility for the contractor to request, with due motivation, a suspension of the activities, such provisions could theoretically recognize to an individual contractor an indefinite term of exploitation of an area. We recommend evaluating if it is not therefore appropriate to confine the terms of the activities in line with the times actually needed for an efficient mining of the area under contract. The guarantee systems that cover the risks related to the mining activities and established by draft regulations 27, 38 and 52 are defined as the Environmental Performance Guarantee, the Insurance and the Trust fund. Specifically, **DR 27** requires that reference should be made to the costs for: premature closure of activities, decommissioning, post closure monitoring, management of residual environmental effects. However, the costs of managing possible emergencies, including subsequent restoration costs, are not taken in consideration. On the other hand, **DR 38** states: *"A Contractor shall maintain in full force and effect, and cause its subcontractors to maintain, appropriate insurance policies"*. It is not clear what kind of damages such insurance should cover, and the scope of such coverage. How does it combine with the guarantees given in regulations 27 and 52? In case of a serious accident or unexpected expenses, bankruptcies of contractors and/or mining companies, especially in the initial phases of the activities, there is a high risk that no adequate hedges (insurance, fund, guarantees) are provided and that the subsequent costs would fall on the member states, the environment and ultimately on the common heritage of human kind. Furthermore, **DR 53** and **54** of part IV, which refer to the establishment and the capacity of the trust fund, do not clarify how to ensure that the fund is adequate at the time when it will be needed to remedy possible damage. It seems that the Fund's contribution modalities are aleatory and unstable and they do not necessarily ensure adequate capacity to cover emergencies. **DR 32-73-94-97** and **section 13** provide an equivalence between vessel and installation. It is recommended to disambiguate because vessels and installations would be subject to different legislations. In the "*Use of terms and scope"* section, the term "Installations" *includes, insofar as they are*

		used for carrying out activities in the Area, structures, platforms, equipment and surface and bottom devices, whether stationary or mobile, including unmanned submersibles". This is too broad spectrum which include both small vehicles and potential fixed installations at the seabed.
IV	**Protection and preservation of the Marine Environment**	**DR 46** *"General obligations"*. We suggest to consider also including "*develop a scientific advisory board to ensure the full implementation of an integrated system for surveillance and monitoring of the impacts deriving from the mining activities*". This would benefit from the ongoing collaborations between contractors and universities and will reinforce transparency of the Authority and improve the role of the Authority in fostering and coordinating marine scientific research in the Area. In **DR 34-47**: the term "minimize" should be used instead of "*reduce*" to be in line with similar existing legislations on marine resource exploitation. A contractor shall minimize the risk of incidents and shall minimize pollution at sea. **DR 48**: "*Mining discharge*". A public communication plan about mining discharge might be prepared by the Authority, based on methods and technical standards of the contractors.
V	**Review and modification of a Plan of Work**	It is noted that the tasks of the Commission will increase and its role will be enhanced. Consider revising the composition and the size of the Commission, including the appointment of separate working groups with different assignments based on the expertise of the members. The role of the Secretary-General should remain that of a guarantor of the Convention and the functions should be limited to the application of the Law.
VI	**Closure plans and post-closure monitoring**	**DR 58** and **DR 59**: It is assumed that the "*closure plan*" will undergo an environmental assessment protocol. Since, frequently, a reference to "*installation*" is made through the regulations, evaluate whether it is appropriate to envisage any re-allocation (repurposing) of the decommissioned infrastructures, e.g. for monitoring purposes.
VII	**Financial terms of an exploitation contract**	The draft regulations currently do not identify definite criteria for adequate setting of fees and royalties. While such criteria should not be bureaucratically burdensome or excessively detailed, they should however provide the fundamental guidelines for the Council to periodically decide their amounts and therefore keep consistency in time. MIT illustrated a comparison between *Ad valorem* and after taxes profit revenue schemes. Professor Roth preliminary concluded that the Ad Valorem model might be more profitable for the Authority in terms of predictable amount of revenues and relative simplicity of the application of the model. Italy would suggest to consider the model, whatever it will be, that better reflects the dynamic behavior of the metals market and how these in turns influence the seabed mining perspectives or activities, when the exploitation will commence. In particular, setting of royalties should consider the context of the concerned periods in relation to the specific international economic and financial environment, and possibly a supplementary effort should be paid to include ever-changing geopolitical scenarios and the uncertainty deriving from the volatility of the metals market. We do expect an increase in metal prices in the near future, but we know they are still fundamentally recovering from the significant drop that followed the late 2000s economic crisis. Furthermore, the cost structure of the various types of polymetallic

		materials is also very different, affecting the Contractor margins, the consequent investment attraction capacities and the possible technological developments. For the moment, the financial model has been applied only to the nodules, but we should expect significant deviations for sulfides and crusts. All these elements of uncertainty, which stand, solely, at the moment, on the financial side and do not take into account any environmental costs, should be considered when identifying the financial criteria for the Authority revenues, before finalizing the regulations. Finally, the thresholds for any deductibles, for example in relation to quantities of product mined, but for different reasons not commercialized or dispersed, used in non-commercial/industrial operations or eventually reintroduced into the seabed, after treatment for environmental remediation, should also be specified in the regulations.
VIII	**Annual, administrative and other applicable fees**	**DR 82**: "*A Contractor shall pay to the Authority, from the effective date of an exploitation contract and for the term of the exploitation contract and renewal thereof, an annual reporting fee as determined by a decision of the Council <u>from time to time</u>*". Such definition seems excessively general, referring to the determination of such taxation "from time to time" to the Council. Regular deadlines will provide a better predictability of costs for contractors and revenues for the Authority. The Council would eventually revise the periodicity of the update process fees.
IX	**Information gathering and handling**	**DR 87 (1)** is appropriate as is written. Although transparency vs confidentiality of the Contractors' know-how and industrial secrets should be treated on an equal footing, the need to preserve transparency is more compelling and therefore contracts should be made as public as possible, as well as information in cases of non-compliance of a Contractor should be made available in due time to the public. Furthermore, the performance assessment reports from the contractors and the Commission's review shall include relevant information, also in non-technical terms, in order to facilitate easy understanding and thus minimizing the perception of poor transparency on issues that would possibly become of high concern for public opinion and stakeholders. A good example is provided by the EITI - Extractive Industry Transparency Initiative - that is a global standard for the good governance of oil, gas and mineral resources and that fosters transparency between governments, industry and civil society. Regarding **DR 87/ 2(e)**, "confidential information" can include sensitive data as defined as such by the law of a sponsoring State. This may generate problems and conflicts between the different legislations of member States and would make it difficult to reconcile the rules of the various States with respect to the common definitions provided by the Authority. Furthermore, it may open to the paradox that a State might issue a legislation to cover under confidentiality certain data related to the activities in the Area. Concerning **DR 88**, additional costs and expenditures may also derive from procedures to ensure confidentiality and this aspect should be foreseen by the Authority, especially in terms of cost-effective analysis. As an example, several-scale facilities, such as online databases, required to maintain confidential information and the criteria to regulate the access to information, including the security enforcement to prevent unauthorized disclosure and update to relevant legislation on the matter.

X	**General procedures, Standards and Guidelines**	
XI	**Inspection, compliance and enforcement**	
XII	**Settlement of disputes**	
XIII	**Review of these Regulations**	