SUBMISSION OF JAMAICA
COMMENTS ON THE DRAFT REGULATIONS

At the Twenty-fourth session of the Council Jamaica provided general comments on the first eight parts of the revised draft regulations contained in document ISBA/24/LTC/WP.1/Rev.1 ('the Draft Regulations') and addressed the areas on which the Legal and Technical Commission ('LTC') requested guidance from the Council[1]. It was agreed that Members would submit their comments in writing and provide additional comments, if any, on the Draft Regulations by 30 September 2018.

The summary of the comments on the Draft Regulations contained in Annex I to the Statement of the President on the work of the Council during the second part of the twenty-fourth session, entitled "Comments on the structure and flow of the revised draft regulations, on its Parts I to VIII (ISBA/24/LTC/WP.1/Rev.1) as well as others for which the Commission has requested guidance from the Council" (hereinafter 'Annex to the President's Statement'), includes many observations which Jamaica supports and some that we believe should be further developed and/or clarified. These are highlighted in the comments on the Draft Regulations that follow.

Jamaica wishes to reiterate its appreciation for the work done on the Draft Regulations by the LTC and the Secretariat of the International Seabed Authority ('ISA'). The revised text is more structured, demonstrates greater consistency with the provisions of the UN Convention on the Law of the Sea (UNCLOS) and the 1994 Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea ('1994 Agreement'), and generally seeks to promote collaboration between the ISA, sponsoring States, flag States, coastal States and other interested States and stakeholders which should minimize the regulatory burden in dispensing with needless duplication in the requirements imposed on Contractors where concurrent jurisdiction exists.

Although the provisions on the protection of the environment have been strengthened in the Draft Regulations, much work remains to be done. This may be attributed to the proposed approach of treating with environmental matters largely through Standards and Guidelines. The Annex to the President's Statement invites the LTC to strengthen the provisions on environmental protection so as to provide a robust environmental framework in the body of the text rather than in annexes. Jamaica is of the view that

[1] See "Draft regulations on exploitation of mineral resources in the Area: Note by the Legal and Technical Commission," ISBA/24/C/20, 10 July 2018.

whatever approach is adopted, the development of Standards and Guidelines must proceed in parallel with the revisions of the Draft Regulations. This should also enable a greater appreciation of the extent to which the proposed regulatory regime for the exploitation of minerals adequately addresses the effective protection of the marine environment.

The following are Jamaica's specific comments on the Draft Regulations. Jamaica will further develop its responses at the Twenty-Fifth Session of the Council taking into account the observations submitted by other member States and stakeholders.

Part 1 - Introduction

DR 1

Jamaica supports the inclusion in DR 1 on use of terms and scope an additional paragraph stating that the annexes, appendixes and Schedule 1 to the Draft Regulations form an integral part of the Regulations and any reference to the Regulations includes a reference to the annexes, appendixes and definitions in Schedule 1 relating thereto.[2]

Alternatively, the above-stated language could be included in the final provisions of the Draft Regulations.

DR 2 - CHM

Jamaica supports strengthening the references in the Draft Regulations to the Common Heritage of Mankind ('CHM'). The Note by the LTC, ISBA/24/C/20, draws attention to the steps taken to reinforce the CHM principle in the operative provisions in the Draft Regulations through including specific regulatory text in draft regulation ('DR') 2 (1) and (2), DR 12 (4) and DR 16(1). Jamaica appreciates the steps taken by the LTC. **Jamaica recommends the further strengthening of the text of DR 2 which addresses the fundamental principles as follows**:

- Include in DR 2 the fundamental principles stated in UNCLOS, Part XI, Section 2, the most important being that stated in Article 136. **Insert a**

[2] The Annex to the President's Statement invites the LTC to "*strengthen provisions on environmental protection, monitoring, evaluation and on the closure plan to provide a robust environmental framework with inputs from all stakeholders in the body of the text rather than in annexes*". This raises questions as to the legal nature of the annexes. Notably, in the Draft Regulations of 9 July 2018 elements of previous version of 29 May 2018 that were in Annex IV have been moved to DR 46 bis of Section 1 bis of Part IV. Similarly, elements of Annex VII of the 29 May 2018 text on the Environmental Management and Monitoring Plan (EMMP) are moved to DR 46 ter; and elements of Annex VIII on the Closure Plan are now incorporated into DR 57.

new DR 2(1) stating "*[Uphold][Affirm] the common heritage of mankind in the Area and its Resources.*" DR 2(1) as currently drafted would become DR 2(2) and the paragraphs thereafter would be renumbered accordingly.

- **DR 2(7) should be amended to refer to "*the [long term] sustainable development of the common heritage of mankind*".** Jamaica is proposing the insertion of the word '*sustainable*'. It is noted that the reference to '*long term*' in the 29 May 2018 text has been dropped from the 9 July 2018 version of the Draft Regulations. The importance of the CHM for generations yet unborn should be captured through appropriate language. An alternative suggested text would read **"*the sustainable development of the common heritage of mankind for present generations and those yet unborn*."**

The insertion of DR 2(8) requiring the Draft Regulations to be interpreted and all functions performed thereunder to be undertaken in conformity with the fundamental principles is a welcome addition to the revised text of 9 July 2018.

DR 2 – prevention of monopolization

DR 2(2) addresses the policies relating to activities in the Area as prescribed by UNCLOS, Article 150. The notable omission from the policies outlined in Article 150 is reference to the "*prevention of monopolization of activities in the Area*" as required by Article 150(g). Jamaica notes that the Annex to the President's Statement in addressing comments under Part II of the Draft Regulations invites the LTC to elaborate on monopolization and highlights DR 16 and also DR 24 in Part III. **Jamaica holds to the view that as DR 2 articulates the fundamental principles that inform action taken under the Draft Regulations and DR 2(2) seeks to give effect to UNCLOS, Article 150, the mandate against monopolization should also be stated in DR 2(2).**

The Note by the Secretariat, ISBA/20/LTC/11, "Monopolization of activities in the Area", highlights the need for the development of clear rules for the implementation of the UNCLOS provisions against monopolization. The deliberations of the LTC, as evidenced in its reports to Council, have not advanced the necessary work to be done on this issue. Clarity on the application of the concept of monopolization in line with the principle of the CHM should be achieved prior the issuance of exploitation contracts.

DR 2 – 'conserve' and 'preserve'

The Annex to the President's Statement invites the LTC to maintain in the Draft Regulations the distinctions between the uses of 'conserve' and 'preserve' in the UNCLOS and refers in particular to DR 2(5)(a). The use of terminology and

the development of a common understanding of various expressions used in the Draft Regulations is an area highlighted for further examination in the Note by the LTC, ISBA/24/C/20.

Jamaica takes this opportunity to address its understandings of the appropriate use of the words 'conserve' and 'preserve'.

UNCLOS, Article 145 imposes an obligation on the ISA to adopt appropriate rules, regulations and procedures for *inter alia* the *protection and conservation* of the natural resources of the Area and prevention of damage to the flora and fauna of the marine environment. The objective of Part XI is to ensure the *conservation and sustainable use* of the marine environment for current and future generations. The focus of Part XII of UNCLOS is on the *protection and preservation* of the marine environment. Parts XI and XII are meant to be read complimentarily.

Part XI, Article162(2)(x) provides for the preservation of the environment through the disapproval of areas for exploitation where substantial evidence indicates the risk of serious harm to the marine environment. Most often, however, the protection of the environment is demonstrated through various conservation measures which protect the environment alongside the development of a deep seabed mining industry. Part XI establishes the mandate of the ISA and its work programme. The development of area-based environmental management tools (ABMTs) including the pursuit of regional environmental management plans (REMPs) as addressed in DR 2(5) are for the protection, conservation and sustainable use as well as the preservation of the marine environment.

The distinction between "impact reference zones" and "preservation reference zones" as defined in the Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area, regulation 31.7 is informative. "Impact reference zones" are areas to be used for assessing the effect of each Contractor's activities in the Area on the marine environment and must be representative of the environmental characteristics of the Area. "*Preservation reference zones*" are areas in which no mining may occur to ensure representative and stable biota of the seabed in order to assess any changes in the flora and fauna of the marine environment.

The use of the word 'preserve' may be read as signifying the maintenance of the marine environment in its present condition, unexploited by humans. For purposes of clarity it may be best to reserve the use of the word 'preserve' for those circumstances where the intention is to prohibit mining and related activities. In any event, as the words are often used almost synonymously,

where distinct legal inferences are to be drawn from the use of the words 'conserve' and 'preserve' the context should clearly demonstrate this.

Other terms used in Part 1 requiring clarification

The Annex to the President's Statement invites the LTC to clarify objectives, standards, thresholds and the relationship between 'best environmental practices', 'best available scientific evidence', 'best available techniques' and 'good industry practices'. This is noted is relation to Part II of the Draft Regulations, although the terms are also used in Part I. **Jamaica recommends that consideration be given, in particular, to the diminished emphasis on the use of Best Environmental Practices which has been subsumed within the broader concept of "Good Industry Practices".**

The definition of "Good Industry Practice" in the Draft Regulations includes "Best Environmental Practice". The latter term is used only on two occasions (aside from its definition in Schedule 1), that is in DR 3(e)[3] and DR 46(b).[4] The use of Best Environmental Practices is an obligation imposed on the ISA, sponsoring States and Contractors under the exploration regulations.[5] The need to apply best environmental practices has been described by the Seabed Disputes Chamber of the International Tribunal on the Law of the Sea (ITLOS) as "*hav[ing] become enshrined in the sponsoring States' obligation of due diligence.*"[6]

While a number of important principles are included in DR 2, no direct reference is made to Best Environmental Practices; reference is made to Good Industry Practice in DR 2(3) addressing exploitation in accordance with sound commercial principles. **Jamaica recommends the inclusion of Best Environmental Practices in DR 2(5) addressing the effective protection of the Marine Environment from the harmful effects that may arise from Exploitation,**

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[3] DR 3(e) calls for cooperation and collaboration with a view to the implementation and further development of Best Environmental Practices.

[4] DR 46(b) is in Part IV of the Draft Regulations and addresses the obligation to ensure effective protection of the environment in the context of UNCLOS, Article 145; it requires the application of Best Available Techniques and Best Environmental Practice.

[5] *E.g.* Regulations on prospecting and exploration for polymetallic sulphides in the Area ('Sulphides Regulations'), regulation 5 on the protection and preservation of the marine environment during prospecting, regulations 33(2) concerning the effective protection for the marine environment from harmful effects which may arise from activities in the Area; Sulphides Regulations, Annex 4, section 5.1, standard clauses for exploration contracts concerning necessary measures to prevent, reduce and control pollution and other hazards to the marine environment arising from its activities in the Area.

[6] ITLOS Advisory Opinion on "Responsibilities and Obligations of States Sponsoring Persons and Entities with respect to Activities in the Area" ('ITLOS Advisory Opinion'), para 136.

and a review of the definition of the term in Schedule 1 of the Draft Regulations when developing the applicable Guidelines.[7]

DR 3

Jamaica recommends that DR 3(b) also refer to flag States in imposing the obligation to cooperate towards the avoidance of unnecessary duplication of administrative procedures and compliance requirements. In this regard Jamaica notes the ISA Secretariat's discussions with the International Maritime Organization (IMO) as regards jurisdictional competence and areas of cooperation[8] as contemplated in DR 3(d).

DR 4

DR 4(2) establishes a process for the Secretary-General to take action where activities in the Area potentially threaten Serious Harm to the Marine Environment of a coastal State. DR 4(3) provides for the issuance of a compliance notice by the Secretary-General where there are '*clear grounds*' for believing that Serious Harm to the Marine Environment is likely to occur. The provisions raise 2 issues. Firstly, the evidential standard to be applied by virtue of the reference to '*clear grounds'*. This phrase *appears* to suggest more than on a 'preponderance of the evidence'; but rather 'clear and convincing evidence' requiring proof that there is a high probability that a particular fact is true, though not proof 'beyond a reasonable doubt'. The second issue relates to the competence of the Secretary-General and whether he or she should assume the role of arbiter between the coastal State, Contractor and its Sponsoring State, resulting in the possible issuance of a compliance notice.

Jamaica recommends that Guidelines should be developed for implementing DR 4(2) and DR 4(3) with a view to ensuring due process and clearly defining the evidential standard to be applied by the Secretary-General in making a determination to issue a compliance notice. Jamaica's general reservations on the circumstances under which compliance notices may be issued are addressed under DR 101.

Part II – Applications for approval of Plans of Work in the form of Contracts

DR 6(2)

The Annex to the President's Statement invites the LTC to review the issues of multiple sponsorship and effective control. **Jamaica supports the proposed**

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[7] Schedule 1 on Use of terms and scope states, ""Best Environmental Practices" means the application of the most appropriate combination of environmental control measures and strategies, taking into account the criteria set out in the applicable Guidelines."

[8] Note by the LTC, ISBA/24/ C/20.

review and recommends that consideration also be given to the manner in which UNCLOS, Annex III, Article 6(4) on monopolisation should be implemented in relation to sponsorship by partnerships or consortiums.

DR 7(3)

An application for a Plan of Work is to be accompanied by a Mining Workplan, Financing Plan, Environmental Impact Statement, Emergency Response and Contingency Plan, Health, Safety and Maritime Security Plan, Training Plan, Environmental Management and Monitoring Plan, Closure Plan, and various data that must be submitted on the expiration or termination of a contract for exploration. DR 7(3) requires that all the afore-mentioned documents and data be "*prepared in accordance with the Guidelines, where applicable*".

The Standards and Guidelines to be developed will significantly define how the regulatory regime will be implemented in practice. The nature and content of Standards and Guidelines has not been substantively addressed by the LTC. The sequencing of the work to be undertaken will be crucial to any assessment of the Draft Regulations. The Annex to the President's Statement makes reference to DR 7(3) and invites the LTC to develop a list of priorities for the development of Standards and Guidelines in parallel with the Draft Regulations.

The Note by the LTC, ISBA/24/C/20, states that, the ISA Secretariat is to provide the LTC with a list of the Guidelines referred to in the Draft Regulations, together with indicative content. Such a list is important as the Draft Regulations in using language such as "*where applicable*" in DR 7(3) leaves it open as to whether Guidelines will or will not be developed in a number of areas.

The Note by the LTC, ISBA/24/C/20, also refers to a proposed multi-stakeholder workshop in the first quarter of 2019 to examine and draw up a list of Standards relevant to activities in the Area, propose a process for the development of Standards, and reflect on the issue of which Standards should be legally binding and how Standards are best reflected and incorporated into the regulations. **In light of the increasing importance of workshops in the development of rules, Jamaica would encourage greater use of webcasting to allow for greater viewing and participation by member States and other stakeholders**.

It is assumed that many Standards and Guidelines will be resource-specific. The Secretariat report "Issues related to the possible alignment of the Authority's regulations on prospecting and exploration concerning the offer of an equity interest in a joint venture arrangement," ISBA/24/LTC/4,

attributes certain distinctions in the resource-specific exploration regulations to differences in the nature of the resources, in particular the two-dimensional nature of polymetallic nodules in contrast with polymetallic sulphides and cobalt-rich ferromanganese crusts which are three-dimensional in nature. The Note by the LTC, ISBA/24/C/20, moots the possibility of resource-specific provisions being included in technical annexures to the Draft Regulations. **Jamaica seeks further clarification on the extent to which resource-specific provisions will be proposed, while ensuring parity in the treatment of Contractors, and the intended mechanism for doing so.**

DR 12(4)

The Note by the LTC, ISBA/24/C/20, cites DR 12(4) as one of the provisions reinforcing the CHM principle. The mandate for the LTC in considering applications for a Plan of Work to have regard to the extent to which the proposed Plan of Work contributes to realizing benefits for mankind as a whole (as provided in DR 12(4)) will not be meaningful without the development of criteria to inform such a determination. **Jamaica notes the LTC's commitment to continue to examine how DR 12(4) may be practically implemented. We recommend that Guidelines be developed to facilitate the consistent application by the LTC of the obligation stated in DR 12(4) and also assist Contractors in developing an appropriate Plan of Work**.

DR 12(5)

Provision is made for the involvement of independent competent persons and/or external experts at various stages of the application, review and monitoring processes in relation to an exploitation contract. DR 12(5)(b) provides that the LTC in considering a proposed Plan of Work shall take into account "*[a]ny advice or reports sought by the Commission or the Secretary-General from independent competent persons in respect of the application to verify, clarify or substantiate the information provided, methodology used or conclusions drawn by an applicant*".

Jamaica is of the view that the process for soliciting the views of independent competent persons/external experts must be transparent and appropriate procedures defined to ensure the sourcing of geographically and culturally diverse representation within the pool external experts. This applies to all references to independent competent persons and external experts in the Draft Regulations. Appropriate reference may be made in the Draft Regulations to relevant international bodies from which independent expertise may be drawn to assist in informing the LTC, and other ISA bodies and organs in their decision-making processes.

DR 13(1)

Jamaica recommends that the assessment of an applicant under DR 13(1) should take into account the applicant's performance under the existing exploration contract.

DR 15

Jamaica recommends that the LTC's consideration and requested amendments to a Plan of Work under DR 15 should take into account the applicant's performance under the exploration contract.

Part III Rights and obligations of Contractors

Section 1

The extensive rights accorded to Contractors over the resources of the Area which are the common heritage of mankind are defined in the provisions of Section 1 of Part III of the Draft Regulations:

- DR 19(1) & (2) grant the Contractor exclusive rights to exploit a specified resource category and preclude any other entity from exploiting or exploring for the same resource category in the Contract Area for the entire duration of the contract.
- DR 19(3) builds on the UNCLOS "reasonable/due regard" requirement that applies to all users of the marine environment, and requires the ISA to ensure that no other entity operates in the Contract Area for a different resource category in a manner which might interfere with the rights granted to the Contractor. Thus the first Contractor to obtain rights over a resource category within a Contract Area limits the access that may otherwise be granted to explore or exploit other resources in the Area.
- DR 19(4) provides security of tenure for a Contractor in limiting the circumstances under which a contract may be revised, suspended or terminated to those stated in UNCLOS, Annex III, articles 18 and 19.
- DR 19(6) grants the Contractor an exclusive right to apply for a renewal of the contract with no limit on the number of renewals that may be granted.
- DR 21(1) provides for a standard thirty (30)-year contract unless the anticipated economic life of exploitation activities is for a shorter period.
- DR 21(4) requires the Council to approve renewal once the Contractor is in compliance with its contract which has not been terminated earlier, mineral exploitation is commercially profitable in the contract area, and the applicable fee has been paid.

- DR 21(4) provides for renewal period of a maximum of ten (10) years.
- DR 21(5) provides that the terms of the renewed exploitation contract will be those stated in the standard contract clauses in effect on the date of the approval of the renewal application. This would allow for changes to be made to contractual terms every ten (10) years after the initial thirty (30)-year period.
- DR 21(7) provides for the extension of the contract until an application for renewal has been considered and either granted or refused, irrespective of the reasons attributable for the delay in decision-making.
- DR 23 and DR 24 provide that an exploitation contract may be used as security with the prior consent of the sponsoring State and Council, and as a tradeable commodity with the prior consent of Council. These provisions highlight the significant commercial value of every exploitation contract that will be granted by the ISA.

The Common Heritage of Mankind in the Area precludes the alienation of the Area or any part thereof. A fulsome appreciation of this necessitates careful scrutiny of the terms on which exclusive control over a specified resource category is granted. Consideration may also be given to the vested rights of Contractors to additional mine sites under the exploration regulations.

The Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area,[9] Regulations on prospecting and exploration for polymetallic sulphides in the Area,[10] and Regulations on Prospecting and Exploration for Cobalt-rich Ferromanganese Crusts in the Area[11] entitle a Contractor whose application for approval of a plan of work for exploration originally included a reserved area, within fifteen (15) years of the commencement by the Enterprise of its functions independent of the ISA Secretariat or within fifteen (15) years of the date on which that area is reserved for the Authority, whichever is the later, to apply for a plan of work for exploration for that reserved area provided it offers in good faith to include the Enterprise as a joint-venture partner. The Contractor also has the right of first refusal to enter into a joint venture arrangement with the Enterprise for exploration of the relevant reserved area.

The indefinite nature of exploitation contracts and the priority accorded to those Contractors that were obliged to submit two (2) mine sites, one being designated as a reserved area, is likely to promote the effective control of

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[9] Polymetallic nodules regulations, regulation 17.
[10] Sulphides regulations, regulation 18.
[11] Cobalt-rich Ferromanganese Crusts regulations, regulation 18.

the resources of the Area by a few entities. **Jamaica supports a comprehensive review of section 1 of Part III in addressing how the principle against monopolization will be applied.**

DR 19(5) and Section 5 of the Standard clauses for exploitation contracts give a Contractor legal title to the minerals recovered from the seabed and ocean floor and subsoil thereof, but no further interest in or over any other part of the Area and its resources. The commercial value of the Area lies in its resources which must be used for the benefit of all humankind. **Jamaica supports a comprehensive review of section 1 of Part III in parallel with the development of Standards and Guidelines with a view to determining the extent to which adaptive management will be fully integrated into contractual obligations so as to ensure the conservation and sustainable development of the Common Heritage of Mankind.**

The legal nature and content of Standards and Guidelines and an objective assessment of the likely effectiveness of such measures in adaptive management of the exploitation of deep seabed resources so as to ensure the conservation and sustainable development of the Common Heritage of Mankind in the Area, will likely determine whether the Draft Regulations provide an appropriate balance between certainty and predictability, as well as providing flexibility and adaptability.[12]

Additional comments on Section 1

DR 19(7)

DR 19(7) provides that in relation to Exploration activities in the Contract Area, the applicable Exploration Regulations, including the payment of the fees required thereunder, shall continue to apply. The Draft Regulations, however, do not expressly require that a Contractor have held an exploration contract in order to apply for an exploitation contract. Indeed, DR 19(1)(a) provides for an exploitation contract conferring exclusive rights to explore. Annex II to the

[12] The Standard clauses for exploitation contracts (section 3.2) require a Contractor to implement the Plan of work in accordance with Good Industry Practice which is defined in Schedule 1, "Use of terms and scope" as "*including Best Environmental Practice, the performance and process requirements under the rules, regulations and procedures of the Authority and applicable Standards that may be adopted by the Authority from time to time*". Section 3.3 reaffirms this requirement in expressly requiring compliance "*with the Regulations, as well as other Rules of the Authority, as amended from time to time, and the decisions of the relevant organs of the Authority;*" and observance "*as far as reasonably practicable, [with] any guidelines which may be issued by the Commission or the Secretary General from time to time in accordance with the Regulations*" (added emphasis). The suggestion that Guidelines may be established where compliance may not be "*reasonably practicable*" merits further examination. Guidelines should be drafted to provide an appropriate level of flexibility as to allow for their application across-the-board. In exceptional cases where the established guidelines cannot be implemented, clear justification should be provided.

Draft Regulations which addresses the contents of a Mining Workplan now refers to "*the results of Exploration (at least equivalent to the data and information to be provided pursuant to section 11.2 of the standard clauses for Exploration contracts)*"; and the word "*Exploration*" is defined in Schedule 1 to the Draft Regulations as including the search for resources in the Area with "*exclusive rights*".

Jamaica recommends that the Draft Regulations expressly provide that an applicant for an exploitation contract must be the holder of a contract for exploration activities in the contract area, and futher provide for an assessment of an applicant's performance under its exploration contract to be taken into account in considering whether to grant an exploitation contract.

<u>DR 20</u>
DR 20 is the sole provision of the Draft Regulations addressing joint arrangements with the Enterprise. It confers the same protection against revision, suspension or termination as other contracts granted by the ISA. DR 20(2) further mandates the Council to enable the Enterprise to engage in seabed mining effectively at the same time as other Contractors.

Article 13(1)(e) of Annex III of UNCLOS includes among the objectives that must guide the financial terms of contracts between the ISA and Contractors, "*to enable the Enterprise to engage in seabed mining effectively at the same time as the entities referred to in article 153, paragraph 2(b)*". DR 61 expressly references UNCLOS, Annex III, Article 13(1)(e). The nature of the broader obligation stated in DR 20(2) requires further elaboration.

Jamaica recommends that an additional Part be included in the Draft Regulations that would address the unique regulatory concerns arising from the distinct operations of the Enterprise through joint arrangements and the delinking of the Enterprise from any sponsoring State.

<u>DR 21(4)</u>
There is no provision for an overall review of the Plan of Work by the LTC in considering an application to renew an exploitation contract. **Jamaica recommends that reference should be made to DR 13(4) in the matters to inform the recommendation of the LTC under DR 21(4). Additionally, DR 21(4)(b) should be amended to mirror the language that has been inserted in section 9(1)(b) of the Standard clauses for exploitation contracts, Annex X to the Draft Regulations**. Section 9(1)(b) of the Standard clauses makes renewal of an exploitation contract contingent on "*compliance with the terms of this Contract and the Rules of the Authority, <u>including obligations with regard to</u>*

the effective protection of the Marine Environment." The underlined text has been omitted from DR 21(4)(b).

DR 21(7)

Jamaica recommends that appropriate measures are put into place to ensure that the ISA has a full opportunity to complete the necessary due diligence exercise prior to the expiry date of an exploitation contract so that contracts are not extended by default. The required deadline for the submission of an application for renewal should be sufficiently well in advance of the date of expiration of the contract as to ensure this.

DR 23(3)

Jamaica supports the requirement of prior consent and requests clarification of DR 23(3) on whether the Council with the benefit of a recommendation from the LTC will be the final arbiter on whether a transferee fulfils the requirements and is able to assume the role of an approved Contractor, taking into account the requirements of DR 5 and DR 13, as appropriate.

DR 24(7)

Where concerns arise with regard to the renewal of an exploitation contract, Council may reasonably expect the LTC to draw such matters to its attention. **Jamaica would propose that the requirement that the LTC "*shall recommend approval*" of an application for transfer once the requirements of paragraphs 4, 5 and 6 are met should be modified to allow the LTC to provide the Council, in appropriate cases, with reasons why the Council may reasonably consider withholding consent in accordance with DR 24(7).**

DR 25

It is possible that a *de facto* transfer of rights and obligations may occur when there is a change of control. DR 25 requires only notification of a change in control and not prior consent. **The decision on whether a situation is to be treated as a change of control or as a transfer of rights rests with the Secretary-General. Jamaica is of the view that this should be subject to review by the LTC.**

Additionally, the definition of 'change in control' as provided in DR 25(3) and appears to be deficient in that a change of much less than fifty per cent (50%) of the ownership of a Contractor may in fact result in a change of effective control with implications for sponsorship. DR 6(2) provides that where an applicant has the nationality of one State but is effectively controlled by another State or its nationals, each State shall issue a certificate of sponsorship. Thus where there is a change in effective control additional States may be required to assume a sponsorship role.

A change in control may also have implications for the financial rating of a Contractor and therefore the economic viability of the Plan of Work and confidence in a Contractor's continued compliance with Good Industry Practice. **DR 25(2)(a) provides that following a change of control the Secretary-General will determine whether the entity providing the Environmental Performance Guarantee or the Contractor will be able to meet its obligations under the relevant contractual arrangements and, if so, the contract shall continue to have full force and effect. Jamaica recommends that the matters that inform the decision of the Secretary-General should be clearly set out in Guidelines and the determination of the Secretary-General should be subject to confirmation by the LTC and/or other relevant organs of Council**.

Section 2

DR 28

Dr 28 requires a Contractor to make reasonable efforts to bring the Mining Area into Commercial Production[13] in accordance with the Plan of Work. The contents of a Mining Workplan as set out in Annex 2 of the Draft Regulations must include (h) the estimated date of commencement of Commercial Production, as well as proposed programme of mining operations and sequential mining plans, including applicable time frames, schedules of the various implementation phases of the Exploitation activities and expected recovery rates. The Plan of Work it is presumed would therefore indicate a sufficiently proximate timeframe within which to commence mining operations. The consequences of extended delays in the commencement of mining operations are not stated.

Annex X to the Draft Regulations, on the Standard clauses for an exploitation contract, section 12.1(e) gives the ISA the authority to suspend or terminate a contract "*[i]f the Contractor has not made bona fide efforts to achieve or sustain Commercial Production and 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 force majeure, or other circumstances beyond the reasonable control of the Contractor that prevented the Contractor from achieving commercial production*." (added emphasis) Thus it would appear that it is only upon a five (5)-year delay in the commencement of Commercial Production that it is contemplated that any action would be taken. This raises concerns with regard to the possibility for speculation on the value of a contract which is a tradeable asset.

[13] Jamaica notes the intention of the LTC to give the definition of this term further consideration; see Note by the LTC, ISBA/24/C/20.

Jamaica recommends that, save in circumstances involving *force majeure*, if a Contractor fails to commence commercial production within one (1) year of the proposed timeframe, provision should be made for the Secretary General to issue a compliance notice in accordance with DR 101.

DR 29

DR 29(1) requires the maintenance of commercial production in accordance with the Plan of Work, and that the Contractor "*optimize the recovery of the Minerals removed from the Mining Area at rates contemplated by the Feasibility Study*." The Annex suggests that the LTC consider replacing 'optimize' with either 'ensure', 'manage' or 'achieve'. The consequences of failing to adhere to the timeframes established in the Plan of Work are not addressed. While some flexibility must be accorded,[14] the failure to maintain commercial production in accordance with the Plan of Work without demonstrating reasonable cause (as suggested in DR 30(4) concerning the protection of the environment or human health or safety) should result in the issuance of a compliance notice under DR 101. **Jamaica recommends that DR 29(2) should require more than mere notification of a failure to comply with a Plan of Work or inability to adhere to such Plan in the future but also the provision of adequate reasons therefor and a revised Plan of Work for the consideration of the LTC.**

DR30

DR 30 allows a Contractor to reduce or suspend production due to market conditions for a period of up to twelve (12) months with the Council's approval based on a recommendation of the LTC. This may be further extended by successive twelve (12) month periods. The Draft Regulations do not establish a limit on the number of successive twelve (12)-month extensions of the period of suspension of production that may be granted. Annex X of the Draft Regulations on the Standard clauses for exploitation contracts, section12.2, provides that

> *"[t]he Council may, without prejudice to Section 8 [on force majeure], after consultation with the Contractor, suspend or terminate this Contract, without prejudice to any other rights that the Authority may have, if the Contractor is prevented from performing its obligations under this Contract by reason of an event or condition of force majeure, as described in Section 8, which has persisted for a continuous period exceeding two years, despite the Contractor having taken all reasonable measures to overcome its inability to perform and*

[14] DR 30 allows a Contractor to reduce or suspend production due to market conditions for a period of up to twelve (12) months with the Council's approval based on a recommendation of the LTC. This may be further extended by successive twelve (12) month periods.

comply with the terms and conditions of this Contract with minimum delay."

It is recommended that DR 31 be amended in accordance with the above-stated provision of the Standard clauses for exploitation contracts so as to provide the Council with the discretionary authority to terminate a contract where suspension has been requested for two successive twelve (12)-month periods and the Contractor remains unable to perform its obligations under the contract.

DR 31

DR 31 addresses optimal exploitation under a Plan of Work. The proposal in the Annex to the President's Statement is to replace 'optimal' with 'sound'. The words 'optimal' and 'sound' are not synonyms and it is questionable whether the substitution would add clarity to the existing text. DR 31(1) requires the efficient conduct of activities and avoidance of waste in accordance with Good Industry Practices as defined in the ISA's rules, regulations, procedures and applicable Standards. DR 31 could therefore provide a basis for proscribing high grading practices depending on the nature and content of the Standards to be developed.[15] The Note by the Secretariat, "Draft regulations on the exploitation of mineral resources in the Area" (ISBA/24/LTC/6, 29 May 2018 at para. 5) however states that "*DR 31, concerning the optimal mining of resources, … is not intended to regulate commercial production per se, but to ensure the efficient conduct of activities in accordance with article 150 of the Convention*."

Jamaica seeks further clarification on the scope of DR 31. DR 31(2) requires the Contractor to demonstrate that it is meeting the obligation imposed by DR 31(1), and in the event that it is not modifications are to be made to the Mining Workplan and mining and processing practices. It would seem therefore that DR 31 is intended to regulate commercial production.

The initial phrase of DR 31(3) has been modified in the revised Draft Regulations of 9 July 2018 considered by Council at its twenty-fourth session; the phrase "*If the Secretary-General determines, after consultation with a Contractor, that the Contractor is not meeting its obligation in paragraph 1*" has been amended to read "*If the Secretary-General becomes aware that the Contractor is not meeting its obligation in paragraph 1*". The Secretary-

[15] Jamaica notes that the Mining Workplan, Annex 2 of the Draft Regulations, provides for details of and validation of the grade and quality of the possible, proven and probable ore reserves, as supported by a pre-feasibility study or a Feasibility Study, as the case may be. The term "Feasibility Study" is defined in Schedule 1 of the Draft Regulations as a comprehensive study of a mineral deposit in which all geological, engineering, legal, operating, economic, social, environmental and other relevant factors are considered.

General likely "becomes aware" of the Contractor not meeting its obligations based on the Contractor's annual reports and requests for information made in the context of DR 31(2).

Thus the amendment to the text does not appear to modify the anticipated procedures nor the nature of the responsibilities imposed on the Secretary-General or address reservations as regards the process of assessing whether a Contractor is not meeting the obligations imposed. Such an assessment would require the intervention of the LTC and/or Council or other competent authority. Although there is no prescribed mechanism for making a determination of non-compliance before the Secretary-General requests a review of mining and processing activities and possible modifications of the Mining Workplan, it is significant that any changes made are intended to be consensual, by way of agreement between the Contractor and Secretary-General. **DR 31(3), however, does not address what should be done if the Secretary-General and the Contractor fail to reach an agreement**.

DR 31(4) requests Members to assist the Secretary-General with the provision of data or information with respect to the processing, treatment and refinement of ore from seabed mining where this occurs under their jurisdiction and control. The Annex to the President's Statement notes concerns as regards the ISA's jurisdiction. **Jamaica shares these concerns.**

The Seabed Disputes Chamber of ITLOS in its Advisory Opinion (paragraphs 87-97) clarified the scope of "activities in the Area" and observed (at paragraphs 95-96) that "processing", namely, the process through which metals are extracted from the minerals and which is normally conducted at a plant situated on land, is excluded from the expression "activities in the Area". Transportation to points on land from the part of the high seas superjacent to the part of the Area in which the contractor operates also cannot be included in the notion of "activities in the Area". However, the Tribunal further observed (at paragraph 92) that *"[t]he scope of "exploration" and "exploitation" as defined in the [Nodules and Sulphides] Regulations seems broader than the "activities in the Area" envisaged in Annex IV, article 1, paragraph 1, and in article 145 and Annex III, article 17, paragraph 2 (f), of the Convention. Processing and transportation are included in the notion of exploration and exploitation of the Regulations, but not in that of "activities in the Area" in the provision of Annex IV of the Convention, which has just been cited.*"

The views expressed by the Seabed Disputes Chamber are also relevant to the definition of "Exploit" and "Exploitation" in Schedule 1 of the Draft Regulations which is limited to "*the extraction of Minerals therefrom, including the construction and operation of mining, processing and transportation*

systems *in the Area*" (added emphasis). The insertion of the underlined text in the current Draft Regulations narrows the definition provided in the 8 August 2017 Draft Regulations on Exploitation of Mineral Resources in the Area, ISBA/23/LTC/CRP.3* ('2017 Draft Text'). It may be suggested that greater clarity would be achieved by referring to **"transportation systems within the Area"** (that is, substituting the word "in" with "within") thereby clearly excluding transportation systems originating in the Area though destined for land-based sites.

Section 4

DR33

DR 33 requires Contractors to have reasonable regard to other activities in the marine environment, and DR13(4) mandates the LTC in reviewing a proposed Plan of Work to determine whether adequate provision has been made to ensure compliance with this obligation. The Annex to the President's Statement invites the LTC to elaborate on the high seas freedoms and the due regard clause.

The 'due regard'/'reasonable regard' clause is a reciprocal obligation as stated in UNCLOS, Articles 87 and 147. DR 33 mirrors this approach in requiring that exploitation must be carried out with reasonable regard to other activities in the area and that "*[o]ther activities in the Marine Environment shall be conducted with reasonable regard for the activities of Contractors in the Area.*"[16] **The ISA does not have jurisdiction over users of the marine environment engaged in activities not falling within UNCLOS, Part XI. Jamaica recommends that DR 33(2) be rephrased and directed to member States in their exercise of jurisdiction and control over persons engaged in other uses of the marine environment to ensure that they have reasonable regard for the activities of Contractors in the Area.**

Section 6

DR38

DR 38 addresses the Contractor's obligations on maintaining appropriate insurance policies. Jamaica notes that DR 13(2)(b)(iv) requires the LTC to assess the applicant's ability to access insurance products that are appropriate to the financing of exposure to risk in accordance with Good Industry Practice. **The Draft Regulations, however, do not require the LTC or other relevant organ to assess the adequacy of the insurance policies obtained by the Contractor. Jamaica recommends that such a requirement be included in DR 38**.

[16] Draft Regulations, DR 33(2).

DR 38(4) provides that a Contractor may not "materially modify" or terminate any insurance policy without the prior consent of the Secretary-General. The term "materially modify" appears to convey the same meaning as "material change" as defined in Schedule 1 to the Draft Regulations: "***"Material Change"*** *means a change (which is not minor or administrative) to the basis on which the original report, document or plan, including a Plan of Work, was accepted or approved by the Authority, and includes changes such as physical modifications, the availability of new knowledge or technology and changes to operational management that are to be considered in the light of the Guidelines.*" **As the term "materially modify" may be equated with "material change" Jamaica recommends the use of the defined term "material change" in DR 38(4).**

Part IV Environment

The Annex to the President's Statement invites the LTC to strengthen the provisions on the environment in Part IV and lists nine ((a) through (i)) specific ways in which this may be achieved. Jamaica is in general support of all nine proposals but would note that some of the revisions made to the Draft Regulations, in particular the revised text of DR 47 on pollution control, address Jamaica's concerns with the text of the previous version of 29 May 2018 which included the words "*as far as reasonably practicable*".

Jamaica wishes to add the following comments on Part IV:

The Draft Regulations should seek to avoid unnecessary duplication of administrative procedures and compliance requirements. Article 150 of UNCLOS establishes the policies relating to activities in the Area and includes in paragraph (b) the requirement for the orderly, safe and rational management of the resources of the Area, including the efficient conduct of activities in the Area. Towards this end, DR 3(b) provides that the ISA and sponsoring States shall cooperate toward the avoidance of unnecessary duplication of administrative procedures and compliance requirements; and DR 3(d) calls for consultations and cooperation between the ISA, sponsoring States, flag States, competent international organizations and other relevant bodies.

The avoidance of unnecessary duplication requires greater clarity in the obligations imposed on sponsoring States and flag States vis-à-vis those imposed and directly monitored by the ISA through the Draft Regulations, Standards and Guidelines. DR 46 is one of the provisions of the Draft Regulations that may create multiple overlapping regulatory requirements

resulting in an increased regulatory burden without enhancing the overall protection of the marine environment.

DR 46 imposes a general obligation on the ISA, sponsoring States and Contractors to implement measures necessary for ensuring the effective protection of the Marine Environment from harmful effects under UNCLOS Article 145 in respect of activities in the Area. It is anticipated that the measures set out in paragraphs (a) through (e) of DR 46 will be addressed in specific obligations imposed in the Draft Regulations and applicable Standards and Guidelines. **The role of sponsoring States in ensuring compliance with the ISA obligations should be clearly defined. This should be distinct to and complementary of the role to be played by the ISA, flag States, and all member States as regards persons subject to their jurisdiction and control.** States may not legislate environmental standards below those required by the rules, regulations and procedures of the ISA and other global rules and standards.[17] Indeed, it would seem optimal that they mirror these standards in their domestic laws.

As regards DR 46(e), the extent to which sponsoring States are required to develop incentive structures to enhance the environmental performance of Contractors requires further clarification. DR 46(e) may be compared with DR 61 which is limited to incentives provided by the ISA. UNCLOS, Annex III, Article 13(1)(f) requires that the rules, regulations and procedures concerning the financial terms of a contract between the ISA and a Contractor and the terms of such contracts do not as a result of the financial incentives that are provided confer subsidies on Contractors so as to give them an artificial competitive advantage with respect to land-based miners. The Annex to the 1994 Agreement, Section 6, paragraphs (1)(c) & (g), (3) and (4) contemplate the possible sanctioning of a State Party that has engaged in subsidization practices and any Contractor that has accepted such subsidies. **The obligation imposed by DR 46(e) may create difficulties for sponsoring States and Contractors unless there are clear Guidelines and a possible scheme for reviewing and approving incentive structures proposed for implementation by sponsoring States. In this regard, a possible role for the Economic Planning Commission under the general mandate conferred by UNCLOS, Article 164(2)(a) may be considered.**

Section 1 bis

Draft regulation 18 of the 2017 Draft Text, ISBA/23/LTC/CRP.3*, provided for an environmental scoping report prior to undertaking an environmental impact assessment (EIA). Annex IV of the 2017 Draft Text further elaborated on the

[17] *E.g.* UNCLOS, Articles 209(2) & 210(6) concerning pollution from activities in the Area and by dumping, respectively.

matters to be addressed in the scoping report. The Secretariat Note, "Draft regulations on the exploitation of mineral resources in the Area", ISBA/24/LTC/6, 15 May 2018, at paragraph 6, explains that *"[t]he Commission agreed on the removal of the scoping exercise from the exploitation regulations, as scoping is more appropriately reflected under the exploration framework."* However no consequential amendments of the exploration regulations have been proposed.

Jamaica recommends that the requirement of a scoping report be retained in the Draft Regulations. This could be addressed in a DR in Section 1 bis inserted immediately after DR 46, or alternatively, included in DR 46 bis and possibly linked, as appropriate, to the prior submission and consideration of the scoping report under the exploration regulations.

<u>DR48</u>

Jamaica would suggest further editing of DR 48(2). The safety of human life will always take precedence over other factors including the protection of the environment. However, the suggestion that the preservation of property from serious damage should be viewed equally requires further qualification. It would seem appropriate to provide for the distinct treatment of the safety of life separate to the preservation of property. As regards the latter, minimizing Serious Harm to the Marine Environment arguably establishes too high a threshold in favour of preserving private property over the environment. **Serious Harm is defined in Schedule 1 to the Draft Regulations as requiring "a significant adverse change in the Marine Environment". Jamaica recommends that the proviso in DR 48(2) as regards the preservation of property should be linked to minimizing "adverse effects/changes" on the Marine Environment as opposed to Serious Harm requiring <u>significant</u> adverse changes.**

<u>DR 50</u>

The language of DR 50 is one of the provisions on which further clarification has been sought in the Annex to the President's statement. DR 50 provides for a Contractor to conduct a performance assessment of its compliance with and the appropriateness and adequacy of its Environmental Management and Monitoring Plan (EMMP). A performance assessment report is submitted for the LTC's review. Paragraphs (5) and (6) of DR 50 describe two alternative determinations on non-compliance that may be made by the LTC: under paragraph (5) the LTC may require the Contractor to redo the assessment or appoint an independent competent person to conduct the assessment; under paragraph (6) the LTC views the Contractor as being incapable of satisfactorily conducting the performance assessment and requests the Secretary-General to procure, at the cost of the Contractor, an independent competent person to conduct the assessment.

The basis on which a Contractor may be viewed as sufficiently incompetent while nevertheless be allowed to continue to hold a contract with the ISA requires clarification. Additionally, paragraph (5) refers to compliance with both the Guidelines and the conditions attaching to the EMMP, whereas paragraph (6) refers only to the Guidelines. Under paragraph (5) the LTC appoints the independent competent person, whereas under paragraph (6) the LTC requests the Secretary-General to do so. The reasons for the different approaches adopted in paragraphs (5) and (6) are not clear. **Jamaica recommends that the approach adopted in the provision be reviewed.**

Jamaica would propose that the performance assessment should be carried out by an independent competent person appointed by the ISA from a roster of qualified persons and undertaken at the Contractor's expense in all instances. The review of the performance assessment report by the LTC would be undertaken in assessing the overall compliance of a Contractor with its obligations under the terms of its contract with the ISA.

Additionally, as regards paragraph 8 of DR 50, the Secretary-General under sub-paragraph(a) issues a compliance notice under regulation 101; or under paragraph (b) requires the Contractor to deliver a revised Environmental Management and Monitoring Plan. **Jamaica recommends the DR 50(8) refer to Guidelines that will indicate the appropriate circumstances for triggering the issuance of a compliance notice under paragraph (a) versus a revised EMMP under paragraph (b).**

DR 53

Jamaica supports the invitation made to the LTC in the Annex to the President's Statement to give further consideration to the purposes of funding the environmental liability trust fund and its impact on the nature of the fund.

The purposes of the Fund as described in DR 53 are overly broad and will likely diminish the utility of the Fund in achieving the stated objectives. Some of the identified activities such as restoration and rehabilitation should only be covered where Contractors fail to make adequate provision and the costs cannot otherwise be recovered. Certain other proposed activities such as training, education and research do not fit within the general objectives of a *liability* trust fund. Such measures could be funded through a separate trust fund that could supplement the Endowment Fund for Marine Scientific Research in the Area and training and internship programmes provided by Contractors under exploitation contracts.

The Environmental Liability Trust Fund should address the possible gap in liability, as identified by the Seabed Disputes Chamber, which may occur

where a Contractor has caused damage and is unable to meet its liability in full and the sponsoring State has taken all necessary and appropriate measures, or has failed to meet its obligations but that failure is not causally linked to the damage. The absence of any residual liability of the sponsoring State as underscored by the Seabed Disputes Chamber in its Advisory Opinion[18] merits the establishment of a special trust fund to compensate for the damage not covered. Attention may be drawn to UNCLOS, Article 235(3) which refers to such possibility.

Part V Review and modification of a Plan of Work

DR 55

DR 55 is one of the provisions of the Draft Regulations that attempts to pragmatically balance the role of the Secretary-General with that of the Council and organs of Council, such as the LTC. UNCLOS, Article 166(3) states

> "*The Secretary-General shall be the chief administrative officer of the Authority, and shall act in that capacity in all meetings of the Assembly, or the Council and of any subsidiary organ, and shall perform such other administrative functions as are entrusted to the Secretary-General by these organs*."

The functions that may be entrusted or delegated to the Secretary-General are limited to 'administrative functions', that is, those that rely on administrative skills and generally pertain to organizing and/or supervising or overseeing an organization or institution.

The 9 July 2018 version of the Draft Regulations improves the text of 29 May 2018. The determinations that may now be made by the Secretary-General under DR 55 are limited to changes to the Plan of Work which are not a Material Change. Where the Secretary-General, after consulting with the Contractor, makes such (non-material) changes, DR 55(4) requires the Contractor to implement the changes. **The scope of the proposed non-Material Changes that may be made by the Secretary-General should be clarified in the regulations or Guidelines. A non-exhaustive list to which the *ejusdem generis* rule may be applied is one approach that could be adopted**.

Where the Secretary-General proposes a change to the Plan of Work which is not a Material Change, the Contractor is required to implement such

[18] See ITLOS Advisory Opinion, paras 203-205.

change. **Should a dispute arise as to the material nature of the change, that is to say, whether it should be treated within DR 55(4) or DR 55(2), simplified dispute settlement procedures, short of having recourse to those provided in UNCLOS, Part XI, Section 5 in accordance with DR 104, should be available**. Jamaica's proposals on a system for an expedited review are outlined in the comments made on DR 104.

The Annex to the President's Statement invites the LTC to "*consider that modifications of environmental plan could be permitted by the Secretary-General in case those modifications do not constitute material change (DR 55)*". Environmental plans are defined in Schedule 1 to the Draft Regulations as referring to the Environmental Impact Statement (EIS), the Environmental Management and Monitoring Plan (EMMP) and the Closure Plan as clarified in DR 46bis, DR 46 ter, and DR 57, respectively. It is noted that DR 55(3) currently makes reference only to the latter two, that is to say, there is no reference to the EIS. **Jamaica would recommend that any extension of DR 55(4) to cover Environmental plans also be accompanied with a non-exhaustive list of non-Material Changes to which the *ejusdem generis* rule may be applied**.

DR 56

The discussion in relation to DR 55 on the providing additional clarity on what may be considered a Material Change is also relevant to the determination under DR 56 on whether the approval of Council must be sought under paragraph 3.

Part VI Closure plans

DR 59

DR 59(2) refers to a period of post-closure monitoring in accordance with a Contractor's final Closure Plan. **Jamaica recommends that an indicative timeframe be established for the period of post-closure monitoring in the Draft Regulations, Standards and/or Guidelines. A Contractor should be required to justify using a shorter time period in its final Closure Plan**.

Part VII Financial terms of an exploitation contract

Jamaica will provide its comments on the financial terms of an exploitation contract after having the benefit of the written report that MIT will deliver ahead of the next session of the Council. At this time we limit our observations to the anti-avoidance rule.

DR 75

DR 75 provides for a general anti-avoidance rule and authorizes the Secretary-General to make a determination on the amount of royalty where he or she reasonably considers that a Contractor has pursued measures which, directly or indirectly result in delayed or reduced payment of royalties and such measures were carried out solely or mainly for such purposes, and not for a *bona fide* commercial purpose. The determination to be made by the Secretary-General on the appropriate royalty payment is essentially premised on a finding of fraud. However, there is no provision for due process.

Due process ordinarily requires that when a person may be deprived of its property by executive action it must be afforded an opportunity to be heard. The possibility of a subsequent challenge through a post-deprivation hearing would not suffice in the absence of circumstances meriting summary action.

Jamaica proposes that DR 75 include a provision for notice to the Contractor and an opportunity for the Contractor to make submissions before the Secretary-General undertakes a reassessment of liability for the payment of royalties. A possible role for the Economic Planning Commission or the Finance Committee may be considered. Additionally, an internal system for a review of the determination of the Secretary-General, short of recourse to UNCLOS section 5 of Part XI in accordance with DR 104, should be provided.

Part VIII Annual, administrative and other applicable fees

The purpose of the annual, administrative and other applicable fees should be more clearly defined. A 'fee' is a generally defined as a charge to cover the costs of providing a service. All costs incurred by the ISA in administering the mining regime of the Area should be recovered through the fees imposed on Contractors independently of any taxation measures.

DR83

The 1994 Agreement, Section 8, paragraph 1(d) provides that an annual fixed fee is to be paid from the date of commencement of commercial production and "*may be credited against other payments due under the system*". The other payments referred to in Section 8, paragraph 1(c) relate to a royalty system or a combination of a royalty and profit-sharing system. A royalty and a profit-sharing system are tax measures which are materially different to fees, properly so-called.

UNCLOS, Article 173(2) provides that the administrative expenses of the ISA "*shall be a first call on the funds of the Authority*." The 1994 Agreement, Section 7, paragraph 1(a) limits the sources of funds that may be used for the

establishment of the economic assistance fund for developing countries that suffer serious adverse effects on their export earnings or economies resulting from deep seabed mining activities. Only funds received from Contractors and voluntary contributions may be used for the economic assistance fund, and only in so far as these exceed the administrative expenses of the ISA.

The LTC has invited the Council to provide guidance on the circumstances under which the annual fixed fee would be credited against other payments.[19] **The extent to which the annual fixed fee may be credited against other payments due to the ISA would depend on the amount to which all administrative costs of the ISA are otherwise covered through the payment of fees. The principal use of taxation measures such as royalties and other levies should be the fulfilment of the mandates of the ISA with regard to the equitable sharing of benefits and compensation to land-based producers**.

PART IX Information-gathering and handling

DR 87

The LTC has invited the Council to consider whether the proposed starting point for the development of a confidentiality regime, as set out in DR 87(1), is appropriate. **Jamaica supports the position that there should be a presumption that information in relation to an exploitation contract and activities undertaken thereunder is public, save for commercially sensitive confidential information and personal data**.

DR 87(2) defines the term 'Confidential Information'. The definition of 'Confidential Information' should be limited to certain types of documents across-the-board, that is to say, the application of the definition should yield the same results irrespective of the Contractor and its sponsoring State. **Jamaica therefore proposes that (i) Guidelines should be developed to inform the designation of information as confidential by a Contractor in consultation with, or with the concurrence of the Secretary-General under DR 87(2) (a) and (d); and (ii) DR 87(2)(e), including within the definition of 'Confidential Information' all data and information deemed as such by the sponsoring State, should be deleted**. The laws of sponsoring States will differ on the nature of data and other information that may be classified as confidential. DR 87(2)(e) may thus result in the differential treatment of Contractors without just cause.

UNCLOS, Part XIII on marine scientific research requires States and competent international organization to promote the flow of scientific data and

[19] See also Draft Regulations, DR 83(5).

information and transfer of knowledge resulting from marine scientific research, especially to developing States.[20] **Jamaica proposes that the circumstances under which information may be withheld for "*bona fide academic reasons*" as provided in DR 87(3)(f) should be subject to conditions dependent on the reasons for delaying the release of the information and the possible consequences thereof**.

Part X General procedures, Standards and Guidelines

Jamaica takes note of the work to be undertaken by the LTC on the development of Standards and Guidelines, including the preparation of an indicative list of Standards by subject area and their legally binding nature as well as a list and indicative content of Guidelines as set out in the Note by the LTC ISBA/24/C/20. It is hoped that the work of the LTC in this area will be made available to the Council before the resumed July 2019 session.

DR 92

DR 92 provides for the LTC to take into account the views of recognized experts in making recommendations to the Council on the adoption of Standards. A transparent process for consultation with experts must be established. The views of experts will differ depending on their philosophical perspective, socialization, and general life experiences. Therefore where the views of experts or other independent competent persons may influence decision-making, individuals should be drawn from a sufficiently diverse pool of persons as to ensure an appropriate balance of perspectives.

The ISA is one of the sponsoring organizations of the Joint Group of Experts on the Scientific Aspects of Marine Environmental Protection. A possible role for recognized international bodies, such as the Joint Group of Experts with diverse experts including representation from developing countries and extensive networks at the regional and global levels, could be built into the Draft Regulations. **Jamaica recommends that DR 92 refers to a roster of recognized experts including international bodies such as the Joint Group of Experts, and requires the LTC in making recommendations to Council on the adoption of Standards to specify when the views of recognized experts have been sought and their contribution to the LTC consultative process**.

DR 93

DR 93 limits the role of the Council in the development of Guidelines to requesting the modification or withdrawal of a Guideline where it is found to be "*inconsistent with the intent and purpose of the Rules of the Authority*". The participation of Council is inserted post-hoc and circumscribed by the

[20] See UNCLOS, Article 244(2).

limited basis on which a negative resolution requiring the amendment or modification of a Guideline may be based.

Jamaica is of the view that Guidelines should be developed through transparent processes that would allow member States and other stakeholders an opportunity to express their views and the Council to provide its guidance in the development of Guidelines and not merely ex post in requiring the withdrawal or modification of a Guideline. A similarly transparent process should also apply to any revisions made to the Guidelines.

Part XI Inspection, compliance and enforcement

DR 94

DR 94(6) provides for the Secretary-General to report, *inter alia*, acts of violence, intimidation, abuse against or the wilful obstruction of an Inspector by any person to the sponsoring State(s) and the flag State of any vessel or installation for consideration of institution of proceedings under national law. However, not every flag State is a Member of the ISA, and depending on the circumstances, a sponsoring State may not have jurisdiction to institute proceedings against all relevant parties under its domestic laws.[21] Even where jurisdiction exists, whether civil or criminal, a sponsoring State may not be able to enforce a judgment against the offender.

UNCLOS, Article 153(4) requires all States Parties to assist the ISA in exercising control over activities in the Area in order to secure compliance with the UNCLOS and ISA rules, regulations and procedures by taking measures in accordance with Article 139. Article 139 imposes the responsibility on States Parties to ensure that "*natural or juridical persons which possess the nationality of States Parties or are effectively controlled by them or their nationals*" comply with the UNCLOS, Part XI. All States Parties therefore have an obligation to ensure that their nationals, whether a Contractor or its agents and employees, comply with DR 94(4) and cooperate with inspectors and not obstruct, intimidate or interfere with them in the performance of their duties; this is implicitly recognized in DR 94(1).

Jamaica recommends that additional reference should be made in DR 94(6) to the State of nationality of any alleged offender. Also, as several States may have concurrent jurisdiction over an alleged offender it would seem useful to

[21] In many jurisdictions an employer may be held vicarious liable for the acts of an employee, including criminal acts, where there is a close connection between the employee's job and his or her wrongful conduct. However, this requires an evaluative judgment in each case having regard to the circumstances.

have Guidelines on which State should exercise primary jurisdiction. The assumption of jurisdiction by one State would in many instances preclude prosecution in another State.

Additionally, the judgment of the national court may require recognition and enforcement in other jurisdictions. Relevant reference may be made to DR 104(2)[22] and its possible extension so as to provide for the recognition and enforcement of a final judgment of a court of competent jurisdiction in any member State resulting from the institution of proceedings under DR 94(6).

<u>DR 101</u>

DR 101 provides the Secretary-General with the authority to issue a compliance notice where it appears to the Secretary-General on reasonable grounds that a Contractor is in breach of the terms and conditions of its exploitation contract. The Contractor is required to take such action as may be specified in the compliance notice which constitutes a warning for the purposes of UNCLOS, Annex III, Article 18, and could result in the imposition of monetary penalties or the suspension or termination of a Contractor's rights under its contract with the ISA.

DR 101(5) of the 9 July 2018 version of the Draft Regulations specifies that it is the Council that may suspend or terminate the exploitation contract if the Contractor fails to comply with the compliance notice. The reference in the version of 29 May 2018 was to "*the Authority*".[23] DR 101(2) however has not been modified and does not indicate which organ of the ISA may prescribe the remedial measures to be taken by the Contractor. **Jamaica recommends that the reference to "the Authority" in DR 101(2)(b) be replaced with "the Council acting on a recommendation of the LTC".**

The underlying concern relates to the nature of the Secretary-General's authority as conferred by UNCLOS, Part XI. Where the decision of the Secretary-General that a Contractor is in breach of the terms and conditions of its exploitation contract is based on a recommendation of the LTC or a decision of the Council, the issuance of a compliance notice would reasonably fall within the Secretary-General's administrative functions. However, where there is no such recommendation, finding or decision, and the Secretary-General forms the view that the Contractor is in breach on the basis of independent evidence brought to his or her attention, the issuance

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[22] DR 104(2) provides "In accordance with article 21(2) of annex III to the Convention, any final decision rendered by a court or tribunal having jurisdiction under the Convention relating to the rights and obligations of the Authority and of the Contractor shall be enforceable in the territory of any State party to the Convention affected thereby."

[23] The Draft Regulations of 29 May 2018 provided that "*the <u>Authority</u> may suspend or terminate the exploitation contract*" (added emphasis).

of a compliance notice may not be an administrative task. The involvement of the Council and the LTC under DR 101(2)(b) would largely address this concern.

A second concern with regard to DR 101 relates to the process of review. DR 101(4) gives the Contractor an opportunity to make written representations to the Secretary-General with a view to the possible modification or withdrawal of the compliance notice. No provision is made for an independent administrative review or other procedure short having recourse to UNCLOS, Part XI, Section 5. **Jamaica supports the establishment of dispute settlement procedures that would expedite the review of administrative decisions taken by the Secretary-General where a dispute arises. Jamaica's recommendations on alternative means of dispute settlement are addressed in the context of DR 104**.

DR 103

The Seabed Disputes Chamber of the International Tribunal for the Law of the Sea (ITLOS) in its Advisory Opinion on "Responsibilities and Obligations of States Sponsoring Persons and Entities with respect to Activities in the Area" identified articles 139(1) and 153(4) of UNCLOS and Article 4(4) of Annex III of UNCLOS as the key provisions concerning the obligations of sponsoring States.[24] The Chamber clarified these provisions and further observed that "*the liability regime established by article 139 of the Convention and in related instruments leaves no room for residual liability*"[25] on the part of the sponsoring State.

DR 103 is stated to be "*without prejudice*" to UNCLOS, articles 139(2) and 153(4), and Annex III, Article 4(4) (and DR 6 and DR 22 which essentially affirm the afore-mentioned provisions). **Jamaica recommends that DR 103 mirror the text of UNCLOS, Article 139(1), that is to say, "the responsibility to ensure that activities in the Area … [are] carried out in conformity with … Part [XI]",** as opposed to the current wording of DR 103, that is, to "*take all necessary and appropriate measures to secure effective compliance by Contractors*".

The application for an Advisory Opinion was with a view to obtaining a desirable degree of clarity and certainty as regards the scope of the obligations and liability that may be imposed on sponsoring States. A reformulation of the UNCLOS text may arguably give rise to different obligations and undermine the value of the Advisory Opinion requested by Council.

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[24] See ITLOS Advisory Opinion, para 99.

[25] ITLOS Advisory Opinion, para 204.

PART XII Settlement of disputes

DR 104

The policies relating to activities in the Area underscore the importance of promoting efficiency and the development of the resources of the Area in accordance with sound commercial principles.[26] An effective dispute settlement process that facilitates the timely resolution of differences in a cost efficient manner is an essential element of a workable mining regime.

DR 104 provides for all disputes to be settled in accordance with UNCLOS, Part XI, Section 5. UNCLOS, Part XI, Section 5 establishes the ITLOS Seabed Disputes Chamber and the scope of the Chamber's jurisdiction over disputes involving the ISA, States Parties, the Enterprise, Contractors and prospective Contractors with regard to the interpretation and application of UNCLOS, Part XI and the Annexes relating thereto, the ISA rules, regulations and procedures, contracts between the ISA and Contractors, and disputes concerning various acts or omissions, as well as excesses of jurisdiction or misuse of power by the ISA.[27] The Seabed Disputes Chamber, however, has no jurisdiction to pronounce on whether the rules, regulations and procedures of the ISA conform with the UNCLOS, nor declare them invalid.[28] The Draft Regulations do not make specific reference to the advisory jurisdiction of the Seabed Disputes Chamber,[29] but one may conceive of the Council utilizing this mechanism in seeking guidance on the interpretation of the exploitation regulations and other relevant texts. The jurisdiction of the Seabed Disputes Chamber is therefore sufficiently broad as to cover the range of disputes that may arise under the Draft Regulations.

Part XI, Section 5 also makes provision for the possible submission of disputes, at the request of the parties to the dispute, to a special chamber of ITLOS, an ad hoc chamber of the Seabed Disputes Chamber or to binding commercial arbitration. Where binding commercial arbitration is chosen any question of the interpretation of Part XI and the Annexes relating thereto, with respect to activities in the Area, must be referred to the Seabed Disputes Chamber for a ruling, following which the arbitral tribunal renders its award in conformity with that ruling.[30] This promotes coherence and a single authoritative interpretation of UNCLOS Part XI. The provision for arbitration outside of Part XI, Section 5 as contemplated in the 2017 Draft Text, posed difficulties and did

[26] See UNCLOS, Article 159(b) & 1994 Agreement, Annex, Section 6(1)(a).
[27] See UNCLOS, Article 187.
[28] See UNCLOS, Article 189.
[29] See UNCLOS, Article 191.
[30] See UNCLOS, Article 188.

not appear to be more effective than arbitration under Pat XI, Section 5.[31] The ISA Secretariat Note (Draft Regulations on the exploitation of resources in the Area, ISBA/24/LTC/6) explains that the proposed review mechanism of the 2017 Draft Text was removed in light of comments from member States and the LTC concerning the finely crafted dispute settlement provisions of UNCLOS, Part XI, Section 5.

Contentious proceedings before the Seabed Disputes Chamber and its ad hoc chambers are governed by the rules applicable to the ITLOS in contentious cases.[32] The ITLOS Rules of Procedure provides sufficient flexibility for the Tribunal to expedite hearings where the parties jointly request this. However, the standard time-limits for pleadings, followed by oral hearings, which would require extensions where there are preliminary objections or third party interventions, may not facilitate timely justice. The determinations to be made under the Draft Regulations whether by the Secretary-General, the LTC, the Council or any other body with delegated authority should be subject to review. In many instances expedited proceedings may be required.

The ITLOS Rules of Procedure makes special provision for the treatment of cases involving the prompt release of vessels and crews. Priority is given to such applications which are dealt with without delay. A hearing will commence within fifteen (15) days of an application and a decision will be given within fourteen (14) days after the closure of the hearing.[33] **In the absence of a consensus to provide for an optional alternative system of administrative review, Jamaica would recommend that the ISA explore the**

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[31] The proposal for a review mechanism in draft regulation 92 of the 2017 Draft Text was deficient in a number of respects: It was framed as derogating from the UNCLOS regime, precluding access thereto, as opposed to establishing an alternative option. It was scripted overly broadly in that it sought to cover any dispute concerning the interpretation or application of an exploitation contract where the Contractor seeks a review of any decision made or action taken by or on behalf of the ISA against a Contractor, and remove all such disputes from the scope of the UNCLOS dispute settlement regime. All disputes were to be referred to "*the Secretary-General who shall cause the matter to be investigated as he considers appropriate*" (draft regulation 92(3)). This despite the likely involvement of the Secretary-General as the chief administrative officer of the ISA in any decision made or action taken by or on behalf of the ISA against a Contractor. Disputes could be submitted to an expert or ad hoc panel of experts that "*shall follow their own procedure, but shall seek to act in the most expeditious and cost-effective manner*". The procedures however provided little assurance that decisions would be more timely than having recourse to ITLOS. The absence of a provision to refer any question that may involve the interpretation of Part XI to the Seabed Disputes Chamber for a ruling, as would occur with commercial arbitration under UNCLOS, Article 188, arguably, appeared to undermine the objective of the UNCLOS dispute settlement regime.

[32] See ITLOS Rules of Procedure, Article 115.

[33] ITLOS Rules of Procedure, Article 112.

possibility of ITLOS establishing special rules of procedure that would accommodate expedited hearings on a subset of disputes that may arise under the exploitation regulations similar to those applicable to the prompt release of vessels and crews.

Jamaica further recommends that special rules of procedure should also be sought to accommodate enhanced transparency and possibly greater participation by third parties in certain dispute settlement proceedings under the Draft Regulations. Currently, the determination on whether the pleadings in a case are made public is made by the ITLOS after ascertaining the views of the parties to the proceedings.[34] Hearings may or may not be public depending on the decision of the Tribunal and the views expressed by the parties.[35]

While sponsoring States have a right to participate in proceedings, other States Parties and the ISA are not accorded similar rights.[36] A right of intervention is accorded to States Parties with an interest of a legal nature in the dispute.[37] Parties to the UNCLOS and any other international agreement concerning matters addressed in UNCLOS also have a right of intervention in disputes concerning the interpretation and application of such treaties.[38] An objection may be filed to an application to intervene, necessitating a hearing on this. Where a party intervenes, the decision of the Tribunal is binding on that party. The desirability of allowing more liberal access to dispute settlement proceedings could be addressed by the LTC and the Council. In this regard, consideration may also be given to the increasing role of *amicus curiae* briefs in international proceedings and implications of this.

Annex IV Environmental Impact Statement

Annex IV to the Draft Regulations, "Environmental Impact Statement", of the 9 July 2018 version considered by Council incorporates the Draft Environmental Impact Statement Template, ISBA/24/LTC/WP.1/Add.1 ('EIS Template'). Paragraph 2 of Annex IV which introduces the EIS Template clearly indicates that the "*document is a template only, and is not intended to be prescriptive but rather to guide the format and general content of an Environmental Impact Statement. It does not provide details of methodology or thresholds that may be resource- and site-specific. These methodologies*

[34] ITLOS Rules of Procedure, Article 67.
[35] ITLOS Rules of Procedure, Article 74.
[36] See UNCLOS, Article 190.
[37] ITLOS Rules of Procedure, Article 99; ITLOS Statute, Article 31.
[38] ITLOS Rules of Procedure, Article 100; ITLOS Statute, Article 32

and thresholds may be developed as standards and guidelines to support the Draft Regulations."

Jamaica looks forward to participating in the deliberations of Council on the relevant Standards and Guidelines but would nevertheless make the following observations on the EIS Template having due regard to the *non-prescriptive* nature of the document.

DR 46 bis provides that the purpose of the Environmental Impact Statement (EIS) is to document and report the results of the EIA process. The EIS Template provides for a description of the existing physicochemical environment (clause 4), the existing biological environment (clause 5), and an assessment of impacts on the biological environment and proposed mitigation (clause 8). **Jamaica proposes including within:**

- **clause 1.4 - verification of credentials of the proponent from credible independent sources;**
- **clause 3.1 or Schedule 1 to the Draft Regulations - a definition of 'project area', 'impact reference zones' and 'preservation reference zones', and clarification of their relationship to an 'impact area';**
- **clause 4.2 - information on the biological resources present, and information on resident and transient/migratory species. The map requested should also depict the distance of the proposed mine site from sensitive resources such as reefs and fishing grounds;**
- **clause 4.6 - modelling of ocean dynamics inclusive of the zone of influence of sediments to assess the possible impact on benthic and biological resources;**
- **clause 5.4 - information on the conservation status of species (for example, endangered), if not addressed;**
- **clause 5.4.1 - specific reference to sea turtles, given the other examples cited, as nearly all species of sea turtle are classified as endangered;**
- **clause 8 (a) - proposed alternative measures where negative impacts are perceived to be 'unavoidable' and an analysis of possible alternatives including offsets and trade-offs; and**
- **clause 8.3 - specific reference to sea turtles, given the other examples cited, as nearly all species of sea turtle are classified as endangered.**

Jamaica further supports the suggestion that the LTC consider as part of a comprehensive environmental (and social) assessment process that additional consideration be given to the potential for adverse socioeconomic impacts of future mining activities (e.g., on fisheries, including any impacts on

small island developing States). This is partially addressed in section 9 the EIS Template and the Note by the LTC, ISBA/24/C/20 (at paragraph 30) raises the possibility of developing EIA Guidelines to reflect the potential for such impacts.

Attention is also drawn to Schedule 1 to the Draft Regulations which defines "Environmental Effect" as "*any consequences in the Marine Environment arising from the conduct of Exploitation activities, being positive, negative, direct, indirect, temporary or permanent, or cumulative effect arising over time or in combination with other mining impacts*" (added emphasis). **Jamaica proposes that the word 'mining' be deleted to allow for consideration of other relevant factors such as ocean acidification.**