MINING
STANDARDS
INTERNATIONAL

29 September 2018

Michael Lodge
Secretary-General
International Seabed Authority
Kingston, Jamaica

sent via email: mlodge@isa.org.jm

RE: Comments to July Draft Regulations on Exploitation of Mineral Resources In the Area

Dear Secretary-General,

MSI appreciates the recent approval accepting our application as an Observer to the ISA. We very much look forward to engaging with the ISA and its constituent stakeholders in connection with the development of the evolving Mining Code regulatory framework.

In this regard, we understand that the Council has invited stakeholders to submit comments by 30 September in connection with the most recent draft Exploitation Regulations dated 9 July 2018 (the "Draft Regulations"). Please therefore find attached our suggestions and general comments in this regard. These comments are divided into two parts: (1) broader structural concerns as to the "architecture" of the draft regulatory framework, and (2) suggestions with respect to certain wording in the existing draft, noting however the expectation that the exact wording is still of course subject to significant reform moving forward.

MSI would welcome the chance to discuss these comments with appropriate stakeholders in due course and appreciates this opportunity to submit our views for consideration.

Yours Truly,

Robert Milbourne
Managing Director
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MSI Comments on Draft July Regulations

MSI understands that the Council and LTC have sought preliminary feedback regarding the broader structure of the proposed in the draft July regulations to ensure essential architectural issues are addressed at this stage of development, rather than detailed drafting suggestions. These should therefore be considered preliminary, and we welcome the opportunity to provide more detailed and substantive comments in the future.

Structural Considerations

(1) Balancing Environment, State Rights, and Contractor Rights. MSI notes that the current Draft Regulations have developed effectively to balance protection of the environment and benefits and protections to states. It seems however that as the Contractor will be undertaking the financial risk and leading the commercialisation of the Area for the benefit of all, certain clear fundamental principles to secure the contractors rights would be appropriate. These could include for example that it is a fundamental principle that the rights of the contractor shall not be unjustly abridged without due process and compensation, and that the Authority shall not change the economic terms and conditions of a project after approval without consent of the contractor or the payment of appropriate compensation.

(2) Fundamental Principle that Contracts must be Granted on a Commercial Basis. While DR 2(3) touches on this, in MSI's view, it seems possible that some Contractors may not have equal levels of commercial drivers in the development of the Area (as some are state sponsored, and some are private sector entities), which could cause unfair competition among competing projects. While it must be clear that all projects will pay the appropriate fees and royalties, it would seem appropriate that this is more fully clarified in the Draft Regulations, for example, such that all projects should be approved on the basis that each project generates a positive commercial return and is not unfairly subsidized by a host country (perhaps to ensure access to mineral supply), such that the economic operations of the Area are not conducted on an equal and fair economic playing field for all participants.

(3) Clarity Regarding Transition Rights between Exploration and Exploitation. The current draft might benefit from clarity on how a party with an exploration right may transition into an Exploitation Contract. For example, given the extended time frames that have emerged, and the lack of a final Exploitation Code, we believe the draft would benefit from providing certainty to existing contract holders that appropriate transitional mechanisms will be secured to ensure that their rights are protected and they are provided adequate opportunity to meet any final expectation and obligations that may be determined by the Authority during the time from the application of its Exploration Right and the new rights now to be established in the Exploitation Regulation. It would seem that in no event should a contractor's rights terminate in the event of an emerging obligation that has not been met between exploration and exploitation without providing the contractor adequate time to meet such obligations.

(4) Common Heritage. The current draft Regulations do not address the balancing between current and future generations in benefiting from the CHM resources provided in the Area for purposes of making assessments or decisions under the Regulations. The regulations might benefit by providing specific instructions concerning CHM for example that the Authority should interpret the operationalisation of CHM by balancing current benefits to society against benefits to future generations, such that neither are disadvantaged in the apportionment. In some form, the issues of CHM should be provided operational clarity with respect to approvals and impact within the Regulations.

(5) Production policies. MSI notes that the new Fundamental Principle DR 2(D) provides "The protection of developing countries from serious adverse effects on their economies or on their export earnings resulting from a reduction in the price of an affected Mineral or in the volume of exports of that Mineral, to the extent that such reduction is caused by activities in the Area".

a. In MSI's view, this appears to address an issue more appropriately deliberated upon by the Assembly and Council and eventually the Economic Planning Commission but is not a matter typically addressed within a mining code itself. It is not clear to MSI how this Fundamental Principle would be appropriately operationalized by the Authority within the terms of the Draft Regulations.
b. MSI views that these issues are appropriately considered within the Economic Assistance provisions of UNCLOS and the Implementation Agreement and accordingly should be operationalized in an appropriate mechanism independent of the Draft Regulations.
c. MSI believes that this issue identifies a substantial matter to all stakeholders (such as whether harm would occur to any country), and accordingly, MSI urges the LTC and the Authority to conduct research into what would constitute a "serious adverse effect" and how it would be determined, and what "protection" may mean in light of the Draft Regulations. Does this mean that an Exploitation Contract would not be approved because of the consequences to a state if Economic Assistance is insufficient to protect against such harm? If that is the case, such a draconian consequence should be addressed as a matter of urgency to all stakeholders such that parties investing in exploration are not adversely harmed by a determination that development may not be approved due to "serious adverse harm" for example, if there are not adequate funds available to mitigate through the contemplated Economic Assistance mechanisms.
d. Consideration should be given to balancing the obligations under UNCLOS to develop the Area for the benefit of all mankind, which seems to sit in opposition with this provision which could result in no benefit to mankind if a project may cause a change in metals prices or production of such metals within a specific country.
e. MSI also believes that it may be appropriate to commission a formal study into the quantifiable benefits of development of projects in the Area for the CHM (security of supply of resources, royalties, potential benefits for all mankind if there is any reduction of costs of metals produced in the Area), so that appropriate balancing tests may be evaluated by the Authority.

f. Finally, it seems that if adverse economic harm is used to prevent development of projects in the Area, for example because of harm to states with significant exposure to manganese market mining operations, then countries with EEZ territories highly prospective and similar to projects such as those in the CCZ might "fill the gap" and develop similar projects to those that would have otherwise been developed by the ISA – and hence cause the same global market impact harm to the same countries, but in that even with no legal framework for support for financial assistance to impacted countries harmed by those developments. It seems therefore that an assessment of the potential for DSM activities in EEZ activities should be considered in the event that production policy constraints emerge as approval factors in the draft mining code, such that these unintended related consequences in the global market are adequately modelled and understood.

(6) Emerging Best Practices and Competitive Operations. MSI believes that it may be possible that the DSM industry may evolve within EEZ territories, and while UNCLOS provides that DSM should not receive unfair advantages against terrestrial mining, the ISA should also be sensitive to the fact that EEZ DSM projects potentially could be create competitive tension as a regulatory matter with the ISA. This may have implications concerning "forum shopping" and may also have implications concerning "production policies", as noted above for example, as projects within an EEZ may not have such restrictions as proposed DR 2(D). Accordingly, the proposed MIT Royalty Regime discussion and the overall Draft Regulatory structure should be developed in light of emerging developments within EEZ operations, and the Draft Regulations should be considered and reviewed in due course in light of any emerging best practices developed within EEZ legislation and projects. MSI believes that the ISA should not, as a general matter, develop regulations substantially more detrimental to contractors than policies developed by EEZ national projects, and that the ISA should seek to establish a coordination mechanism among appropriate state parties to ensure parity and harmony of regulatory settings to the extent possible. This could take effect perhaps through a provision that requests state parties to use reasonable efforts to coordinate policies to the extent possible with ISA policies. The ISA should seek if at all possible to prevent a bifurcation of the industry between "more favourable" and "less favourable" regulatory settings in competition with EEZ host countries. The Draft Regulations might expressly note that the Authority is entitled to take reference of emerging regulatory practices in EEZ Legislation in interpreting, revising and enforcing the Draft Regulations if ever applicable.

(7) Seabed Mining Registry. MSI believes that more detailed structural thought should be given to the content and administrative procedures and roles of the Registry. For example, clarity around the specific goals, intent, functions and procedures.

(8) Serious Harm. MSI believes that any mining operation has the potential, and indeed the likelihood, that some harm is to be expected. Such harm may be mitigated, and off-setting benefits may be created, to justify or balance benefits against such harm. MSI suggests the Draft Regulations should address that the distinction between potentially harmful consequences of a planned and scientifically evaluated and approved operation, which operates within the confines of its approval, and "serious harm", which in MSI's

view would constitute unplanned activity or harm beyond that approved and authorized by the Authority in connection with an Exploitation Contract. If a Contractor is approved to conduct activity in connection with an approved plan of work, according to a scientific study and detailed review and approval by the Authority, the contractor should be entitled to a reasonable presumption of the benefit that conducting such approved activity would not retroactively later be halted because the approved activity was deemed to cause "serious harm" if the specific consequences had been reviewed and approved by the Authority. In MSI's views, if an activity is authorized and the contractor relies on that approval to invest and commence operations, and a later definition of serious harm is developed which stops a previously authorized activity, then the contract should be entitled to dispute such determination or seek compensation. MSI would welcome providing supplemental views as to how national legislation regimes deal with this issue of unauthorized harmful activity.

(9) UNCLOS 160(2)(f) "Powers and Functions" v Who has authority to promulgate rules. UNCLOS reserves to the Assembly, which nominates the Council, the authority to consider and approve, upon the recommendation of the Council, the rules, regulations and procedures of the Authority, on the equitable sharing of financial and other economic benefits derived from activities in the Area and the payments and contributions made. The Regulations in their current form seem to violate this approval principle, and allow for approvals at lower levels (Commission, Secretariat, etc). MSI assumes the way this will be cured is by the Assembly approving the actions of the Council including the adoption of these regulations and the process for issuance of Standards and Guidelines and Rules and Procedures, etc. This should be addressed with the LTC and Secretariat though to ensure that there are no future challenges to the validity of the Regulations as a matter of international law. MSI does not believe the way the current Regulations are drafted unequivocally meets the requirements under UNCLOS.

(10) UNCLOS Article 140(2) "Other Economic Benefits derived from Activities in the Area" This clause does not yet seem reflected in the Draft Regulations. The provision states that "The Authority shall provide for the equitable sharing of financial and ***other economic benefits derived from activities in the Area*** through any appropriate mechanism, on a non-discriminatory basis." Has the ISA considered what would constitute other economic benefits, and whether they are relevant to be considered in the Draft Regulations? Would not this meet the standard for a Fundamental Principle to be considered in the administration of the draft Regulations?

(11) UNCLOS Article 147 "Accommodation of Activities in the Area" v Installations When contemplating the governance of the Area's activities, which are the subject of these Regulations, UNCLOS has relatively extensive provisions with respect to "installations". The current Draft Regulations do not really address this. It would seem appropriate to address this in some more direct form (i.e. what is permitted and how regulated, etc).

MSI Preliminary Comments to Draft July Regulations
Drafting Comments

(1) Draft Regulation 2(d) "Fundamental Principles "
   a. MSI suggests consideration be given to how this new principle work in conjunction with Article 150(f) UNCLOS ("Policies relating to activities in the Area") which specifically provides that activities in the Area should ensure "the promotion of just and stable prices remunerative to producers and fair to consumers for minerals derived both from the Area and from other sources, and the promotion of long-term equilibrium between supply and demand" which seems to override this new principle?
   b. UNCLOS references that the Council shall make a recommendation to the Economic Planning Commission for economic adjustment assistance to affected countries. This mechanism is not contemplated in the current Regulations. How does this fundamental principle work in connection with the concept of Economic Assistance? Presumably no assistance would ever be required if no project was approved that created economic harm. Should this Principle be tied to Economic Assistance, or more appropriately be moved to a separate document or adjudication mechanism?

(2) Draft Regulation 13(4)(d) – "Reasonable Regard"
   a. The Plan of Work must provide "reasonable regard" for other activities including navigation, submarine cabling and pipelines, fishing and scientific research. "Reasonable regard' seems to MSI to be so unclear as to almost certainly open the Contractor to risk of litigation. For example, if there is a cost that is incurred by a Contractor to comply with a future cable operator, it may be that someone could determine that "reasonable regard" does not allow a Contractor to require compensation for any costs incurred. It should be considered whether greater definition is needed here. For example, one clarification could be that "in the event such reasonable regard requires costs to the Contractor which can be reasonably avoided in reasonable coordination with the proponent of such other activity or should otherwise be incurred by such proponent, the Contractor shall not be required to bear financial loss in any accommodation of such alternative activities."

(3) Draft Regulation 15 – "Amendment to Plan of Work"
   a. Specific consideration might be given to providing that the Council shall not unreasonably withhold approval of any amendment to a Plan of Work if such plan does not increase any environmental or safety risk and is otherwise reasonably justified and commercially and operationally appropriate.

(4) Draft Regulation 16 - "Consideration and Approval of Plans of Work"
   a. It may be reasonable to consider a provision that in no event should any non-enumerated reason to be used to prevent the approval of a Plan of Work. Essentially, the regulations should make it expressly clear that if a Contractor meets the obligations enumerated, then the Commission and Council shall not unreasonably withhold approval.
   b. In the prior draft there was an aspiratory obligation of the Commission to be non-discriminatory in the conduct of consideration of any approval of a plan of work

which has been removed. It should be reinserted.

(5) Draft Regulation 17 – "Effective Date"

a. Consideration might be given to whether it should be expressly clear when approval of a Plan of Work becomes effective. MSI assumes it is the date the Council approves the Plan of Work (and any conditions precedent to the effectiveness of approval have been satisfied). This should be made clear.

(6) Draft Regulation 23 (4) and (6) – "Security"

a. While there is now a very helpful level of clarity and detail on allowing filling of caveats for purpose of financing, there is possible challenge in clause 4 which requires any beneficiary to, upon foreclosure, undertake Exploitation activities or transfer. Even with the newly added right to transfer the obligation, this still may not be possible for a financier. It would be preferable that suspension should be automatic at the election of the financier as a third option.

(7) Draft Regulation 24(10) – "Transfer"

a. Transfers are subject to the "then prevailing" exploitation contract terms – which of course may very well be more onerous than those under the then existing contract. Clearly all parties want to encourage the development of the industry, and this provision poses a risk to the industry as there is uncertainty in future terms and if terms become restrictive, a contractor could be artificially "locked" into keeping the asset even when another appropriate international DSM operator would like to take over the asset because the transfer would result in more onerous terms. We suggest that once a contract is approved, the terms of that contract should be transferable while that contract is operative. This applies of course to DR 25 "Change of Control" as well.

(8) Draft Regulation 25 "Change of Control".

a. We believe that the new language in DR 25 is unclear in the event the Secretary General does not believe that the new controlling entity "will be able to and have the financial capability" to continue operations. Is it intended that a change of control could occur, and the Contract could be terminated? What would happen then? Separately, in the event a contractor might consider an initial public offering and offer 50% of its shares to the public, would this be captured as a change of control event, or would an exclusion be appropriate?

(9) Draft Regulation 27 – Performance Guarantee

a. The quantum required should be measured in light of the cost of closure/monitoring/rehabilitation at any given point at time – so in the first year for example, the quantum should be significantly lower than the quantum required toward the end of mine life – and this concept should be made explicit in this clause.
b. MSI is not clear whether the concept of "progressive rehabilitation" could be explored in the context of DSM. MSI would be interested in understanding whether and how to incentivize such activity in light of performance guarantee obligations.
c. Note that for high credit worthy entities, some jurisdictions have begun adopting mechanisms in which rather than mandating the costly issuance of security or performance bonds which provide little actual immediate benefit (given the low risk

of insolvency), the cost to post such bonds can at the option of the regulator be paid into a fund for specific related purposes (such as broader environmental monitoring). This example of innovative financial assurance regimes might be explored by the ISA.

(10)Draft Regulation 31 "Optimal Mining of Mineral Resources"

a. Clause 4 requires members of the Authority to provide data on processing, treatment and refining of ore. It is not clear why this provision is included or what its relevance is. Does the ISA wish to understand processing in assessing operations outside the Area? If so, on what basis is this information necessary?
b. While "avoidance of waste" is a clearly appropriate principle, it should not force future unbudgeted costs on the Contractor to change activities that had been previously approved, if to do so would cause unreasonable economic hardship. MSI suggests that this clause should operate at the point of approval, and to the extent it applies in annual report changes, it should be limited to "reasonable best efforts" rather than a mandatory provision.

(11)Draft Regulation 34 "Risk of Incident"

a. The Draft includes a valuable balancing test between change in operations against prior approved operations. The draft provides that there should be an assessment as to "whether the time, cost and effort would be grossly disproportionate to the benefits". MSI suggests that this balancing test language might be usefully used as a standard formulation more comprehensively throughout the draft Regulations.

(12)Draft Regulation 43 "Other Resource Categories"

a. The Contractor is now required to report any finding of resource categories other than the category the subject of the Contract. While that is appropriate and reasonable, if the discovery is made by the Contractor, then it would be reasonable that the Contractor has priority rights in filling an application for a Plan of Work and negotiating an Exploitation Contract. A simple addition to this Regulation providing a priority right seems appropriate.

(13)Draft Regulation 44. Disclaimer

a. It is reasonable to limit disclosure that implies the Authority has endorsed a resource estimate, but it should be made expressly clear that for the avoidance of doubt, this provision's prohibition on disclosure does not prevent the Contractor from disclosing that it has received approvals from the Authority to conduct its operations in accordance with the terms of its submissions.
b. Further, it may be appropriate in due course that the Authority adopt provisions upon which its determination of a Contractor's DSM resources can be reviewed and disclosed to the market as having met the scientific and geological reporting procedures required by the Authority and commonly accepted by the international market. Indeed, it would seem important that the Authority has adopted reasonable provisions to ensure that any project is approved already meeting such standards.

(14)Draft Regulation 45 – "Compliance with Other Laws and Regulations"

a. There may need to be some substantive legal consideration with respect to clause 2, which provides what otherwise seems a reasonable obligation that "Contractors

shall comply with all laws and regulations, whether domestic, international, or other, that apply to its conduct of activities in the Area". The problem here is that a "Law" can be passed by any country, anywhere, which could be deemed by such country's own laws, to "apply to the conduct of activities in the Area." For example, the US regulates activities in third party countries all over the world, as do other countries. It is therefore very reasonable to imagine that this clause could create a conflict of laws situation in which different countries adopt provisions that assert potentially conflicting application to the Area. MSI suggests that some limitation be considered, such as that compliance shall apply first with the laws of its sponsoring State and these Regulations, and then, to the be to the best of ability and knowledge of the Contractor (as otherwise they would need to constantly monitor all the laws of the world to ensure none are applicable to the Area at any given time), any other laws or regulations whether domestic or international that apply to the Area, to the extent such laws do not create a conflict of laws with respect to its existing obligations.

(15)Draft Regulation 46(e) "General Obligations"

a. This provision requires that the Authority, Sponsoring States and Contractors "develop incentive structures, including market-based instruments that support and enhance the environmental performance of Contractors, including technology development and innovation". It is not clear what is the intent here, or how it would be achieved, let alone what role a Contractor would have in creating an instrument to enhance its own performance. Clarity should be provided here. In what way could a party be in breach of this obligation?

(16)Draft Regulation 48 – Restriction on Mining Discharges

a. This provision states that there can be no "Mining Discharges" unless expressly permitted. Would this prevent unplanned and inadvertent "incidental" and "non-harmful" discharges generally? In the event harm is caused or the discharge is more than de minimis, it would seem disclosure should be required and sanction should result. Some adjustment to this language might therefore be considered.

(17)Draft Regulation 52 "Purpose of the Fund"

a. MSI suggests for consideration into research into the design of optimal Mine Closure plans according to scientific and engineering best practice research, and research into development of optimal regulatory standards and methodologies to improve protection of the global marine environment.

(18)Draft Regulation 55 "Modification of a Plan of Work by a Contractor"

a. MSI suggests consideration as to whether this Regulation should allow a modification to a Plan of Work for changes that are Material Changes, with the consent of the Secretary-General, not to be unreasonably withheld, where such modifications do not increase risk to safety or the environment.

(19)Draft Regulation 58 – Closure Plan

a. Clause (4) contemplates that the Commission could review the amount of the Environmental Performance Guarantee. While this may be appropriate in sudden actions (such as suspension), it would be problematic at the end of mine life, when a

Contractor may no longer have the ability to raise new funds to support additional guarantees if there is no further exploitation development activity to finance any material increase in such funding. If there is a need to increase this amount, which may of course be reasonable, it should not be decided at a point the Contractor and its State Sponsor may be unable to finance a new obligation. MSI suggests that the timing of reassessment (if it occurs) needs to be done (i) at a point that is reasonable to allow the financing of such obligation to be achievable or otherwise to require the cessation of activity, and (ii) if the outcome is not acceptable to the Contractor, allow time for appeal before cessation of activity.

(20)Draft Regulation 60/61 "Equality of Treatment" / "Financial Incentives"

a. Draft Regulation 60 provides that, with respect only to financial terms, the Council shall apply provisions in a uniform and non-discriminatory manner and provide for the equality of treatment. It seems problematic that this non-discrimination is limited here to financial dealings but is not all applicable decisions of the Authority.
b. Draft Regulation 61(3) provides that there should not be any financial incentive that creates an "artificial competitive advantage with respect to land-based miners". This seems problematic. The overall intention seems to be for the development of resources for the common benefit of all mankind. Land based miners have different financial structures often because of "financial incentives" that countries might choose to provide. How would the ISA evaluate incentives provided by countries to incentivize terrestrial mining to determine whether equal incentives could apply to the Area?
c. Should the Draft Regulations extend to consider whether countries that are developing deep sea mining in their EEZ territories have adopted incentives that are more advantageous than those provided by the ISA? Should the ISA encourage equality of treatment in such circumstances?

(21)Draft Regulation 62 "Contractor shall pay Royalty"

a. In Draft Regulations 79 and 80 it is provided that fees should be determined by the Council "taking account of the level of maturity and development of Exploitation activities in the Area" and changes "shall only apply to existing exploitation contracts by agreement between the Authority and the Contractor". MSI believes that to attract and finance development in the Area, it may be appropriate to consider in Draft Regulation 62 that the Contractor shall benefit from fiscal stability and certainty with respect to the level of royalty applicable during an Exploitation Contract.

(22)Draft Regulation 69 – Required Information.

a. Clause 1(d) should include that if reasonably requested or required, suitable confidentiality against disclosure of offtake agreements or sensitive commercial information is adequately protected.

(23)Draft Regulation 73 – Audit and Site Inspections

a. Again, any information obtained should be kept generally (or to the extent possible and appropriate) commercially confidential and not subject to general disclosure.

(24)Draft Regulation 74 "Assessment by the Authority"

a. Clause 4 provides a ten-year window for audit and review. That seems unusually long. In contrast, errors in overpayment of royalty are limited to only 5 years. It would seem that a common period be consistently applied such as 5-7 years.

(25)Draft Regulation 75 "General Anti Avoidance Rule"

a. Financial instruments, such as futures, may become essential to the financing of projects. The Draft includes much broader language in 69(1)(d) for disclosure of "all contracts and sale or exchange agreements." Is it contemplated that pre-sale arrangements can be disclosed and approved by the Commission? The same concept applies to financing structures that involve a cost plus pre-purchase arrangement with a refinery or similar metals processing firm in order to obtain financing to commence operations (selling equity, etc). It seems that the structure at the moment requires a qualified person to report on the value and basis of valuation of mineral bearing ore removed from the area – so a per tonne basis, regardless of the financial structure that a Contractor develops. It may be appropriate that financial arrangements appropriate and customary for the international mining industry be reviewed (at first instance perhaps confidentially) and if considered fair and reasonable, approved (and disclosed as appropriate) by the Commission and Council so that certainty and clarity is provided. This could enable the Contractor to develop risk sharing models of finance (for example, if there is a pre-sale of commodity at a fixed price to bring in early finance), which could benefit the Authority by facilitating the development of projects. MSI recognizes that the parties must avoid transfer pricing issues, but financial structures customary to the industry that are not unreasonable should be considered and reviewed by the Authority and not restricted out of hand without consideration.
b. After approval and commencement of operation, a Contractor might further change its financial structure. In domestic jurisdictions companies often have the right to seek the equivalent of pre-approval of the appropriateness of a change in financial structure. It would seem advisable that amendments to financial structures be capable of submission to the Authority for pre-approval from time to time to optimize its ability to raise finance or structure its developments.

(26)Draft Regulation 76 "Arm's Length Adjustments"

a. Clause 2 provides that adjustments can be made after the fact. As noted above, a no-action letter type structure should be considered, so that ex post facto adjustments are not imposed.
b. This Draft Regulation appears to adopt a position that might be extended to the entirety of the Regulations, in which a Contractor can not combine the financial structure of processing activities with the mining operations in the Area into an integrated financial structure. This seems reasonable from one perspective but could have unintended consequences for Contractors. Consideration might be made as to whether approval of arrangements of an integrated project, including the costs and risks of domestic based processing integrated into one project, might be evaluated and not excluded on the basis of the language in this clause.

(27)Draft Regulations 80 "Review of Rates"

a. MSI suggests that in the event the structure of fees change in the Second Period of Commercial Production, any change should not materially detriment the Contractor from the financial provisions granted to the Contractor in the First Period.

(28)Draft Regulation 87 "Confidentiality of Information"

a. The draft Regulations might consider, for the avoidance of doubt, that certain information would have the presumption of confidentiality such as confidential business intellectual property, industrial secrets, proprietary data, commercial sales contract pricing and structures, among others.
b. In Clause 2 there is the presumption of disclosure after 10 years unless the Contractor can "demonstrate to the satisfaction of the Secretary-General" that it should remain confidential. MSI suggests that Contractors should have the right to propose that this be qualified by a general request that the Secretary-General shall not unreasonably withhold approval to keep confidential such information for the period in which the project continues to be operating.
c. MSI does not understand Clause 5 which provides "Nothing in these Regulations shall affect the rights of a holder of intellectual property". Does that mean that where a third party has rights, the ISA cannot violate and disclose constituent confidential information? This could have a variety of implications, including some which could otherwise negate the impact of other disclosure obligations in the Draft Regulations. Some clarity on this provision might be appropriate.

(29)Draft Regulation 88 "Procedures to ensure confidentiality"

a. Regulations and risk policies are increasingly recognizing the emerging risk to confidential information posed from electronic information disclosure through cyber security threats. Given the high value of confidential information, a cyber security protection system should be specifically required to be implemented by the Secretariat in addition to its system of protecting and logging written information.

(30)Draft Regulation 90 "Seabed Mining Register"

a. As a key administrative body the SMR should have detailed procedures that govern its operation. MSI suggests that this be governed by SMR Procedures to be released at a later stage or elaborated now. MSI would be pleased to provide more support and recommendations in this regard.
b. Clause 1 should make express that the enumerated categories in this clause shall in all cases and for the avoidance of doubt exclude in each case any information deemed Confidential.
c. Clause 1(l) provides that disclosure can include "any other details which the Secretary-General considers appropriate". That seems to be a very open permission when the paragraph already enumerates specific topics. MSI suggests an alternative to this language such as "other information authorised by the Council to be disclosed from time to time", or "other information authorised to be disclosed under the [SMR Procedures], as amended from time to time".

(31)Draft Regulation 91 "Notice and General Procedures"

a. Paragraph (5) provides registered airmail is deemed effective 21 days after posting—seems slightly unusual and lengthy, when normally it would be deemed effective the

day the registered mail is received by the registered delivery service (or maybe the next day).

b. MSI also believes that the language "Delivery by email is deemed to be effective when the email enters an information system designated or used by the addressee for the purpose of receiving documents of the type sent and is capable of being retrieved and processed by the addressee" is not appropriate as this is not something a posting or issuing party can know. The provisions could rely on evidence of return receipt notification, or the prior disclosure and acceptance by both parties of a particular email address, but it should not be acceptable that delivery doesn't occur because a system has an error that the delivering party is unaware of, which this language provides.

(32)Draft Regulation 92 "Adoption of Standards"

a. MSI believes that the development of Standards should also take into account the views of interested stakeholders, sponsoring States, and Contractors in addition to "recognized experts". Further, the submission of standards should include an assessment of the cost of adoption of any new standard to the industry and each Contractor and a cost/benefit analysis for all stakeholders. Further, as a general principle such Standards should not be adopted if to do so would comprise an unreasonable financial impost on an operation that had already been approved and sanctioned by the Commission.

(33)Draft Regulation 93 – "Issuance of guidance documents"

a. Should the title of this regulation and Clause 1 both refer to guidance documents which then seems to be defined as "Guidelines"? Is there a reason for this, and is there intended to be a difference? This is not an approach used elsewhere (two slightly different terms for the same concept) in the draft Regulations so seems to have some specific drafting intention which might be useful to be made clearer.
b. This Regulation should ideally include a clause that any Guidelines shall only be adopted once adequate consultation with experts, interested stakeholders, sponsoring States and the Contractors has been conducted, and as a general principle such Recommendations shall not be adopted if to do so would comprise an unreasonable financial impost on an operation that had already been approved and sanctioned by the Commission.
c. Further, it is not clear why "Guidelines" should merely be reported to the Council, rather than approved by the Council. Given their potential for significant impact, it would seem the same structure as Standards should be adopted.
d. Separately, Given Regulation 92 and 93 only addresses Standards and Guidelines, the related process of issuing "Rules" and "Procedures" should also be included.

(34)Draft Regulation 97 "Inspector's power to issue instructions"

a. MSI suggests that any significant action permitted to be taken in clause (1) by the Inspector should be limited to a "material" breach, rather than just any breach (even if de minimis).

(35)Draft Regulation 98 "Inspectors to report"

a. MSI suggests requesting that any Inspector report be initially prepared in draft form and issued to the Contractor, Sponsoring State and Secretary General for

consultation before being finalized and formally issued to the Secretary-General and others. This is particularly important as these reports might be disclosed publicly there should be an informal corrective mechanism in place in order for all parties to correct the record if necessary and ensure that the broader community does not receive incomplete or incorrect reports about performance in the sector which could undermine the credibility of the sector. This generally seems to be contemplated in the Contract, so it should be reflected in the Regulations.

(36) Draft Regulation 99 "Complaints"

a. If there is a complaint, any report of the Inspector should be withheld from public disclosure until the complaint has been adjudicated in order to avoid any damage accruing to the Contractor from any wrongful or incorrect action by an Inspector.
b. There should be an appeal process specified for any corrective actions.
c. The Secretary General should in principle not undertake material actions that could financially or operationally harm a project without consultation and approval by the Commission or Council.
d. It would seem the Sponsoring State should be involved in reviewing and responding to any Complaints.

(37)Draft Regulation 100 "Electronic Monitoring System"

a. Electronic monitoring systems are evolving rapidly with satellite technology. Best in class remote monitoring (drone, satellite) technologies should be considered and adopted to improve all stakeholders to trust performance in the sector.

(38)Draft Regulation 101 "Compliance Notice and Termination of Exploitation Contact"

a. In Clause (1), the Secretary-General should only take action on "material" breaches (the draft Exploitation Contract refers to serious persistent and wilful violations of fundamental terms).
b. It would seem that the Sponsoring State should be involved in any notice and corrective action required.
c. Unless required for immediate safety or health precautionary reasons, the right to suspend or terminate should be based on a recommendation of the Commission and approved by the Council, after a reasonable defined period (not provided at the moment) to take corrective action has elapsed (such as perhaps 90 days).
d. An appeal mechanism should be considered.

(39)Draft Regulation 103 "Sponsoring States"

a. Note that under UNCLOS 139(1) States Parties shall have the responsibility to ensure that activities in the Area, whether carried out by States Parties, or sponsored nationals, comply with UNCLOS. It would seem that the Authority must ensure that any actions it takes are undertaken in cooperation with the State Sponsors to enable such State to meet its obligations under UNCLOS. UNCLOS 139(2) provides that where a State Party acts together with an international organization, they shall bear joint and several liabilities for any damage. This means that a State Sponsor has liability for any actions taken or failed to be taken by the Authority, furthering the need for clarity on how the two entities will cooperate.

b. There should be specific requirements here for the Inspector, Commission and Secretary General to consult with and inform the Sponsoring State of any relevant information in order for it to undertake its compliance enforcement role.
c. Consideration might be given to whether a broader right should be adopted such that the Sponsoring State is entitled to be copied on all material compliance correspondence between the Contractor and the Authority.
d. Consideration should be given to whether the Sponsoring State should be consulted before any action is taken by the Authority that impacts on the Contractor under the Regulations.
e. As an interesting technical legal matter, UNCLOS Article 178 provides the Authority immunity from legal process, so the joint and several liabilities could result in the Sponsoring State having the sole financial liability of actions wrongfully taken by the Authority. (This is seemingly avoided by actions taken in connection with the draft Contract which does grant liability of the Authority).

(40)Draft Regulation 104 "Settlement of Disputes" and Administrative Appeals

a. This Draft Regulation does not provide for any administrative appeal with respect to actions taken by the Secretary-General, the Secretariat, the Commission or the Council. That does not seem appropriate. Some natural justice appeal rights should exist if such determinations are objectively unreasonable, fail to include necessary factors, etc. This Draft Regulation makes reference to the Seabed Disputes Chamber.
b. UNCLOS Article 187 establishes the Seabed Disputes Chamber but limits the type of disputes that can be heard, and does not specifically allow jurisdiction to regulatory actions, or to the adoption of regulations, procedures or standards that are "ultra vires" or beyond the authority of the Council, Commission or Secretary General.
c. Unfortunately UNCLOS Article 189 " Limitation on jurisdiction with regard to decisions of the Authority" provides that "The Sea-Bed Disputes Chamber shall have no jurisdiction with regard to the exercise by the Authority of its discretionary powers in accordance with this Part; in no case shall it substitute its discretion for that of the Authority" it goes on that "the Sea-Bed Disputes Chamber shall not pronounce itself on the question of whether any rules, regulations and procedures of the Authority are in conformity with this Convention, nor declare invalid any such rules, regulations and procedures" MSI believes that the Regulations ***adopt some jurisdictional administrative rights appeal mechanism***.
d. MSI suggests that a specific provision be adopted in the Regulations to enable a Contractor or a State Party to bring an action for adjudication with respect to administrative appeal of any action arising under the Regulations before an Administrative Appeals Tribunal to be constituted by the Seabed Disputes Chamber.
e. Finally MSI notes that it appears that some terms under the Contract are entirely in alignment with the Regulations – the two should not be different.

(41)Draft Schedule 1 Definitions "Environmental Effect"

a. This term as used in the Regulations may potentially be triggered by non-material events. The language describes indirect and temporary impacts that could arise over time – that may possibly capture unintended impacts or effects that are de-minimis or caused using reasonable precautions under pre-approved activities. Often words like "effects that are, or should be, reasonably foreseeable" can be used and would appropriately protect against unreasonable harm while not capturing non-material

events. It seems unreasonable to ascribe liability if an indirect and long-term impact is not reasonably environmental foreseeable by scientists or the ISA or Contractors when planning for, monitoring and managing impacts.