

关于开发规章草案评论意见*

上海交通大学极地 & 深海发展战略研究中心，中国

上海交通大学极地 & 深海发展战略研究中心感谢秘书长和法律技术委员会（法技委）在制定《“区域”内矿产资源开发规章草案》（规章草案）（ISBA/24/LTC/WP.1/Rev.1）方面的努力。总体来说，目前规章草案比前一版本有了很大改进，为后续讨论提供了良好基础，但仍有继续完善的空间。建议规章草案在以下四个方面得到加强：

第一，“区域”资源利用与海洋环境保护平衡原则。开发规章的制定应以促进人类共同继承财产的利用和分享、推动“区域”内矿产资源的开发为导向，同时按照《联合国海洋法公约》（《公约》）及其附件以及《关于执行 1982 年〈联合国海洋法公约〉第十一部分协定》（《执行协定》）的规定，切实保护海洋环境不受“区域”内开发活动可能产生的有害影响。

第二。健全的商业原则。健全的商业原则意味着“区域”内资源开发运用成本效益分析方法，综合资源开发、环境保护、惠益共享等问题基础上，在开发申请、合同管理、缴费机制、监管制度方面尽量减少对国际海底管理局（管理局）、缔约国和承包者不必要的负担。

第三，规章草案应当涵盖惠益分享制度。惠益分享是“区域”制度不可或缺的有机组成部分，是“区域”内资源开发整体制度中重要和关键的一环，规章草案没有纳入惠益分享内容，在结构安排上存在缺陷。

“区域”及其资源是人类共同继承财产，为了落实这一原则，管理局、缔约国、承包者及相关利益攸关方都做出了

* 本评论意见，中文为原版，英文为翻译版。

不懈的努力，使得人类共同继承财产原则在建章立制、“区域”实践、技术发展等方面有了长足的进步。然而，如何构建“区域”惠益分享制度，却迟迟没有进展，管理局在这方面的精力和讨论明显不足。“区域”资源商业开发可能在不久的将来实现，而如何对开发获得的利益进行分享却讨论甚少，这是不可想象的。

与之形成鲜明对比的是，在国家管辖范围以外的遗传资源问题上，惠益分享制度一直是谈判的重点问题。目前联合国大会正在就国家管辖范围以外生物多样性的养护与可持续利用问题拟订一份具有约束力的国际文书，其中，包括惠益分享在内的海洋遗传资源的养护和可持续利用正是核心议题之一。

惠益分享是人类共同继承财产原则的具体体现，事关各利益攸关方的利益平衡，涉及缴费机制、成本效益、环境保护、可持续发展、发展中国家待遇等诸多问题。这些问题都是相互关联的，是开发规章不可分割的一部分，惠益分享问题应同这些问题一起讨论才可能得出正确的结论，而现在规章草案制定正是提供了这样难得的机会。

第四，规章应强调描述：加强管理局与相关国际组织的协调与信息共享。例如，在环境事项上，应加强管理局与联合国粮食与农业组织的协调与信息共享。在深海勘探、开发活动与其他海洋活动适当顾及方面，应加强管理局与国际电缆保护委员会的协调与信息共享。

关于规章草案具体条款评论如下：

规章草案第 4 条 沿海国的权利

本条规定“海洋环境造成严重危害或具有严重危害的威胁”，其中“严重危害”应当如何定义，由哪些主体进行认

定，规章草案应进一步澄清。对本条第 3 款中规定的“遵行通知”要求也应进一步澄清。

规章草案第 13 条 对申请者的评估

本条第 4 款规定，法技委应确定拟议工作计划是否规定在实施开发活动时应合理顾及海洋环境中的其他活动，包括但不限于《公约》第八十七条所述航行、铺设海底电缆和管道、捕鱼和海洋科学研究。

由申请者自行判断其拟定的工作计划是否规定了在实施开发活动时应合理顾及海洋环境中的其他活动是比较困难的，申请者在获取相关信息方面可能存在盲区，因此管理局应和相关国际组织加强合作，沟通信息，为申请者提供相关资料。建议管理局在“区域”活动与其他活动相互顾及方面出台指导性文件，帮助申请者提交符合本条内容要求的工作计划。

规章草案第 27 条 环境履约保证金

该条规定了承包者在深海采矿之前须向海管局缴存环境履约保证金。环境履约保证金是承包者履行的环境义务，建议在确定缴纳保证金数额的时候区分发达国家承包者和发展中国家承包者。

一方面，1992 年联合国《里约环境与发展宣言》第 7 项原则以“各国对全球环境恶化所引起的作用、掌握的技术和财力资源不同”为基础，明确了发达国家与发展中国家在追求可持续发展的过程中拥有共同但有区别的责任，其已经成为国际环境法的一项基本原则。另一方面，“区域”活动对发展中国家予以优惠是人类共同继承财产原则的题中之义。

规章草案第 45 条 遵守其他法律规章

本条规定，承包者应遵守适用于其在“区域”内开展活动的所有法律规章，无论是国内、国际或其他法律规章。本条规定承包者需遵守的法律范围过于宽广，且范围不甚清楚。规章草案已经在其他地方表明承包者应当遵守担保国法律，因此，此处毋须再次强调，建议删去此条。

规章草案第 53 条 环境责任信托基金的宗旨

建议对设立环境责任信托基金的目的和性质作进一步考虑，例如，基金是否可以用作资助发展中国家在采矿活动中保护海洋环境工作。

规章草案第十一部分 检查、遵守和强制执行

检查是确保开发合同顺利进行必不可少的措施。但是应当注意，“区域”资源开发在远离大陆的深邃海底进行，相比于陆地采矿，“区域”资源开发检查的成本大大增加。因此检查应当坚持最低限度原则，尽量不对承包者、缔约国和管理局造成不必要的负担。

如何启动检查程序，根据《公约》第 165 条第 2 款 m 项对法技委的相关规定：

“就视察工作人员的指导和监督事宜，向理事会提出建议，这些视察员应视察“区域”内活动，以确定本部分的规定、管理局的规则、规章和程序、以及同管理局订立的任何合同的条款和条件是否得到遵守。”

应由法技委向理事会提出相关建议。且检查不应该是常规性检查，而应是必要性检查，应当在难以确定承包者是否遵守合同的情况下，进行检查。

规章草案第 103 条 担保国

本条规定，为承包者担保的国家应该尤其采取一切必要和适当的措施，以确保其担保的承包者依据《公约》第十一



上海交通大学

极地 & 深海发展战略研究中心

SJTU-CENTRE FOR POLAR AND DEEP OCEAN DEVELOPMENT

A: 800 Dongchuan Road, Minhang

District, Shanghai City, China

E: oceanlaw@sjtu.edu.cn

T: +(86)21-34207499

W: <http://colp.sjtu.edu.cn>

部分、《协定》、管理局的规则、规章和程序以及开发合同的条款和条件切实遵守规定。

国际海洋法法庭海底争端分庭（分庭）就“国家担保个人和实体在‘区域’内活动的责任和义务问题”发表的咨询意见对于明确担保国的责任、规范国际海底活动、维护国际海底秩序具有重要意义，建议本条增加咨询意见的表述。

Comments on the Revised Draft Regulations on Exploitation of Mineral Resources in the Area¹

SJTU-Center for Polar and Deep Ocean Development, China

SJTU-Center for Polar and Deep Ocean Development (PDOD) appreciates the efforts made by International Seabed Authority (ISA) Secretary General and ISA Legal and Technical Commission (LTC) in developing Draft Regulations on Exploitation of Mineral Resources in the Area (the Draft Regulations, ISBA/24/LTC/WP.1/Rev.1). In general, the current version of the Draft Regulations shows improvements compared to the version in ISBA/23/LTC/CRP.3*. The Draft Regulations provide solid foundation for further discussions, meanwhile it calls for continuing improvements. PDOD provides following suggestions for the Draft Regulations to be fortified in 4 aspects:

First, we refer to the Principle of Balancing Use of Resources Use and Protection of the Marine Environment. The formulation of the Draft Regulations shall aim at promoting the utilization and sharing of common heritage of mankind, as well as promoting the exploitation of mineral resources in the Area. Meanwhile, the formulation of the Draft Regulations shall ensure effective protection for the marine environment from harmful effects, which may arise from exploitation activities in the Area according to the United Nations Convention on the Law of the Sea 1982 (the Convention) and Agreement Relating to the

¹ The Chinese version is the original and English is the translation.

Implementation of Part XI of the United Nations Convention on the Law of the Sea 1994 (the Agreement).

Second, we refer to the Sound Commercial Principle. Sound Commercial Principle means that cost-effectiveness analysis be applied to the exploitation of resources in the Area, where resource exploitation, environment protection, and benefit sharing integrated as the basis for minimizing the unnecessary burden for ISA, Sponsoring States, and Contractors in issues of exploitation application, contract management, financial mechanism, supervision, etc.

Third, the Draft Regulations shall contain benefit sharing mechanism. Benefit sharing is an indispensable part of the legal regime of the Area, and therefore an essential part of the legal regime of exploitation of resources in the Area. Lacking the content of benefit sharing is a defect in the structure of Draft Regulations.

The Area and its resources are the common heritage of mankind. To enforce this principle, ISA, Sponsoring States, Contractors, and other stakeholders have made continuous efforts for the long-term developments in developing laws and regulations, activities in the Area, technical improvements, etc. However, construction for a benefit sharing mechanism of the Area is in slow improvements. Where ISA lack efforts and discussions. The commercial exploitations of resources in the Area may occur in the near future, therefore it is inconceivable of lacking discussions for benefit sharing from exploitations.

In a contrast way, benefit sharing has been a major issue for discussion in genetic resources of marine biological diversity

beyond areas of national jurisdiction (BBNJ). Currently the UN General Assembly is drafting a binding international instrument on conservation and sustainable use of biodiversity of BBNJ, where benefit sharing is included in the key issue of “conservation and sustainable use of the marine genetic resources”.

Benefit sharing is the substantial form of the principle of Common Heritage of Mankind and closely related to the balance of stakeholders’ rights, where issues of financial system, cost-effectiveness, environment protection, continuous developments, treatment for developing countries, etc. are involved. These issues are interrelated as an indispensable part of the Draft Regulations. Thus, the formulation of the Draft Regulation provides a chance for benefit sharing to be discussed with these issues so as to draw the right conclusions.

Fourth, the Draft Regulations shall emphasize that ISA strengthen the coordination with other international organizations and information exchange. An example of this point is that ISA shall strengthen the coordination and information exchange with FAO in terms of environment protections. Furthermore, ISA shall strengthen the coordination and information exchange with ICPC in terms of deep-sea explorations, exploitations and reasonable regard with other activities in the marine environment.

Comments for specific articles of the Draft Regulations are:

Draft Regulation 4 Rights of coastal States

This article mentioned “serious harm or a threat of serious harm to the marine environment”, where the definition for and authority to define “serious harm” shall be further clarified in the

Draft Regulations. The requirements for “compliance notice” mentioned in paragraph 3 of this article shall also be further clarified.

Draft Regulation 13 Assessment of Applicants

Paragraph 4 of this article provides that the LTC “shall determine if the proposed plan of work [...] provides for exploitation activities to be carried out with reasonable regard for other activities in the Marine Environment, including, but not limited to, navigation, laying of submarine cables and pipelines, fishing and marine scientific research”, which is also mentioned in Article 87 of the Convention.

It is difficult for applicants to determine whether their plans of work provide for exploitation activities to be carried out with reasonable regard for other activities in the Marine Environment, because applicants may encounter blind spots in obtaining relevant information. Therefore, ISA shall strengthen the cooperation with other international organizations through information exchange, so as to provide Contractors with relevant materials. ISA is suggested to issue guidelines for “reasonable regard between activities in the Area and other activities” in order to assist applicants to submit plans of work in compliance with this article.

Draft Regulation 27 Environmental Performance Guarantee

This article provides that “A Contractor shall lodge an Environmental Performance Guarantee in favor of the Authority and no later than the commencement date of production in the Mining Area”. Environmental Performance Guarantee is an obligation in environmental protection enforced by Contractors,

therefore Contractors from developing countries and developed countries shall be separated when calculating the amount of the Guarantee.

On one hand, in view of “the pressures developed countries’ societies place on the global environment and of the technologies and financial resources developed countries command”, Principle 7 of UN Rio Declaration on Environment and Development 1992 acknowledges that developing countries and developed countries States have common but differentiated responsibilities, which has been a fundamental principle of International Environmental Law. On the other hand, an indispensable part of the Principle of Common Heritage of Mankind is to provide benefits for developing countries in activities in the Area.

Draft Regulation 45 Compliance with other laws and regulations

This article provides that “Contractors shall comply with all laws and regulations, whether domestic, international, or other, that apply to its conduct of activities in the Area”. However, the range of laws and regulations that the Contractors shall comply with is excessively broad and vague. Due to it that the Draft Regulations has contained articles ensuring Contractors’ compliance to domestic laws of the Sponsoring State, Paragraph 2 of Article 45 is suggested to be deleted.

Draft Regulation 53 Purpose of the Fund

The formulation of the Draft Regulation should take the goal and characteristics of the Fund into further consideration, such as figuring out whether the fund can be used in supporting

developing countries to protect the marine environment during mining.

Part XI Inspection compliance and enforcement

Inspection is a necessary mechanism for the enforcement of the exploitation contracts. However, it needs to be cautious that exploitations of resources of the Area will be under the deep seabed away from mainland, so the costs for inspections of exploitations of the Area will be much higher than of land-based mining activities. Therefore, inspections shall be kept to minimum, without adding unnecessary burden to Contractors, Sponsoring States, and the ISA.

As to the procedure of initiating an inspection, Article 165(2)(m) of the Convention provides that the LTC “shall make recommendations to the Council to disapprove areas for exploitation by contractors or the Enterprise in cases where substantial evidence indicates the risk of serious harm to the marine environment”.

Thus, it shall be the LTC providing relative recommendations to the Council. Also, the inspection shall not be deemed as a routine, but an inspection based on needs, which means an inspection is to proceed only when a Contractor’s compliance to the contract is difficult to confirm.

Draft Regulation 103 Sponsoring States

This article provides that “States sponsoring Contractors shall take all necessary and appropriate measures to secure effective compliance by Contractors whom they have sponsored with Part XI of the Convention, the Agreement, the rules,

regulations and procedures of the Authority and the terms and conditions of the exploitation contract”.

The Advisory Opinion on Responsibilities and Obligations of Sponsoring States with Respect to the Activities in the Area issued by the Seabed Disputes Chamber of the International Tribunal for the Law of the Sea shows significant importance for clarifying sponsoring states liabilities, regulating international seabed activities, and maintaining the legal system of the seabed, thus the formulation of the Draft Regulations may add contents from it.