SUBMISSION OF THE UNITED KINGDOM GOVERNMENT IN RESPONSE TO THE ISA JULY 2018 DRAFT REGULATIONS ON EXPLOITATION OF MINERAL RESOURCES IN THE AREA

General comments

The United Kingdom welcomes the revised draft deep sea mining regulations published as ISBA/24/LTC/WP.1/Rev.1. We are grateful to the Legal and Technical Commission for their ongoing work on the draft regulations and to the Secretariat for the support provided to the Legal and Technical Commission and the Council in this respect. We are of the view that the revised regulations are significantly improved from the draft published in August 2017. In particular, we welcome the fact that comments made both in writing during the consultation on the August 2017 draft, and at the March 2018 Council session have been incorporated into the current draft. We believe that this has resulted in a more logical structure for the draft regulations.

We are, however, of the view that there are still areas where there could be greater clarity, both linguistically and conceptually. There are also several issues of where we are clear more work needs to be done. We have set out our comments in more detail below, but in summary, these are the UK's main points:

- The UK is of the view that there are still places in the regulations where environmental issues could and should be more prominent. We are of the view that the precautionary principle should be at the heart of this process; we are also of the view that Regional Environmental Management Plans are essential, not optional;
- We are also of the view that further consideration is needed of some key definitions in the draft regulations. These include the definition of "serious harm", which in our view must include an appropriate level of precaution, and the definition of "Good Industry Practice";
- With respect to consultation, the UK is clear that there needs to be proper, open consultation at appropriate points in the application and evaluation processes;
- With respect to agreed standards and methodologies, "good industry practice" and the development of guidance documents that will underpin the regulations, the UK considers that it is essential to get the process of agreeing these concepts and supporting documents right, including transparency in their development. Standards and Guidance must be adopted before any application for an exploitation contract can be considered, in order to ensure that the application of best practice and a level playing field. We also consider that transparency is critical to ensure that these standards are applied consistently by all contractors;

- With respect to the financial model, the UK is of the view that a royalty regime is the most appropriate. We have serious concerns about the workability of a profit-based regime.

In addition to these specific points, we would refer to our written response to the previous draft regulations that raised some general points of concern. As the draft regulations evolve, it remains important to keep under review the question of the appropriate roles and responsibilities to be assumed in the regulatory process by the various organs of the Authority. We previously highlighted the references to actions or decisions to be taken by the Secretary-General. We remain of the view that in order to ensure transparency in the decision making procedures of the Authority, it would be appropriate for the Authority to develop a policy or policies, potentially adopted by decision of the Council, setting out the approach to decision making to be taken by the Secretary-General. We are also of the view that transparency in decision making would be further enhanced by a requirement that the Secretary General report to the Council on regulatory decisions taken during the previous year. It is also important to ensure that necessary regulatory decisions can be taken in a timely fashion taking into account the fact that meetings of the LTC and the Council only occur twice a year.

Part 1: Introduction

The UK is supportive of the new structure in Part 1 and in particular of moving what were previously regulations 81 and 82 forward to Part 1. As set out in the summary of our views, the UK considers that the definitions set out in Schedule 1, in particular the definition of "serious harm" and "Good Industry Practice" to be key and that these need to be kept under review.

We are of the view that regulation 2 is a good starting point, but we do have some concerns that it is still some way from setting out all of the fundamental principles clearly enough. With respect to regulation 2(5) and the effective protection of the marine environment, whilst recognising that the mandate of the ISA is to regulate the Area, the potential impacts of deep-sea mining are not limited to the seabed. It is important that the regulations are clear that the fundamental principle to provide for the effective protection of the marine environment applies to the water column and the sea surface. We are of the view that this could be expressly incorporated in regulation 2(5). We also have the following specific comments on regulation 2(5):

- As stated above, the UK position is that REMPs are a critical part of ensuring that mining takes place in an environmentally sensitive manner and therefore in the chapeau of paragraph 5 the words "if any" must be removed;
- Regulation (5)(b) needs to refer to the precautionary principle (not approach);
- Regulation (5)(c): we think that there may need to be more discussion to ensure that we all understand what is meant by the ecosystem approach;

- Regulation (5)(d): consultation has to be mandatory not just encouraged, therefore we propose the following reformulation: “the right to effective public consultation and participation”;
- We are also of the view that there should be further sub-paragraph (5)(e) that reflects the provision of regulation 4(4) in respect of areas under the sovereignty or jurisdiction of coastal states. This would read, “Contractors shall take all measures necessary to ensure that their activities are conducted so as not to cause serious harm to the marine environment including, but not restricted to, pollution”.

We note the addition by the LTC of new regulation 2(8), with which we agree.

Part 2: Applications for approval of Plans of Work in the form of contracts

In general, the UK is of the view that this part is clearer and is a logical structure for applicants to follow.

We do have specific comments on the provisions of Part 2. We note, with appreciation, the addition by the LTC of new regulation 13(4)(d) and the requirement for the LTC to determine whether the proposed Plan of Work provides “for Exploitation activities to be carried out with reasonable regard for other activities in the Marine Environment”. The UK agrees with the LTC that this is an important inclusion in the regulatory regime, but would also suggest including the following language “including potential upstream and downstream impacts” to this new text.

There are some points where we consider there is still a little work to be done to remove any uncertainty, for example in regulation 9(1)(c)(i) the phrase “information of a general nature which is not confidential” is somewhat confusing, and we think unnecessary. The UK’s position is that all information (so the entire application form) should be circulated with any confidential information redacted. In a few places, we consider that the process is becoming a little too complicated. For example, in regulation 10(2) we do not believe that it is necessary to have a “justification in writing as to why the information is necessary” because the regulations set out what information is necessary and it is a matter of compliance with those regulations. We therefore believe that this could be safely removed from the draft.

With respect to regulation 11, the most important issue for the UK is to ensure the best and widest possible level of consultation. Re-vamping the website will certainly help with this objective. The UK, however, is also of the view that it is vital to ensure that the applicants consider the any feedback provided. We would suggest that a simple way to do this is by providing that the Applicant must consider any comments received and, where the Applicant considers relevant and appropriate to do so, make amendments to the application papers that take into account those comments. We also believe that the LTC should produce a reasoned decision document setting out their basis for concluding that an EIA is sufficient, taking account of comments received during the consultation process. The UK would be happy to provide examples

of documentation used and assessment tables used for UK extractive industries as examples of how the contractor and/or the LTC could demonstrate that comments submitted during the consultation phase have been taken into account.

The environmental element is vitally important in Section 3 of Part 2.The key issues that we would highlight here are:

- Expert bodies, such as the IMO, should be included in regulation 12(5)(b);
- There must be a mention of environmental protection in regulation 13;
- We welcome the addition at regulation 13(4)(d);
- We would like to understand the rationale behind removing the pre-application Environmental Scoping Report from this Part;
- With respect regulation 15, the UK would like to raise the question of whether the Applicant should be able to propose amendments to the draft Plan of Work of its own volition, e.g. to take into account developments since the submission of the draft plan for consideration. It may be the view of others that this could happen in any event, but we feel that the question of whether this should be made explicit should be considered;
- Regulation 16(2) should include Areas of Specific Environmental Interest;
- Regulation 16(3) should include that the LTC will not approve a Plan of Work if it does not comply with the requirements of the relevant REMP;
- As currently drafted, regulation 16(4) reads as though the LTC will only go back to the Applicant if both conditions are not met. In our view, this should be the case if either condition is not met, so there should be an “and/or” between them.

Part 3: Rights and obligations of contractors

In general, the UK considers that this Part is much clearer than before. We do continue to have an overarching question about how exploration and exploitation fit together, in particular when considering regulation 19. This issue would benefit from further discussion at the Council. We also consider that environmental issues should be better addressed in this Part, in particular:

- With respect to the possibility of overlapping contracts for two different resources in the same area, if this did not fall foul of regulation 19(3), how would the environmental considerations be addressed? Should there be a specific provision or provisions to address this possibility from an environmental standpoint?
- We are of the view that before any renewal can be approved under regulation 21, another Environmental Impact Assessment should be completed or at the least that the existing EIA should be updated including a report on the impacts to date;
- Regulation 21(3) and (4) do not include the need for further consultation. It is our view that any changes to a contract should involve consultation if the changes alter or are likely to alter the magnitude or duration of impact to the environment. It is also unclear in these new provisions whose responsibility it is to circulate the renewal documents 30 days before a meeting of the LTC.

- Regulation 22 should include post-termination environmental monitoring;
- The UK would like to discuss the proposed Environmental Performance Guarantee in regulation 27. We would be concerned if this were a financial means of "permitting" otherwise unsanctioned and unacceptable impacts on the marine environment. Whilst the UK recognises that compensation in terms of money is a valid measure when considering socio-economic impacts, it is not one that the UK currently uses in terms of environmental impacts (other than the polluter pays principle or enforcement fines). What is the purpose of the Environmental Performance Guarantee? If it is clearly understood a guarantee of environmental acceptability rather than a payment for damage, it could be acceptable to us. The UK understands that the concept of an Environmental Performance Guarantee has been well defined in management regimes in other countries, and these could serve as a source of suitable language to clarify the purpose of this provision.
- Given that regulation 30(4) deals with the situation where production is suspended due to environmental or health and safety considerations, we assume that regulation 30(2) only applies to suspension of production due to market conditions. We believe that this point could be clarified in the drafting.
- Even as revised by the LTC, regulation 31(1) does not contain a reference to protection of the marine environment and the UK is of the view that this should be included. With respect to regulation 31(3) as amended by the LTC, the UK is unclear why the reference to taking into account "the effect on the marine environment" has the qualifier "where applicable". It is also important that there is a clear definition of "Good Industry Practice" and "inefficient mining practices".
- With respect to "incidents and notifiable events" in Section 5 of Part 4, we would note that this is an area where the definition of "serious harm to the marine environment" will be key. Key also will be the definition of "adverse environmental conditions", which we are clear must include results outside the expected range and/or an incident that has potential to cause environmental damage. The UK would note that continuing exploitation activities could prevent effective management of an incident.

The UK supports the role of the Commission as proposed in regulations 23 and 24, however we wonder whether there should be an express role for the Sponsoring State in regulation 24. We remain of the view that the Authority should not give its consent to the transfer of part or all of the contractor's rights and obligations under the contract unless and until it has established that the Sponsoring State is content with such a transfer. The situation could arise in which the contractor wishes to transfer part of its rights and obligations to an entity that is not under the jurisdiction of its contracting state. In those circumstances, the contractor and transferee will need to establish that another State is able and willing to take up the obligations of the Sponsoring State in these circumstances, and the Authority should receive that information before consent to any transfer is given. Regulation 24(4)(b) makes reference to the need for a

certificate of sponsorship before the LTC will consider the transfer, but it is unclear how this will work in practice in the event that only part of the contractor's rights and obligations are transferred.

We welcome draft regulation 32, and would like to raise the question of the extent to which the contractor should have to provide information to the Commission on their compliance with the provisions listed in that regulation?

The UK remains concerned to test the timelines envisaged in the draft regulations. It is important to make sure that the timelines are workable in practice – for example if a Plan of Work needs to be revised and the Commission rejects the revised Plan of Work that there will still be sufficient time to address the outstanding issues in that Plan of Work. We do believe that the Commission should have an express power to reject revised Plans. On a similar note, we are of the view that it is important to consider how best to ensure that renewals are not left until the last minute. Another element that needs to be considered in ensuring the timetables are appropriate will be the need to ensure that there is sufficient time to notify other maritime industries, for example shipping, of new or revised mining activities.

We would also note that there several points in this Part where guidance will be needed (e.g. on the training plan in regulation 39). As stated in our general observations, we consider that it is important to discuss and agree the process by which the necessary guidance documents will be drafted.

Part 4: Protection and preservation of the Marine Environment

With respect to regulation 46, it is the UK's position that this should refer to the "precautionary principle" and not the "precautionary approach". The ecosystem approach should also be reinserted into this provision. We would reiterate comments above that 'Good Industry Practice' etc. will need to be properly defined and that any standards and guidance will need to be in place prior to any application being be considered, including quality objectives, quality standards and regional environmental management plans. We welcome regulations 46 bis and ter, but would question whether social effects should be included in an Environmental Impact Statement. If so, the purpose of the Environmental Impact Statement should be defined as including issues outwith those concerning the environment.

We welcome the inclusion of regulation 47, but note that the obligation is to act in accordance with Standards and Guidance. As noted above, it is important that such standards and guidance documents be in place prior to an application for an exploitation licence being received. In the same vein, we welcome the inclusion of regulation 48, but note that operationally, the level of acceptable discharges will rely on the presence of Guidelines.

With respect to regulation 49, the UK is of the view that compliance with the environmental management and monitoring plan should be included in the annual report.

Turning to regulation 50, the UK is of the view that the performance assessments set out in that regulation should be reported to the Council by the LTC. In our view, the logical stages of the process would be for the contractor to publish the report and invite comments, the contractor would then review the report in light of comments received, and publish a revised report if required, including if, in accordance with regulation 50(5) the Commission was of the view that the report was not acceptable. We are of the view that consultation is an important part of this performance assessment process.

The UK considers that the new provisions on the Environmental Liability Trust Fund are a significant improvement, but as currently drafted, it is not in our view a Liability Trust Fund, but a Trust Fund with broader purposes. We note the comments that were made by other States during the July 2018 Council session that the purposes for which the money held in the Fund may be too broad. It is also unclear what trigger would make funds available for these broader purposes. We would welcome further discussion on this issue.

Part 5: Review and modification of a Plan of Work

Our overall concern in relation to this Part is to do with the frequency of reviews and monitoring – whether a period "of at least five years" as currently provided for in regulation 56 is sufficiently frequent, in particular during the early years of the industry. We are also of the view that it should expressly state that the reviews must include environmental considerations.

With respect to regulation 55, in paragraph (1) we are of the view that a rationale should be provided as to why a change is not considered a "material change". Whilst in some circumstances it may obvious, in others the question of whether a change falls below the criteria of "material change" may be less clear. The UK is also of the view that there should be a further consultation process in respect of a material change to the Plan of Work. We also note that Regulation 55 (4) does not fit with the heading of the regulation, as it is not a change proposed by a contractor. With respect to the substance of this provision, we have previously recommended that the Authority should adopt a policy or policies setting out how decisions are to be taken by the Secretary General. We would recommend that these document or documents should also set out the evidence base the Secretary-General would use as the basis for a request for such a change.

Part 6: Closure plans and post-closure monitoring

The UK welcomes regulation 57 as drafted by the LTC. With respect to regulation 58, it is our view that further consideration is needed as to whether 12 months is a sufficient period of time for the submission of the report, in particular given that the plan may not be considered adequate by the LTC and require substantial revision. We note the comments made at the July 2018 Council Session that there should be public consultation with respect to the closure plan, and we support that proposal. The requirement of public consultation would also further suggest that the 12 month period is too short. We welcome the option in Regulation 58(3)(c) for a closure plan to be rejected if it is not fit for purpose.

With respect to regulation 59, Guidance will need to be developed to ensure that post-closure monitoring programmes are appropriate, proportionate and hypothesis driven. This one Guidance document may not be fully developed before the first application for an exploitation contract is received.

Part 7: Financial terms of an exploitation contract

We are generally supportive of this part and the process. The UK remains of the view that the royalty approach is the right approach. We note the changes made to draft regulation 61, and we will reflect further on those.

We note that regulation 60 sets out the principle of Equality of Treatment. The UK would also support a “total cost approach” to the financial obligations placed on contractors. We note that some financial obligations may disadvantage certain types of contractors and it is important that a level playing field be maintained and that particular corporate structures are not favoured or disadvantaged.

There are a few issues on which we wonder if guidance would be helpful, for example on what “promptly” means in regulation 67, on “special circumstances” in regulation 68, “a suitably qualified person” in regulation 69(1)(c) and “internationally accepted principles” in regulations 72(2) and 76.

In our view, regulation 62 could include clearer signposting to Appendix IV for the royalty calculation.

We would suggest that in regulations 69 and 72 it should be made explicit that the type of mineral must be included in the information provided.

We believe that the review of rates of payments in regulation 80 should include the monetary penalties in regulation 78.

Part 8: Annual, administrative and other applicable fees

The UK is generally supportive of the greater level of detail in this Part, we would, however note that the calculation of the annual and administrative fees should be tied to an administrative cost recovery mechanism that ensures efficiency in the administration of the Authority. We have some comments on the detail of the provisions in this Part:

- Regulation 82 (1) - the word “any” is missing before “renewal”;
- Regulation 83 (2) - there is a question as to when will the Council establish the rate for the next calendar year. The concern is to ensure sufficient notice to the contractors.
- Regulation 84 – we think that 90 days would be more appropriate than 3 months as that is more consistent with the approach to time periods in the regulations as currently drafted;
- Regulation 86 - what does “regular” mean in this context – we would suggest something between annual and every five years;

Part 9: Information gathering and handling

The UK considers that it is important to be very clear on how information will be used. In our view, it should be very clear that information is public unless it is deemed confidential. In our view, including a “presumption”, such as that included in regulation 87(1) will cause confusion.

In line with that approach, it is our view that paragraph (2)(e) must be removed from regulation 87. If the treatment of information follows the domestic law of the Sponsoring State this is highly likely to result in different contractors having different obligations, which is unacceptable. These are international, not domestic, law obligations, and it is for the Sponsoring State to ensure that it has the necessary domestic legislative, regulatory or administrative measures in place to comply with their international law obligations.

The list of data not considered to be “confidential information” in Regulation 87(3) should also include any academic data relied upon in preparing application or renewal documents.

We would also note that Regulation 87 could be read as placing the burden on the contractor to monitor the possible release of data previously classified as confidential information after 10 years have passed. This would seem an unreasonable burden to place on the contractor. We would recommend that the provision be redrafted to require the Secretary-General to notify the contractor of the possible release of the data, at which point the contractor would need to demonstrate that the data should continue to be classified as confidential data.

In regulation 88, we consider that there should be a provision that in the case of a breach of the confidentiality obligations, the Authority should notify the relevant contractor.

Part 10: General procedures, standards and guidelines

The UK is of the view that the process by which standards and guidelines will be adopted is a key issue, including how these will be developed and who will be involved in their development. We are concerned to establish a plan of work that sets out what is envisaged in terms of scoping out what is appropriate and needed in the standards and guidelines, how these will be developed, who will be involved and how they will be published. We consider it to be vital that the standards and guidelines are well publicised in advance of any exploitation activity, and that no exploitation application should be considered before such standards and guidance are adopted. To this end we suggest putting in a requirement that "Such standards/guidance should be made available by the start of monitoring activity or before the acceptance of an application for exploitation activity in the Area, whichever occurs sooner" in regulations 92 and 93.

We welcome the inclusion of regulation 93(3) that guidelines can/ will be updated as new knowledge becomes available.

Part 11: Inspection, compliance and enforcement

As currently drafted, the regulations governing the appointment and conduct of Inspectors appears to the UK to provide for the possibility that the Inspectors will not be part of the permanent staff of the Authority. The UK can see the benefits of such flexibility; however, it will be important to ensure that such Inspectors act independently of all Member States and other stakeholders. It might be appropriate to consider the establishment of a list pre-approved Inspectors.

We are also aware that concerns have been raised about the jurisdiction of the Authority under UNCLOS to make regulations concerning the inspection of premises. The UK would welcome further discussion on this point.

The UK has three further points on this Part:

- Regulation 95 - we need more detail on how the code of conduct will be drawn up, for example the level of consultation envisaged and how it will be revised in light of experience;
- Regulation 100 - with respect to the electronic monitoring system, we would like to include the possibility (albeit for the future) that this could also provide environmental data;

- Regulation 101 – if a compliance notice is issued under this regulation, we are of the firm view that this should be reported to the Council.
- Regulation 101(6) - we welcome this inclusion, but would prefer it to include some concept of restoration rather than simply a monetary penalty.

Part 12: Settlement of disputes

The UK welcomes the approach to adopt Part XI, section 5 of UNCLOS.

Annexes

The UK has the following comments on the Annexes:

Annex I: the limitation of using coordinates in provision 17 is that the water column is linked to a mobile ecosystem such that downstream effects may not be captured

Annex II: we welcome the inclusion that the Mining Workplan will be based on the results of exploration.

Annex IV: We welcome the inclusion at Annex IV(1), particularly the requirement for applicants to provide justification and evidence of what an assessment has concluded 'no significance' as well as including proportionality. We consider that the wording should be, "Where an applicant considers an effect to be of no significance, there should be sufficient information to substantiate such conclusion, AND a brief discussion as to why further research is not warranted". Again, this must be enacted with reference to the Guidelines.

The UK is currently reviewing document ISBA/24/LTC/WP.1/Add.1.

Annex VII: We welcome the inclusion at provision 1, but note that question of how to define an "independent competent person" needs to be considered. As with the Inspectors, such "independent competent persons" will need to be independent of Member States and all stakeholders. It may be appropriate to have list of pre-approved "independent competent persons" and to use the "cab-rank rule" in allocating the work (i.e. the first person on the list is chosen to verify the EMMP). There is also the question of who will pay for the verification report. On the assumption that it will be the contractor, we would suggest that this cost should be included in the general application fee.

As a point of detail, the EMMP needs to include a hypothesis-based approach whereby the environmental impacts are monitored against certain hypothesis

Annex VIII: we welcome the inclusions at Annex VIII(1). We also welcome the inclusion at Annex VIII(2) which is in line with a hypothesis driven monitoring programme and will ensure such programmes are proportionate and pragmatic in delivery.

We would also reiterate, with respect to Schedule 1, that definitions and scope are key and needs to be kept under review at each stage of the process of elaborating these regulations. In addition to those definitions that we have already mentioned, the definition of “marine environment” should also be reviewed to ensure that it is consistent with the mandate of the Authority.