Draft ISA Exploitation Regulations: ISBA/24/LTC/WP.1/Rev.1 - *Comments*

Submitted by: Dr. Philomène Verlaan JD PhD FIMAREST
Oceanographer and Attorney-at-Law
These comments are offered in the author's personal capacity.

Note: The asterisked[*] *comments* [*italicized*] were also made in plenary and submitted in writing to the Secretariat by this commentator during the meeting of the Council (16-20 July 2018) under the agenda item "Consideration and adoption of the draft regulations on the exploitation of mineral resources in the Area". The absence of a comment on a draft regulation or an Annex does not necessarily either imply either approval or disapproval of that draft regulation or Annex.

- **Draft Regulation 2: Fundamental principles**

Comment on the use of the word "principles"

The drafters of the LOSC were well aware of the potential legal ramifications of the use of the word "Principles" in a legally binding document. The word is used in the LOSC, but with great care. Part XI Section 2 is entitled "Principles". Those items in the list under DR 2 taken from section 2 are correctly categorized in this DR as "Principles."

*However, those items taken from Part XI Section 3, entitled "Development of Resources of the Area", are not "principles" under the LOSC. In particular, the Article 150 heading in the LOSC, from which these "non-principle" items are taken, reads "**Policies** relating to activities in the Area". [**Emphasis supplied**]. It is recommended to change the title of DR 2 to: Fundamental principles and policies.*

DR 2(5)(a): "A fundamental consideration for the development of environmental objectives shall be the protection and conservation of the Marine Environment …,"

*The Law of the Sea Convention (LOSC) does not use 'conserve' for the marine environment, but 'preserve'. It uses 'conserve' for natural resources. These distinctions have legal consequences. This distinction must be carefully maintained in the Regulations. This is particularly important given the specific definition given in the LOSC to 'resources', as in 'the Area and its resources', under Part XI.**

DR 2(7): "Ensure the effective management and regulation of the Area and its Resources in a way that promotes the development of the common heritage of mankind."

LOSC Art. 150 (j) must be reprised in its entirety here to reflect what is actually required by the governing instrument and to ensure that the guidance provided by the LOSC is not lost. Therefore, DR 7 should read: "Ensure the effective management and regulation of the Area and its Resources in a way that promotes the development of the common heritage for the benefit of mankind as a whole."

DR 2(8): "Ensure that these Regulations shall be interpreted compatibly with these fundamental principles, and that all the functions performed under these Regulations shall be undertaken in conformity with these fundamental principles."

In light of my comment above on the title of DR 2, it is recommended that the words 'and policies' be added after both "principles" in DR 2(8).

- **Draft Regulation 3: Duty to cooperate and exchange of information**

DR 3(g): "In order to assist the Authority in carrying out its policy and duties under section 7 of the annex to the Agreement, Contractors shall, on the request of the Secretary-General, provide or facilitate access to such information as is reasonably required by the Secretary-General to prepare studies of the potential impact of Exploitation in the Area on the economies of developing land-based producers of those minerals which are likely to be most seriously affected. The content of any such studies shall be in accordance with the Guidelines."

I can find no specific power in the LOSC or the Implementing Agreement (IA) for the ISA to require this of the contractors. Even if some residual or implied power to this effect could be found in either of these instruments, it would be impossible to implement.

Legal problems that immediately arise include, e.g., how to implement this without discriminating between contractors? The ISA cannot legally require this information from only some contractors; all contractors must be required to provide it. Next, all the land-based producers must be required to produce similar information, because the ISA cannot discriminate, or be thought to be discriminating, in their favour by not subjecting them to this requirement as well. Furthermore, the views of land-based producers on the possible effects of DSM in the Area are essential to obtain a complete picture of the "relevant market" (a well-known anti-trust concept, the definition and application of which is recommended to the regulator). Also, how will sensitive commercial information belonging to the contractors and the land-based producers be protected? Potential anti-trust consequences must here be considered as well (for example, sharing of this type of information between competitors is particularly sensitive). How and by whom will the responses be evaluated? Will the responses be public, and if not, why not?

It is recommended to delete DR 3(g).

- **Draft Regulation 7: Form of applications and information to accompany a Plan of Work**

DR 7(4): "Where the proposed Plan of Work proposes two or more **non-contiguous** Mining Areas, the Commission shall require separate documents under paragraphs 3(d) 15 and (h) above for each Mining Area, unless the applicant demonstrates that a single set of documents is appropriate according to the Guidelines." **[*Emphasis supplied.*]**

A 'non-contiguous mining area' in this context must be defined. See also DR 8(2).

- **Draft Regulations 9 and 10 sequencing**

It is not clear why DR 9(1)(c) and DR 9(2) take place before DR 10.

- **Draft Regulation 12: General**

DR 12(4): "The Commission shall, in considering a proposed Plan of Work, apply the Rules of the Authority in a uniform and non-discriminatory manner, and shall have regard to the principles, policies and objectives relating to activities in the Area as provided for in Part XI and annex III of the Convention,

and in the Agreement, **and in particular to the extent to which the proposed Plan of Work contributes to realizing benefits for mankind as a whole." [*Emphasis supplied.*]**

This appears to be another attempt to reprise the Art 150(i) requirement ("ensuring ... the development of the [CH] for the benefit of mankind as a whole") in the context of setting criteria for evaluating Plans of Work by the LTC. The problems with the highlighted portion are legion and include the following.

First, the precise LOSC language of Art. 150(i) is again not used. Legally binding documents (such as the LOSC/IA) must not be paraphrased in their implementing instruments (such as the exploitation regulations). Paraphrasing will not operate to change the text or the meaning of the governing instrument. It is the governing instrument that will prevail if the text of the implementing instrument is submitted to judicial or arbitral scrutiny. It is necessary to implement what is actually written in the governing instrument, not what one might have wished had been written.

Second, even if the correct legally binding language under Art. 150(i) were used here, there is as yet no definition of what "the development of the common heritage for the benefit of mankind as a whole" means. It is necessary to be precise and specific in legally binding instruments, including these Regulations, in order to facilitate their predictability, implementation, and enforcement.

Third, even if this phrase were to be adequately defined in these regulations for the regulatory purpose set out herein, it is unlikely that the LOSC may legally be interpreted so as to cause a Plan of Work alone to bear the entire burden of that Art. 150(i). This is in part because, this phrase is only one of many criteria (see, e.g., Part XI Sections 1 and 2) to which activities in the Area must be subject under the LOSC; hence why single out this one criterion in these Regulations for special attention in evaluating Plans of Work? This selective focus in itself is likely to be incompatible with the LOSC.

Fourth, even if it could legally be singled out for special focus, Art. 150(i) must apply to all Plans of Work, because Art. 150 sets out "policies relating to activities in the Area", not just to exploitation. This has at least two legally problematic consequences:

a) Art. 150(i) also applies to, for example, exploration (this is also a form of "development of the common heritage" that can "benefit mankind as a whole"), and it is noted here that Plans of Work for exploration are not subject to specific evaluation for this criterion under the current Exploration Regulations.

b) It is also unlikely that Art. 150(i) can be applied "uniformly" (as required by Annex III Art. 17(1)) and that the requirement itself is "non-discriminatory" (Annex III Art. 6(3)). This is in part because with each additional application for a Plan of Work - including for exploration - the circumstances (e.g., economic, environmental, commercial) surrounding that application will be different from those obtaining for the previous applications. (The difficulties this poses for the development of Regional Environmental Management Plans and the assessment of cumulative impacts are noted but not further addressed here.)

It is therefore recommended to amend DR 12(4) to have a full stop after 'Agreement'.

- **Draft Regulation 13: Assessment of applicants**

DR 13(1)(e): "Has, **or will have**, the financial and technical capability to carry out the Plan of Work and to meet all obligations under an exploitation contract;" **[*Emphasis supplied.*]**

Even assuming that such a 'future capability' facility - which is at least implicit, if not explicit, in the "will have" criterion - is compatible with the LOSC, which itself is not at all clear (see, e.g., Annex III Art.

13(c)), many implementation questions immediately arise. These include the following. How and when will this 'future capability' be determined? What is the cut-off date? How will it be decided which contractors will benefit from what is essentially a relaxation of the financial and technical requirements that are supposed to be applicable to all? How will the requirement that the ISA must treat contractors uniformly and without discrimination be met under these circumstances?

If this 'future capability' option is to be retained, although this commentator ***recommends that it be deleted****, this DR requires much more detailed elaboration on how it will work in practice.*

DR 13(1)(f): "Has demonstrated the **economic viability** of the mining project." **[*Emphasis supplied.*]**

This first presents a problem of legal competence. Where in the LOSC/IA is the ISA given the power to substitute its economic - i.e., commercial - judgement for that of the contractor?

Next, if the ultra vires/legal competence issue raised above is overcome, how will 'economic viability' be defined and by whom will it be determined whether it has been credibly demonstrated? Where will the ISA find the appropriate expertise to advise it? The evaluation of the economic viability of a commercial enterprise, especially an emerging one, is very difficult, as venture capitalists, fund managers, investors, accountants, bankers and others for whom this type of evaluation is their profession will attest. Even some long-established companies have collapsed shortly after and despite apparently having been given a clean bill of health by their auditors.

DR 13(1)(f) *also illustrates an overall problem permeating these draft Regulations, i.e., they currently require the making of commercial judgments by a regulatory body for which I can find no authority in the LOSC/IA and for which, even if some such power could be implied, the regulator (regardless of whether it is the LTC or the Council) is neither equipped nor qualified. Furthermore, it is likely to be impossible to apply these requirements to contractors uniformly and without discrimination.*

This combined ultra vires/substantive legal competence problem, which also arises with regard to some of the functions assigned in these draft Regulations to the Secretary-General, is also found in, e.g., ***DR 13(4), DR 21(3)(a), DR 26(2), DR 30(2), DR 31(3), DR 55(2), DR 55(4), DR 56(1), DR 56(5), DR 74-76, DR 87(2)(d), DR 89, DR 90(1)(i).***

DR 13(3)(a): "The necessary technical and operational capability to carry out the proposed Plan of Work in accordance with Good Industry Practice using appropriately qualified **and where applicable**, adequately supervised personnel;" **[*Emphasis supplied.*]**

*Why is this qualifier '**and where applicable**' included? Under what circumstances and why would this 'adequate supervision' requirement not be applicable? Considering that most of the problems arising at sea are due to human error (I believe I recall accurately a horrifying statistic from the IMO of 75-80%), why is it not a requirement for all personnel to be adequately supervised? It is recommended that this qualifier be deleted.**

DR 13(4): "The Commission shall determine if the proposed Plan of Work: (a) Is technically achievable and **economically viable**;" **[*Emphasis supplied.*]**

See comments made under DR 13(1)(f) above re ***economic viability*** *and ultra vires/substantive legal competence aspects. These comments also apply with regard to the determination of* ***technical achievability****.*

- **Draft Regulation 21: Term of exploitation contracts**

DR 21(3)(a): "3. An exploitation contract shall be renewed by the Council, provided that: (a) The Resource category is recoverable annually in **commercial and profitable quantities** from the Contract Area;" **[*Emphasis supplied.*]**

How will be **'commercial and profitable quantities'** *be defined and by whom will it be determined whether this has been credibly demonstrated? What is the difference between 'commercial' and 'profitable'? The comments above under* ***DR 13(1)(f)*** *and DR 13(4) apply here as well. See also comments made under* ***Annex X Section 9.1(a).***

- **Draft Regulation 22: Termination of sponsorship**

DR 22(7): "Nothing in this regulation shall relieve a Contractor of any obligation or liability under its exploitation contract, and **the Contractor shall remain responsible and liable to the Authority for the performance of its obligations under its exploitation contract in the event of any termination of sponsorship." [*Emphasis supplied.*]**

This is inconsistent with ***DR 22(3) and (6)****. Responsibility and liability cannot remain open-ended once State sponsorship ceases irrevocably. State sponsorship is a non-negotiable condition precedent for a contractor to be even considered for, let alone granted, a contract to operate in the Area. It is therefore unclear how a contractor can remain "responsible/liable, etc." under that contract without continued State sponsorship. It is recommended to reconsider and rewrite* ***DR 22(7)*** *accordingly.*

- **Draft Regulation 26: Documents to be submitted prior to production**
- **Draft Regulation 55: Modification of a Plan of Work by a Contractor**

These two draft regulations are considered together here because they represent the same problem: the issues of ultra vires and substantive competence raised in ***DR 13(1)(f)*** *above with regard to two ISA regulatory bodies - i.e., the LTC and the Council - but here the problem occurs with regard to the role and functions assigned to the Secretary-General.*

DR 26(2): "…In the light of the Feasibility Study, the **Secretary-General** shall consider whether any Material Change needs to be made to the Plan of Work in accordance with regulation 55(2). If he or she determines that any such Material Change needs to be made, the Contractor shall prepare and submit to the **Secretary-General** a revised Plan of Work accordingly." **[*Emphasis supplied.*]**

DR 55(2): "… The **Secretary-General** shall, in consultation with the Contractor, consider whether a proposed modification to the Plan of Work constitutes a Material Change in accordance with the Guidelines." **[*Emphasis supplied.*]**

DR 55(4): "The **Secretary-General** may propose to the Contractor a change to the Plan of Work which is not a Material Change. After consulting the Contractor, the Secretary-General may make the change to the Plan of Work, and the Contractor shall implement such change. The **Secretary-General** shall so inform the Commission at its next meeting." **[*Emphasis supplied.*]**

Where in the LOSC/IA is the power assigned to the Secretary-General and where is the expertise in the Secretariat or in the Secretary-General to consider, let alone decide, on the need, if any, of Material Changes or non-Material Changes in a Plan of Work? LOSC Art. 166(3) assigns ***administrative*** *functions*

to the Secretary-General. **[*Emphasis supplied.*]** *It is not at all clear to me that the tasks assigned to the Secretary-General in these two draft regulations are administrative, especially with regard to Material Changes. See also discussion under* ***DR 74*** *below. Furthermore, how will this process ensure transparency and uniform and non-discriminatory treatment of Contractors?*

These tasks are the responsibility of the LTC under the LOSC/IA, which must then make the appropriate recommendations to the Council, on which the Secretary-General must act. See also comments made under ***DR 13(1)(f)*** *above re ultra vires/substantive legal competence issues with regard to the role and functions assigned to the Secretary-General under these draft Regulations.*

The Secretary-General could perhaps be accorded the option to propose to the LTC that certain (Material and/or non-Material) Changes to a Plan of Work may be needed and to advise the Contractor accordingly so that the Contractor can prepare a response for the LTC and (eventually) the Council to consider. However, I am unable to find in the LOSC/IA any basis for the Secretary-General alone to engage in such consultations with the Contractor and to take such decisions alone, without consulting the LTC and the Council. Furthermore, how will this process ensure transparency and uniform and non-discriminatory treatment of Contractors? This proposed process is also not clear in light of ***DR 26(4)-(6)***.

- **Draft Regulation 30: Reduction or suspension in production due to market conditions**

DR 30(2): "The Commission shall, **upon determining that the reasons for the reduction or suspension are reasonable, including where the prevailing economic conditions make Commercial Production impracticable,** recommend approval of the suspension to the Council. The Council shall, based on the recommendation of the Commission, **consider** the reduction or suspension requested by the Contractor. **[*Emphasis supplied.*]**

This is another example of the combined ultra vires/substantive legal competence problem with regard to commercial judgements by regulatory bodies described under ***DR 13(1)(f).***

- **Draft Regulation 29: Maintaining Commercial Production**
- **Draft Regulation 31: Optimal Exploitation under a Plan of Work**

With regard to DR 29(1) and DR 31: *The term 'optimize' in any form should not appear in these regulations, because it is undefinable and therefore unenforceable.*

a. It is recommended to replace 'optimize' with 'ensure' or 'manage' or 'achieve' in ***DR 29(1)****.*
b. In ***DR 31****, it is recommended to replace "optimal" in the title with "sound".*
c. In ***DR 31(1)****, it is recommended to delete "optimally". No other adverb is needed. 'Mining in accordance with the work plan' is sufficient, because the work plan is what was approved. If the mining that then occurs is not 'optimal', regardless of how 'optimal' is defined (assuming it is even possible to define it), then the work plan on which the mining is based should not have been approved to begin with.**

DR 31(1)(a): …."Avoid inefficient mining practices;"

The purpose of ***DR 31(1)(a)*** *with regard to 'inefficient mining practices' is not clear. Why would a truly commercial operator engage in inefficient mining practices? Furthermore, even if the regulator considered that such inefficient practices may be occurring, how would this inefficiency be identified, proven, remedied and any remedies enforced, and by whom? What the LOSC actually requires in Art. 150(b) is 'ensuring … efficient conduct of activities in the Area'.*

*It is not clear that **DR 31(1)(a)** achieves that requirement, and it is recommended that the LTC review it in light of these comments.**

DR 31(3): "If the Secretary-General becomes aware that the Contractor is not meeting its obligation in paragraph 1 above, the Secretary-General may, by way of written notice to the Contractor, request of *[sic]* a review of mining and processing activities carried out under the Plan of Work. The **Contractor and Secretary-General** shall agree any modifications to bring the Mining Workplan and any mining and processing practice into conformity with Good Industry Practice, **taking account of the technical and financial resources of the Contractor**, **the prevailing market conditions** and, where applicable, the effect on the Marine Environment. The Contractor shall implement such modifications and by such time **as agreed between it and the Secretary-General**." **[*Emphasis supplied.*]**

*The same problems described above re the potential ultra vires nature of actions by the Secretary-General under **DR 26, DR 55** above and **DR 76** below apply here as well. See also comments made under **DR 13(1)(f)** above re ultra vires/substantive legal competence issues with regard to the role and functions assigned to the Secretary-General under these draft Regulations. The tasks to be undertaken after the requested review has been received are not administrative. They are substantive and require the input of the LTC, and possibly approval of the LTC's recommendations by the Council as well. Furthermore, how will this process ensure transparency and uniform and non-discriminatory treatment of Contractors?*

*Next, the two criteria "**taking account of the technical and financial resources of the Contractor,**" and "**the prevailing market conditions**" cannot be invoked in deciding whether and if so how to modify the Plan of Work, etc. to bring it "into conformity with Good Industry Practice", because: a) they are wholly irrelevant in assessing whether the Contractor is meeting the obligations under **DR 31(1)** (i.e., to avoid inefficient mining practices and minimize waste generation); and b) this would lead to unequal and potentially discriminatory treatment between contractors by the Regulator, which is not permitted under the LOSC. It is recommended to delete both criteria.*

- **Draft Regulation 32: Safety, labour and health standards**

DR 32(3)(a): *It is recommended to specify clearly that the applicable international rules and standards must function as the **minimum** standards, to avoid the risk of less stringent national laws remaining applicable.*

*It is therefore recommended to add after 'Installations': "where these national laws are more stringent than the applicable international rules and standards listed in 2. above. Where these national laws are less stringent, the rules and standards listed in 2 above shall apply."**

- **Draft Regulation 34: Risk of Incidents**

"…In assessing whether the time, cost and effort would be grossly disproportionate to the benefits of further reducing the risk, consideration **should** be given to best practice risk levels compatible with the operations being conducted." **[*Emphasis supplied.*]**

The word "should" is inappropriate in a legally binding document setting out requirements. Replacement with "shall" or "must" is recommended.

- **Draft Regulation 38: Insurance**

DR 38(1): "1. A Contractor shall maintain, **in full force and effect**, and cause its subcontractors to maintain, appropriate insurance policies, …" **[*Emphasis supplied.*]**

It is recommended to move the phrase "in full force and effect" to after the word "policies" to ensure that this phrase also applies to subcontractor insurance policies.

- **Draft Regulation 46: General obligations**

DR 46(d): **Promote** accountability and transparency in the assessment, evaluation and management of Environmental Effects from Exploitation in the Area," … **[*Emphasis supplied.*]**

It is recommended to replace "Promote" with "Require". This is consistent with Fundamental Principle 5(d) of these draft Regulations.

- **Draft Regulation 48: Restriction on Mining Discharges**

*It is recommended that **DR 48(2)** as currently drafted be mostly replaced with the (adjusted* mutatis mutandis) *language from Article 8(1) of the 1996 Protocol to the 1972 Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter (which closely follows Article V of the 1972 Convention covering the same topic), as follows:*

Proposed Revised DR 48(2): However, the Contractor need not comply with the obligation in paragraph 1 above "*when it is necessary to secure the safety of human life or of vessels, aircraft, platforms or other man-made structures at sea in cases of force majeure caused by stress of weather, or in any case which constitutes a danger to human life or a real threat to vessels, aircraft, platforms or other man-made structures at sea if*" disposal, dumping or discharge into the Marine Environment of any Mining Discharge "*appears to be the only way of averting the threat and if there is every probability that the damage consequent upon such*" disposal, dumping or discharge into the Marine Environment of any Mining Discharge "*will be less than would otherwise occur*. *Such"* disposal, dumping or discharge into the Marine Environment of any Mining Discharge" *shall be conducted so as to minimize the likelihood of damage"* or injury *"to human or marine life"* or Serious Harm to the Marine Environment "*and shall be reported forthwith to the*" Authority.

- **Draft Regulation 56: Review of activities under a Plan of Work**

DR 56(1): "At intervals not exceeding five years from the date of signature of the exploitation contract, or where, **in the opinion of the Secretary-General**, there have occurred any of the following events or changes of circumstance …. the **Secretary-General** may review with the Contractor the Contractor's activities under the Plan of Work, and shall discuss whether any modifications to the Plan of Work are necessary or desirable."

*See also comments made under **DR 13(1)(f), DR 26, DR 55 and DR 74** re issues relating to ultra vires/substantive legal competence with regard to the role and functions assigned to the Secretary-General under these draft Regulations in this context.*

Furthermore, it is not clear why the occurrence of the listed events/circumstances triggering a review are to be a matter of "opinion", and the opinion of only one individual at that. Why isn't the occurrence of these events/circumstances required to be a matter of demonstrable fact instead, to which any stakeholder

*is able to draw the attention of the Authority? Why is the initial avenue via "discussions" between the Secretary-General and the Contractor? Why is the decision on whether or not to conduct such a review to be taken at the sole discretion of the Secretary-General? How will this process ensure transparency and uniform and non-discriminatory treatment of Contractors? Why are any modifications limited to the Plan of Work? There may also be ramifications for "the exploitation contract or the activities under the exploitation contract" as set out in **DR 56(5)**. As currently drafted **DR 56(1)** and **DR 56(5)** are inconsistent with each other in this respect.*

It would be much simpler and far less prone to legal complications to just require a review if one of the listed events/circumstances has occurred as a matter of demonstrable fact, and to enable the requisite modifications to be made to the Plan of Work, the exploitation contract or to the activities under the exploitation contract accordingly.

DR 56(1)(e): "Changes in ownership or financing which may **impact** the financial capability of the Contractor;" **[*Emphasis supplied.*]**

"Impact" is a noun, not a verb. In addition to being poor English, here it is also imprecise. Required here instead is at least the word (verb) "affect"; and if only adverse effects of these changes on the Contractor's financial capability are of interest, then the phrase "adversely affect" is to be used here.

DR 56(5): "Nothing in this regulation shall preclude the **Secretary-General** or the Contractor from making a request to initiate discussions regarding any matter connected with the Plan of Work, exploitation contract or the activities under the exploitation contract in cases other than those listed in paragraph 1 above." **[*Emphasis supplied.*]**

*See comments made under **DR 13(1)(f), DR 26, DR 55 and DR 74** re issues relating to ultra vires/substantive legal competence with regard to the role and functions assigned to the Secretary-General under these draft Regulations in this context. See also comments made above under **DR 56(1)** re the transparency and uniform/non-discriminatory issues raised by the process set out herein.*

It is recommended that the LTC and the Sponsoring State be included in the list of those permitted to make such a request. "Discussions" as a process will require careful definition.

- **Draft Regulation 57 Closure Plan**

DR 57(1): *what are "residual and natural Environmental Effects" ?*
DR 57(2)(e): *what are "residual negative Environmental Effects"? How are these different from "residual Environmental Effects?*

- **Draft Regulation 58: Closure Plan: cessation or suspension of production**

DR 58(3)(c): [the LTC shall] "Reject the final Closure Plan in the event that the amendments are not made by the Contractor."

Under the LOSC the LTC cannot by itself "require" (the verb used is "suggest", but as the Plan will be rejected if the amendments are not made, the legal effect is to require them) amendments to the Closure Plan and then reject the Plan if these amendments are not made. However, under the LOSC the LTC can recommend its suggested amendments to the Council and recommend rejection of the Plan if these amendments are not made. Only the Council can require and reject.

- **Draft Regulation 60: Equality of treatment**

"The Council shall, based on the recommendations of the Commission, apply the provisions of this Part in a uniform and non-discriminatory manner, and shall ensure equality of financial treatment and **comparable** financial obligations for Contractors." **[*Emphasis supplied.*]**

A definition of "comparable" in this context is needed.

- **Draft Regulation 73: Audit and inspection by the Authority**

Provision must be made for the exemption of documents subject to attorney-client privilege.

- **Draft Regulation 74: Assessment by the Authority [*Emphasis supplied.*]**

*General comment on the imprecise use of "the Authority": this is a pervasive problem with these draft Regulations. It is often unclear as to what specific body or organ is intended to actually undertake the task(s) set out. This lack of clarity is also at the root of the many ultra vires/legal competence issues raised in these comments, and especially with regard to the role and functions of the Secretary-General. See also comments made under **DR 13(1)(f), DR 26 and DR 55**. Under the LOSC, the Secretary-General performs administrative functions. It will be necessary to define what "administrative" means, because in these draft Regulations, the tasks assigned often appear to be substantive and within the specific purview of the LTC.*

DR 74(1): "Where the Secretary-General determines …" "…the Secretary-General **may**,…" "that the Secretary-General **considers reasonable in the circumstances**…"
DR 74(3): "The Secretary-General **may**, …" and **after giving due consideration** …" "that the Secretary-General **considers ought to be**…" **[*Emphasis supplied.*]**

Problems with this DR are legion. For example, it is not clear to me that:
a) the Secretary-General is legally empowered to undertake these tasks under the LOSC
b) even if such a power is found in the LOSC, they can be undertaken entirely at the sole discretion of the Secretary-General (for example, what about the Finance Committee?)
*c) the **bolded** terms are precise enough to facilitate predictability, implementation and enforcement*
d) this does not incur the same transparency and uniform/non-discriminatory issues raised by the process as set out herein and discussed in e.g.*, **DR 56(1).***

Provision must also be made for the exemption of documents subject to attorney-client privilege.

- **Draft Regulation 75: General anti-avoidance rule**
- **Draft Regulation 76: Arm's-length adjustments**

*The same comments made under, e.g., **DR 74** above re issues relating to ultra vires/substantive legal competence issues raised with regard to the functions and role of the Secretary-General in this context and the transparency and uniform/non-discriminatory issues raised by the process set out herein apply here as well.*

- **Draft Regulation 79: Review of system of payments**
- **Draft Regulation 80: Review of rates of payments**

DR 79(1) and DR 80(1): "…taking into account the **level of maturity and development of Exploitation activities** in the Area." **[*Emphasis supplied.*]**

*What does the **bolded** language mean? This language is not in the LOSC. Problems with it include: even if it can be defined, how is this going to be applied in practice? Will it be applied to all the different types of mineral resources for the whole Area?*

- **Draft Regulation 81: Recording in Seabed Mining Register**

DR 81(1): "All payments made by the Contractor to the Authority under this Part **shall be deemed** non-confidential." **[*Emphasis supplied.*]**

It is recommended to replace "shall be deemed" with "are" in order clearly to establish the non-confidential status of these payments without any further action being needed by the Authority.. "Shall be deemed" is not strong enough because this formulation requires another action, namely that of "deeming".

- **Draft Regulation 87: Confidentiality of information**

DR 87(2): *Provision must be made in the list for the exemption from disclosure of documents subject to attorney-client privilege - and/or their specific inclusion confirming their confidential status.*

DR 87(2)(d): "Data and information designated by the Contractor as Confidential Information at the time it was disclosed to the Authority, provided that, subject to paragraph 4 below, such designation is deemed to be well founded by **the Secretary-General** on the basis that there would be substantial risk of serious **and** unfair economic prejudice if the data and information were to be released;" **[*Emphasis supplied.*]**

*The same comments made under, e.g., **DR 74** above re issues relating to ultra vires/substantive legal competence issues raised with regard to the functions and role of the Secretary-General in this context and the transparency and uniform/non-discriminatory issues raised by the process set out herein apply here as well.*

*Furthermore, the bolded "**and**" must be replaced by "**or**". This is because "economic prejudice" can take a variety of forms: they can be either serious (i.e., they can be serious without being unfair) or unfair (which is always serious) or both, but none can be acceptable under the circumstances set out in the **DR 87(2)(d).***

- **Draft Regulation 88: Procedures to ensure confidentiality**

DR 88(5): "Taking into account the responsibility and liability of **the Authority** pursuant to article 22 of annex III to the Convention, **the Authority** may take such action as may …"**[*Emphasis supplied.*]**

*Who is the Authority here? See also general comment re use of "the Authority" under **DR 74** above.*

- **Draft Regulation 89: Information to be submitted upon expiration of an exploitation contract**

DR 89(2): "…the Contractor and the Secretary-General shall consult together…"

*See also comments made under, e.g., **DR 13(1)(f), DR 74** above re issues relating to ultra vires/substantive legal competence issues raised with regard to the functions and role of the Secretary-General in this context. See also comments made above under, e.g., **DR 56(1), DR 74** re the transparency and uniform/non-discriminatory issues raised by the process set out herein.*

- **Draft Regulation 90: Seabed Mining Register**

DR 90(1)(i): "The Secretary-General shall establish a Seabed Mining Register in which shall be published: … (i) Any other details which the Secretary-General considers appropriate (save Confidential Information)."

*See also comments made under, e.g., **DR 13(1)(f), DR 74** above re issues relating to ultra vires/substantive legal competence issues raised with regard to the functions and role of the Secretary-General in this context. See also comments made above under, e.g., **DR 56(1), DR 74** re the transparency and uniform/non-discriminatory issues raised by the process set out herein.*

- **Draft Regulation 91: Notice and general procedures**

DR 91(5): "Delivery by hand is deemed to be effective when made."

More detail is needed here in terms of actual proof of delivery by hand. There must be some form of publicly available written or otherwise recorded registration by the Secretariat and preferably as well a recorded transmission to the sender by the Secretariat of a written acknowledgement of receipt.

- **Draft Regulation 92: Adoption of Standards**

DR 92(3): "The Standards contemplated by paragraph 1 above may include qualitative **or** quantitative standards and include the methods, process **or** technology required to implement the Standards." **[*Emphasis supplied.*]**

*This is an inappropriate and confusing use of 'or'. The sentence should read [**bolded** changes] as follows:*

*The Standards … may include **both** qualitative **and** quantitative standards and include the methods, process **and** technology required to implement the Standards.*

- **Draft Regulation 93: Issue of guidance documents**

DR 93(1): "The Commission **or** the Secretary-General shall, from time to time, issue guidance documents (Guidelines) of a technical or administrative nature …. "

DR 93(3): "The Commission **or** the Secretary-General shall keep under review **such** Guidelines in the light of new knowledge or information." **[*Emphasis supplied.*]**

*This is an inappropriate and confusing use of 'or'. The sentences should read [**bolded** changes] as follows:*

***DR 93(1):** "The Commission **and** the Secretary-General, **respectively,** shall ... issue guidance documents (Guidelines) of a technical (the Commission) or administrative (the Secretary-General) nature …"*

***DR 93(3)**: "The Commission **and** the Secretary-General shall keep under review their respective Guidelines …"*

- **Draft Regulation 94 Inspections: general**

DR 94(2): "The Secretary-General shall give reasonable notice …., save in situations where the Secretary-General has reasonable grounds to consider the matter to be so urgent that notice cannot be given, in which case **the Authority** may, where practicable, exercise its right …" [***Emphasis supplied.*]**

Who is the Authority here? Why the shift from the Secretary-General to the Authority? *See also general comment re use of "the Authority" under **DR 74** above.*

DR 94(3): Inspectors may inspect **any relevant documents** …" [***Emphasis supplied.*]**
DR 94(4): The Contractor and **its agents and employees …*" /Emphasis supplied.*]**

Provision must be made for the exemption from disclosure of documents and communications subject to attorney-client privilege.

- **Draft Regulation 95: Inspectors: general**

DR 95(2): "An Inspector … must have no **conflicts of interest** … "[***Emphasis supplied.*]**

What constitutes a conflict of interest must be clearly defined.

- **Draft Regulation 96: Inspectors' powers**

Provision must be made for the exemption from disclosure of documents and communications subject to attorney-client privilege.

- **Draft Regulation 99: Complaints**

DR 99(2): "The Secretary-General **may take such reasonable action as is necessary** in response to the complaint .." [***Emphasis supplied.*]**

*See comments made under **DR 13(1)(f)** above re issues relating to ultra vires/substantive legal competence issues raised with regard to the functions and role of the Secretary-General in this context. See comments made above under, e.g., **DR 56(1)** re the transparency and uniform/non-discriminatory issues raised by the process set out herein. The **bolded** language in **DR 99(2)** is also too vague.*

- **Draft Regulation 101: Compliance notice and termination of exploitation contract**

DR 101(4): "The Contractor shall be given a reasonable opportunity to make representations in writing to the Secretary-General concerning any aspect of the compliance notice. Having considered the representations, the **Secretary-General** may confirm, modify or withdraw the compliance notice." [***Emphasis supplied.*]**

*See comments made under **DR 13(1)(f)** above re issues relating to ultra vires/substantive legal competence issues raised with regard to the functions and role of the Secretary-General in this context. See comments made above under, e.g., **DR 56(1)** re the transparency and uniform/non-discriminatory issues raised by the process set out herein.*

- **Draft Regulation 102: Power to take remedial action**

*Who is "the Authority" here? See also general comment re use of "the Authority" under **DR 74** above.*

Comments on the Annexes

Note: Comments on Annex IV follow the comments on Annex X.

Annex X: Standard clauses for exploitation contract

- **Section 3: Undertakings**

Section 3.3: "The Contractor shall, in addition:
… (c) Observe, **as far as reasonably practicable**, any guidelines ….[***Emphasis supplied.***]

Why the qualifier? It makes the clause unenforceable. Its removal is recommended.

… (e) Carry out its obligations under this Contract with due diligence, **efficiency and economy**, **with due regard to the effect of its activities on the Marine Environment,** and **while** exercising reasonable regard for other activities in the Marine Environment." [***Emphasis supplied.***]

The purpose of requiring "efficiency" is not clear. Why would a truly commercial operator operate inefficiently? How would this inefficiency be identified, proven, remedied and any remedies enforced, and by whom? What the LOSC actually requires in Art. 150(b) is 'ensuring … efficient conduct of activities in the Area'. It is not clear that Section 3.3 achieves - or even contributes to achieving - that requirement, and it is recommended that it be deleted.

What is the meaning of "and economy"? What is the purpose of adding this criterion? How would a lack of economy be identified, proven, remedied and any remedies enforced, and by whom? Why would a truly commercial contractor conduct its activities with a lack of economy? Furthermore, the LOSC does not apply this criterion to contractors. It is applied to the exercise of powers and functions of the Council (Art. 162(2)(d), Art. 163(2)) with regard to the establishment of subsidiary organs. It is recommended that it be deleted.

What is the meaning and purpose of the requirement "with due regard to the effect of its activities on the Marine Environment"? The "due regard" formulation is not used in this context in Part XI, and the clause is also incompatible with the LOSC in that it does not require what the contractor in fact must do, i.e., comply with the rules, regulations and procedures adopted by the Authority for protection of the marine environment, for which a non-exhaustive list of specific examples is set out in Art. 145.
It is recommended to rephrase this part of the clause as follows: "... due diligence, including compliance with the rules, regulations and procedures adopted by the Authority for protection of the Marine Environment, ..."

Finally, use of the conjunction "while" here is inappropriate and confusing. It is recommended for deletion; this part of the clause will read as follows: "...Marine Environment, and exercising reasonable regard ...."

- **Section 6: Use of subcontractors and third parties**

Section 6.1: "…as is relevant." [***Emphasis supplied.***]

*It is recommended to delete the **bolded** language because it is unnecessary and adds vagueness and opportunities for confusion.*

- **Section 9: Renewal**

Section 9.1(a): "The resource category is recoverable annually in **commercial and profitable quantities** from the Contract Area;" **[*Emphasis supplied.*]**

*See comment on the **bolded** text here as made under **DR 21(3)(a)** above.*

Section 9.1(b): "The Contractor is in compliance with the terms of this Contract and the Rules of the Authority, including obligations with regard to the effective protection of the Marine Environment;"

It is recommended to substitute for "obligations with regard to the": rules, regulations and procedures adopted by the Authority to ensure…."

It is recommended to replace "of" after "protection" with "for", as this is the exact language of LOSC Art. 145 and the legal meaning is different.

It is recommended to add after "Marine Environment": "from harmful effects which may arise from activities in the Area."

- **Section 12: Suspension and termination of Contract and penalties**

Section 12.1(c): "If the Contractor knowingly or recklessly provides the Authority with information that is false or misleading";

It is recommended to add "or negligently" after "recklessly".

- **Section 13: Obligations on Suspension or following Expiration, Surrender or Termination of a Contract**

Section 13(1)(d): "Make the area safe so as not to constitute a danger to persons, shipping or to the Marine Environment **to the reasonable satisfaction of the Authority**." **[*Emphasis supplied.*]**

*What does the **bolded** text mean? How will it be applied? Who is "the Authority" in this case? Why is this text even necessary? Either the area constitutes a danger or it doesn't, and this must be objectively ascertainable, not dependent on a vague "reasonable satisfaction" of a regulatory body. The IMO's standards for determining danger and safety could be consulted and considered for use here, with appropriate adaptations. It is recommended to delete the **bolded** text.*

Annex IV - Environmental Impact Statement (EIS) Template

"1. The Environmental Impact Statement shall be in the form prescribed by the Authority in this Annex IV."

My observations on this Annex are limited to its section 2: "Policy, Legal and Administrative Context" as set out in ISBA/24/LTC/WP.1/Add.1.

*The purpose and relevance of this section 2 are wholly unclear. Why is this section relevant to stating/ascertaining/assessing the **environmental consequences** of an activity, which is the purpose of an EIS/A. Furthermore, this section 2 as currently structured and drafted is incompatible with the LOSC/IA and with their status in international law.*

I recommend removal of this section 2 from the EIA template.

My reasons for this recommendation follow.

First, the structure of section 2 reveals a profound and disturbing misunderstanding of the legal regime applicable to activities in the Area. The LOSC is not only placed in the third category of elements to be addressed (2.3), but it is there also incorrectly placed on a legal par with the other instruments listed there, as well as being placed in a position of legal authority inferior to that of the instruments of less, if any, status in international law listed in 2.1 and 2.2.
This is completely at variance and incompatible with the actual legal context in which activities in the Area must be conducted and evaluated.
The LOSC is the governing international legally binding instrument for oceans in general and the Area in particular, and for the latter the IA is added.

The LOSC already addresses the types of and relationships with legally binding international treaties and conventions, including multilateral trade agreements, and rules of international law, in accordance with which, as relevant and appropriate, activities in the Area are to be carried out under the auspices of the International Seabed Authority.

*Furthermore, the body of international law within which the LOSC operates, and the operation of the LOSC itself, are exceedingly complex. The nature and mechanisms of their application to the Area and the activities of the Area, including with regard to the marine environment, cannot be considered as being so clear and settled that a request for their description and analysis by an applicant to conduct an activity in the Area can reasonably be made. Nor is it at all clear what purpose such an analysis would serve in the context of an **EIA/S**. Indeed it is likely that such a request would be inconsistent with the requirements set out by the LOSC itself with regard to how the activities in the Area are to be organized, carried and controlled by the ISA.*

Other questions raised by this Section 2 include:

Why is this section relevant at all to a statement/assessment of environmental impacts?

Why is the applicant being required to describe the applicable legal regime? Does the regulator not consider itself to be cognizant of the legal basis pursuant to which the assessment is being conducted? And if not, why not?

But if for some reason (that totally escapes me) this is indeed the case, why is the applicant, clearly an interested party - which, is not to be considered in any way as a negative attribute - the appropriate source for legal advice to the regulator on the applicable law?

In the same vein, why is the applicant being required to assess its own compliance with the law? Is the regulator not capable of doing this? If not, why not, and then if not, what is the purpose of the regulator?

With regard to "policies" (2.1 and 2.2), their establishment for activities in the Area is within the sole purview of the ISA, and specifically the Assembly (Art. 160(1)). Policies promulgated by other

international bodies, especially if they are not legally binding, may or may not be taken into account by the ISA. Whether and if so how to do so is entirely at the ISA's discretion. Unless and until the Assembly has formally done so, it is incompatible with the LOSC to require an applicant to take them into account. The same issues re requiring the applicant to list them also apply here.

With regard to 2.4, why is the applicant being required to describe non-legally-binding instruments? On what legal basis are these instruments considered to be relevant at all?

The only non-legally-binding guidelines, standards, principles, etc. (collectively referred to as "guidelines" in this comment), which any entity applying to conduct an activity in the Area must take into account, pursuant to the LOSC, are those formally issued or endorsed by the ISA.

For both policies and "guidelines," this sole formal source in this context is necessary, inter alia*, to ensure that a level playing field of requirements for conducting activities in the Area is maintained among all contractors.*

The examples of other "guidelines" set out in item 2.4 apparently considered to be potentially relevant by the drafters of this section have not been so endorsed by the ISA.

It must also be noted that these non-ISA examples have not been universally accepted or adopted by their own constituents either and remain subjects of debate.

This 2.4 furthermore and again erroneously places the ISA's own guidelines on a legal par with these others, which is incompatible with the governance hierarchy of instruments applicable to activities in the Area set out in the LOSC. That hierarchy does not include guidelines from other sources that have not been formally endorsed by the ISA.

In any event, whether or not a given contractor has chosen to abide by any or all or none of these non-binding "guidelines" and non-ISA policies is irrelevant both in law and in fact, as that choice is not pertinent to stating/ascertaining the environmental consequences of the activity being examined, which is the objective of this document.

In conclusion: this entire item 2 as currently structured and drafted is incompatible with the LOSC/IA and with their status in international law and if it is retained at all, which I do NOT recommend, it requires at the very least major amendment.