



**To: Intersessional Working Group (IWG) on ‘Test Mining’ (TM) (DR 48 (bis))  
co-hosts/chairs: Belgium and Germany**

**Re: Proposal by the Advisory Committee on Protection of the Sea (ACOPS)**

## Introduction

1. As requested by the co-chairs of the Intersessional Working Group on ‘Test Mining’ (TM IWG), the oral proposal made by ACOPS during the second meeting of the TM IWG on 25 May 2023 is hereby presented in writing, with additional detail on the documents discussed for ease of reference. ACOPS appreciates the opportunity to contribute to the work of the International Seabed Authority (ISA).

## Summary of proposal

2. ACOPS proposes that: *those parts of the “Recommendations for the guidance of contractors for the assessment of the possible environmental impacts arising from exploration for marine minerals in the Area”<sup>1</sup> and “Recommendations for the guidance of contractors on the content, format and structure of annual reports”<sup>2</sup> be incorporated by reference into DR 48(bis) and remain applicable until standards and guidelines for TM currently envisaged under DR 48(bis) are adopted.*

## Rationale

3. The “Exploration Regime” for polymetallic nodules<sup>3</sup> addresses TM<sup>4</sup> in detail, and encompasses most, if not all, of the technical and procedural questions discussed so far in the present IWG, including modelling, monitoring, EIA and procedural (e.g., in terms of plans of work (POW)), reporting<sup>5</sup> and timing requirements.
4. ‘Test mining’ falls within the definition of “activities in the Area” under the UN Convention on the Law of the Sea (the Convention)<sup>6</sup> and thus must be subject to

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<sup>1</sup> ISBA/19/LTC/8.

<sup>2</sup> ISBA/21/LTC/15.

<sup>3</sup>The “Exploration Regime” comprises the “Regulations on prospecting and exploration for polymetallic nodules in the Area and related matters (ISBA/19/A/9; ISBA/19/C/17) and the two sets of Recommendations (see notes 1 and 2, *supra*), including an Explanatory Commentary and Glossary for the environmental impact assessment (EIA) in ISBA/19/LTC/8). The present proposal is limited to polymetallic nodules, although its organizing principle and rationale should be applicable as well to seafloor massive sulphides and Co-rich Fe-Mn crusts.

<sup>4</sup> TM is defined in the Glossary as: ‘Use and testing of recovery systems and equipment’. It is used in the “Exploration Regime” as a term of art.

<sup>5</sup> For example, Annex I, Section V of the Annual Report Recommendations (note 2, *supra*) sets out specific recommendations for reporting on “Mining tests and proposed mining technologies.”

<sup>6</sup> Part I, Article 1, Use of terms and scope, 1. (3): “all activities of exploration for, and exploitation of, the resources of the Area.”

“assessment of environmental implications of these activities”<sup>7</sup>, as well as falling within the “proposed activities” for which an EIA “shall” (i.e., must) accompany an application for approval of a POW<sup>8</sup> pursuant to the Part XI Implementation Agreement (IA).<sup>9</sup>

5. From publicly available Annual Reports and other documentation submitted to the ISA by exploration contractors, it may be concluded that they are preparing for, costing, and in some cases already conducting TM, including by gathering TM-related environmental data and by developing TM-related EIA, on the basis of and/or guided by the aforesaid “Exploration Regime”, wherein the Recommendations and Explanatory Commentary in particular are consulted and, at least in some cases, explicitly relied on.
6. An effective regulatory regime must be transparent, clear, predictable, stable, consistent and provide a level playing field, as well as remaining flexible enough for adjustment – with appropriate safeguards for existing contracts – as conditions change and new information is acquired. The Convention foresees the need and provides for this delicate balance, which must be borne in mind in light of the current effort to regulate TM, which is already subject to extensive regulation under the “Exploration Regime”, in the draft “Exploitation Regime” as well.
7. Other than the “Exploration Regime” as described in paragraph 3 above, exploration contractors at present have no other source of formal written guidance issued by the ISA for conducting TM that addresses the marine environmental protection requirements set out in the Convention and the IA and the requirements for an effective regulatory regime set out in Paragraph 6 above.
8. With regard to TM, as far as ACOPS is aware, no States-Parties have objected to the “Exploration Regime,” including the Recommendations, and exploration contractors<sup>10</sup> are relying on this Regime, including the Recommendations, to plan for, implement (including incurring expenditures), and comply with its environmental protection requirements.
9. Many exploration contractors are well advanced in their 15-year exploration contracts, some contracts have already been extended for a further five years, and TM is already being conducted under some contracts. Therefore, changes to the TM aspects of the “Exploration Regime” in the context of an “Exploitation Regime” must be undertaken with particular caution. This is necessary to avoid, for example, potential ‘detrimental reliance’ and ‘level playing field’ issues that might otherwise arise with existing exploration contractors, whose POW still have only the “Exploration Regime” to work with to plan for and implement environmentally responsible TM as required by the Convention.

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<sup>7</sup> See, e.g., Part XI, Article 165, 2(d) and (f).

<sup>8</sup> This clause is applicable to POW for both exploration and exploitation activities.

<sup>9</sup> IA, Annex, Section 1, Paragraph 7. Note ‘*potential impacts*’ are included [emphasis supplied].

<sup>10</sup> As exploration contractors must be either sponsored by States Parties or be themselves States-Parties or State Party-owned entities, the absence of objections, as well as demonstrable attempts to comply with the Recommendations, offer evidence of State practice in support of the Recommendations.

10. These potential issues could be addressed by formally designating the environmental and reporting requirements of the “Exploration Regime” with regard to TM as being applicable under DR 48(bis), and elsewhere as appropriate in the draft “Exploitation Regime”, until the latter and the ancillary Standards and Guidelines for TM have been approved, together with any transitional arrangements for existing contractors.
11. This proposal is consistent with and implements the stated marine environmental protection objective of DR 48(bis), maintains consistency within the ISA Mining Code as a whole, and makes use of the extensive work on marine environmental protection in the TM context already done in developing the “Exploration Regime” to comply with, e.g., Article 145 and other environmental protection requirements in the Convention for activities in the Area.

**Drafting suggestion for inclusion of this proposal in DR 48(bis)**

12. *Pending formal approval by the ISA of “standards and guidelines” for ‘test mining’, those parts of the “Exploration Regime” [ISBA/19/LTC/8; ISBA/21/LTC/15; ISBA/19/A/9; ISBA/19/C/17] currently applicable to ‘test mining’ are hereby formally incorporated by reference in the present DR 48(bis). Such incorporation does not change the legal status of the documents forming part of the “Exploration Regime”.*

**END OF PROPOSAL**

Respectfully submitted to the TM IWG  
by the Advisory Committee on Protection of the Sea (ACOPS) ([www.acops.org.uk](http://www.acops.org.uk))

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