

Original: Chinese

**Comments**

**by**

**the Government of the People's Republic of China**

**on**

**the Draft Regulations on Exploitation of  
Mineral Resources in the Area**

**15 October 2019**

Pursuant to the Decision of the Council relating to the reports of the Chair of the Legal and Technical Commission (Commission) at the twenty-fifth session of the International Seabed Authority (Authority), the Government of the People's Republic of China hereby, on the basis of its previous comments submitted on 20 December 2017 and 28 September 2018, makes the following comments on the Draft Regulations on Exploitation of Mineral Resources in the Area (Draft Regulations) contained in document ISBA/25/C/WP.1.

## **I General Comments on the Draft Regulations**

As a legal instrument regulating activities in the Area, the Exploitation Regulations is essential for implementing the principle of common heritage of mankind. China initiates to build a maritime community of a shared future, attaches great importance to the formulation of the Exploitation Regulations, and is willing to work with all parties to jointly contribute to further optimize and rationalize the Draft Regulations. The Chinese Government considers that the Exploitation Regulations shall reflect the provisions and spirits of the United Nations Convention on the Law of the Sea (Convention) and the Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982 (Implementing Agreement) in a faithful, accurate and strict manner, treat the Authority and Contractors fairly, and ensure the balance of their rights and obligations. Benefit sharing is not only part of the important contents and embodiment of the principle of common heritage of mankind, but also an important duty of the Authority under the Convention. The Finance Committee had made positive progress in the study of this issue before the twenty-fifth session of the Authority. As an important part of the overall system designed to regulate the exploitation of the resources in the

Area, benefit sharing needs to be addressed along with other issues concerning the deep seabed exploitation, with relevant regulations being formulated in a coordinated way.

## **II On the Key Issues Concerning the Draft Regulations**

### **i On the Enterprise**

The Enterprise is the organ of the Authority which shall carry out activities in the Area directly as well as the transporting, processing and marketing of minerals recovered from the Area. It is also a vital channel for developing States to participate in the exploitation of resources in the Area. However, the provisions concerning the Enterprise in the Draft Regulations are too sketchy. Relevant discussions and decisions of the Council relating to the Enterprise have also revealed the problem of the shortage of rules. It is suggested that the Draft Regulations should further enrich and specify the provisions concerning the Enterprise.

Firstly, the meaning and standard of the term “sound commercial principles” should be clarified. According to Article 1 (3) of Annex IV to the Convention, Article 2 of Section 2 and Article 1 (a) of Section 6 of the Annex to the Implementing Agreement, “sound commercial principles” is not only the principle for the development of resources in the Area, but also the principle for the Enterprise to operate its business, including entering into joint ventures with other entities. Since neither the Convention nor the Implementing Agreement provides the exact meaning of the “sound commercial principles”, the Exploitation Regulations, which is an implementing legal instrument, needs to specify this crucial term further, as appropriate.

Secondly, the standards and procedures for establishing joint ventures should be formulated as soon as possible. Article 2 of Section 2 of the Annex to the Implementing Agreement stipulates that the Enterprise shall conduct its initial deep seabed mining operations through joint ventures. Article 9 (3) of Annex III to the Convention provides that the Authority may prescribe, in its rules, regulations and procedures, substantive and procedural requirements and conditions with respect to joint ventures. It is proposed to take the formulation of the Exploitation Regulations as an opportunity to develop relevant standards and procedures on issues of, *inter alia*, the nature and legal status of the joint ventures, the proportion of seats to be held by the Enterprise in the Governing Board and management staff, and the laws applicable to joint ventures.

Thirdly, equities in joint venture arrangement should be stipulated. Article 19 of the Regulations on Prospecting and Exploration for Polymetallic Sulfides in the Area and Article 19 of the Regulations on Prospecting and Exploration for Cobalt-rich Ferromanganese Crusts in the Area both stipulate that the Enterprise may obtain the equity participation in joint venture arrangements, which shall take effect at the time the applicant enters into a contract for exploitation. The footnotes of the two provisions also indicate that the terms and conditions upon which such equity participation may be obtained would need to be further elaborated. However, none of the contents mentioned above has been referred to in the Draft Regulations, and therefore it is suggested that relevant provisions be supplemented and improved.

## **ii On the Payment Mechanism**

There are more efforts to be made on the subject of the payment mechanism for the implementation of the provisions and requirements of the

Convention and the Implementing Agreement. Payment mechanism is the core issue in the formulation of the Exploitation Regulations and should strictly follow relevant principles and spirits of the Convention and the Implementing Agreement. Article 1 (a) of Section 8 of the Annex to the Implementing Agreement stipulates that the system of payments “shall be fair both to the Contractor and to the Authority”. Paragraph (b) of the same Article provides that “[t]he rates of payments under the system shall be within the range of those prevailing in respect of land-based mining of the same or similar minerals in order to avoid giving deep seabed miners an artificial competitive advantage or imposing on them a competitive disadvantage”. Paragraph (c) of the same Article provides that in the payment mechanism, “[c]onsideration should be given to the adoption of a royalty system or a combination of a royalty and profit-sharing system. If alternative systems are decided upon, the Contractor has the right to choose the system applicable to its contract”. The fairness, comparability with land-based mining and diversity of payment model involved in the above-mentioned provisions need to be reflected and implemented in the Draft Regulations. However, a large gap still exists in this regard.

It is gratifying that the open-ended working group in respect of the financial terms has made positive progress on the issue of the payment mechanism. The Chinese Government supports the working group in continuing its discussions, and considers that, in order to reasonably avoid the deep seabed mining risks and protect the Contractors' enthusiasm for deep seabed exploitation, phased payment and floating payment rates varying with metal prices should be considered on condition that alternative payment models are available to Contractors. Meanwhile, appropriate and explicit criteria for annual fees and royalties need to be developed in order to facilitate the Contractors'

understanding of their obligations and for the future review by the Council.

### **iii On the Inspection Mechanism**

In order to ensure the smooth operation of deep seabed mining, it is essential to establish a reasonable inspection mechanism, which is also what the Convention requires the Authority to do. The Draft Regulations should clearly and explicitly define the rights, obligations and responsibilities of all parties concerned in inspection activities, and avoid increasing the burden of the Contractors.

Activities in the Area involve multiple inspection subjects. Article 153 (5) of the Convention provides that the Authority shall have the right to inspect all installations in the Area used in connection with activities in the Area. As the international organization that manages and controls activities in the Area, the Authority should assume primary regulatory responsibility, and its inspection competence should be strictly confined to the scope and matters authorized by the Convention. In order to fulfill the responsibility of sponsorship, the sponsoring State should assume subsidiary and supplementary regulatory duties. In accordance with Article 153 (4), Article 165 (2) (c) and (3) of the Convention, the sponsoring State is both obliged and entitled to assist the Authority in carrying out inspection. Meanwhile, the sponsoring State has the authority to inspect the Contractor's activities in accordance with domestic legislation. The flag State has jurisdiction over its ships involved in activities in the Area. The inspection mechanism should properly address and coordinate the respective regulatory responsibilities of the Authority, the sponsoring State and the flag State.

The powers and functions of the organs of the Authority and the inspectors

concerning inspection shall strictly conform with the provisions of the Convention. Pursuant to Article 162 (2) (z) of the Convention, the Council is the organ of the Authority to exercise inspection functions, and has the power to establish appropriate mechanisms for directing and supervising a staff of inspectors. In accordance with Article 165 (2) (c) and (m), and Article 165 (3) of the Convention, the Commission shall supervise, upon the request of the Council, activities in the Area, and shall make recommendations to the Council regarding the direction and supervision of a staff of inspectors. The Convention does not specify the competence of the Secretary-General and the Secretariat with regard to inspection. If the Exploitation Regulations is going to allow the Secretary-General to exercise some inspection functions, it needs to make clear that the Secretary-General's function in this regard should only be authorized by the Council with appropriate restrictions and limitations complying with the Convention. Pursuant to Article 162 (2) (z) and Article 165 (2) (m) of the Convention, inspectors are responsible for inspecting activities in the Area to determine whether the provisions of the Convention, the rules, regulations and procedures of the Authority and the terms and conditions of any contract with the Authority are being complied with. It is worth emphasizing that the functions of inspectors shall be limited to inspecting activities in the Area, and should not include "law enforcement power".

It is necessary to formulate associated rules and procedures for the inspection mechanism. In accordance with Article 17 (1) (b) (viii) of Annex III to the Convention, the Authority shall adopt and uniformly apply rules, regulations and procedures for the exercise of its functions as set forth in Part XI, including inspection and supervision of operations. To this end, the Council, with the assistance of the Commission, should formulate and adopt relevant

rules and procedures, including procedures for designation of inspectors, procedures for inspection notifications, systems for submitting and evaluating inspection reports, the rights and responsibilities of inspectors, procedures for boarding and inspection, checklist system, deployment of remote real-time monitoring and surveillance equipment, and manual or guideline for directing the inspectors to conduct inspections.

The inspection mechanism should not impose major administrative costs on the Authority or on a Contractor and should be efficient, taking full account of the complexity and uniqueness of deep seabed mining. On-site inspection needs not to be routine and should be carried out only where necessary and clearly defined. Meanwhile, remote monitoring and other means can be used for inspection. The establishment and implementation of the inspection mechanism for activities in the Area could draw on the experiences of other international organizations, including the system of inspection of the Commission for the Conservation of Antarctic Marine Living Resources, but complete copy of other models should be discouraged.

#### **iv On the Independent Expert**

In view of the complexity of deep seabed mining, it is necessary for relevant organs of the Authority, at their discretion, depending on the needs of performing their duties, to invite independent experts to provide advice on specific matters.

The involvement of independent experts in relevant work should be in conformity with the provisions of the Convention. In accordance with Article 165 (2) (e) and Article 8 of Annex III to the Convention, independent experts may provide advice on specific matters such as marine environmental protection



and assessment of data with respect to the reserved areas. The Draft Regulations provides that independent experts and independent competent persons can provide advice or reports for the consideration of a proposed Plan of Work, conduct performance assessments of the environmental management and monitoring plan, verify and audit the implementation of risk management systems and procedures, and participate in the development of standards. Most of the above activities go beyond the matters and scope in which independent experts could be involved under the Convention. It is suggested that independent experts should play their role strictly according to the provisions of the Convention.

The opinions of independent experts have no legal effect and should not impede or substitute the decisions made by the organs of the Authority. The Note by the Commission on the Draft Regulations on Exploitation of Mineral Resources in the Area contained in ISBA/25/C/18 clearly states that “[t]he Commission recognized the merit of engaging with external experts in supplementing its work and expertise, but considered that such engagements should be discretionary and not mandatory...the Commission is conscious of the need to avoid establishing a mechanism that would be overly bureaucratic and formalistic”. The provisions of the Draft Regulations concerning independent experts should fully respect the aforementioned position of the Commission and should avert causing negative influence or impacts on the existing mechanisms of the Authority.

The selection and appointment of independent experts should be inclusive and transparent. Whether establishing a roster of independent experts or appointing independent experts on specific issues, the principles of openness, fairness and impartiality should be followed, taking full account of geographical

balance and cultural diversity, so as to ensure the procedural fairness and practical effect for the participation of independent experts.

### **III On specific Provisions of the Draft Regulations**

#### **i Part I**

##### **1. Draft regulation 2**

This regulation stipulates the fundamental principles for deep seabed exploitation. It is proposed to have two principles in addition to those already included. The first one is to ensure a reasonable balance between exploration for and exploitation of the resources in the Area and protection and preservation of the marine environment. The second one is to ensure mutual due regard for each other between activities in the Area and other activities in the marine environment.

“The polluter pays” principle mentioned in subparagraph (e) (4) has different meanings and applicable conditions in distinct contexts. “The polluter pays” principle as contained in principle 16 of the Rio Declaration on Environment and Development is a consensus reached by the international community. It is suggested to change the wording as “‘the polluter pays’ principle as contained in principle 16 of the Rio Declaration on Environment and Development”.

##### **2. Draft regulation 4**

With regard to paragraph 4 of this regulation, in order that the issuance of emergency orders by the Council is more authoritative, China proposes to substitute the legally binding “standards” for the term “guidelines” in regulation 4(4). It is also suggested that the procedures and rules through which the

Council issues emergency orders should be clarified to make this paragraph more operational.

With regard to paragraph 5 of this regulation, in accordance with the Convention, if the Commission determines that the Serious Harm or threat of Serious Harm to the Marine Environment is attributable to a breach by the Contractor, it shall make recommendations to the Council, the organ that is entitled to make decisions on the measures to be taken. The Secretary-General has no authority to issue a compliance notice or to order an inspection on the Contractor's activities. If there is need to delegate relevant power to the Secretary-General, it should be authorized by the Council with specific terms of reference provided for in the Exploitation Regulations.

## **ii Part II**

### **3. Draft regulation 5**

It is not clear which body the “competent authority” herein refers to in subparagraph 2 (b). If the competent authority is the Authority, it will lead to such a situation where the Authority submits application to itself, which is apparently inappropriate. It is suggested that the term “competent authority” be clarified. Otherwise, it could be deleted, and the application can be submitted directly by the Enterprise.

### **4. Draft regulation 10**

Article 10 of Annex III to the Convention not only stipulates the preferences and priorities enjoyed by an exploration Contractor, but also provides that such preferences and priorities may be withdrawn if the performance of the operator has not been satisfactory. It is suggested that the Secretary-General only carry out preliminary review on the form of the

application for approval of a Plan of Work, and it should be left for the Commission or the Council to determine whether the performance of the applicant has been satisfactory and whether a situation of withdrawal of preferences and priorities occurs. Therefore, it is suggested that in paragraph 1, the sentence “the Secretary-General shall determine whether the applicant has preference and priority in accordance with Article 10 of Annex III to the Convention” be replaced by “the Secretary-General shall determine whether an applicant has preference and priority in accordance with Article 10 of Annex III to the Convention, and in case of any dispute, it shall be submitted to the Commission to make recommendations, upon which the Council shall make the decision.”

#### 5. Draft regulation 12

It is suggested that a new paragraph be added after paragraph 1. That is “should there be more than one application for the same area and same Resource category, the Commission shall make recommendations to the Council on whether the applicant has preference and priority in accordance with Article 10 of Annex III to the Convention.”

On paragraph 4, since the Commission shall have full discretion in reviewing the proposed Plan of Work, it is suggested that the wording “the Commission shall” be replaced by “the Commission may”. Furthermore, the scope of “any reports from the Secretary-General” mentioned in subparagraph (a) is too broad, and it is suggested to be replaced by “relevant reports of the Secretary-General”.

According to the Convention, matters upon which independent experts or independent competent persons may advise are mainly confined to environmental issues. It is suggested that the word “application” in respect of

which advice or reports can be sought from independent competent persons in paragraph 4 (b) be replaced by “environmental plan” or “environmental matters”.

### **iii Part III**

#### **6. Draft regulation 18**

The Contractor has paid an annual fixed fee or royalties for the total Contract Area in obtaining and performing the exploitation contract. The exploration activities carried out in the exploitation contract Area are preparatory and incidental to exploitation. Therefore, no further payment should be required from the exploitation Contractor for exploration activities. It is suggested to delete the relevant content.

#### **7. Draft regulation 21**

On paragraph 2 of this regulation, after a State asks to terminate its sponsorship, the termination of sponsorship takes effect no later than 12 months after the date of receipt of the notification by the Secretary-General. However, this regulation only specifies the latest date for the termination of sponsorship to take effect. It is still unclear when the termination of sponsorship will take effect and how to determine that. Further clarification is required on this issue in the Exploitation Regulations.

#### **8. Draft regulation 24**

Paragraph 1 of this regulation states that a “change in control” occurs where there is a change of 50 per cent or more of the ownership of the Contractor, or of the membership of the joint venture, consortium or partnership. In practice, however, one party can gain control over a company with less than 50 per cent of the holding. Further study is needed on how to determine “change

of control”. In addition, paragraph 2 provides that the Contractor shall notify the Secretary-General where there is a change of control. It is worth noting that a change of control may pertain to the obligations of the sponsoring State. Therefore, the Contractor should also notify the sponsoring State in case a change of control occurs. A change of control may further lead to the change of the sponsoring State, and it is suggested that relevant provisions be put in place accordingly.

#### 9. Draft regulation 25

In paragraph 1 of this regulation, the Secretary-General shall, on the basis of the feasibility study provided by the Contractor, determine whether any Material Change needs to be made to the Plan of Work. In view of the fact that Material Change is an important but not urgent matter, it seems more appropriate for the Commission to assume this function. It is proposed that paragraph 1 of this regulation be revised as: “At least 12 months prior to the proposed commencement of production in a Mining Area, the Contractor shall provide to the Secretary-General a Feasibility Study prepared in accordance with Good Industry Practice, taking into account the Guidelines. In the light of the Feasibility Study, if the Secretary-General considers any Material Change needs to be made to the Plan of Work, he or she shall submit this matter to the Commission. If the Commission determines as such, the Contractor shall prepare and submit to the Commission a revised Plan of Work accordingly.”

#### 10. Draft regulation 26

Paragraph 2 of this regulation involves the calculation of the Environmental Performance Guarantee. It is suggested that the Finance Committee study the calculation method and the ceiling of the Environmental Performance Guarantee and make relevant recommendations to the Council.

Paragraph 3 stipulates that the amount of an Environmental Performance Guarantee is determined according to the relevant Guidelines. Given that Guidelines are not legally binding, it is suggested that the term “Guidelines” in this paragraph be replaced by “Standards”.

Paragraph 6 stipulates that upon compliance by the Contractor of its obligations that are the subject of the Environmental Performance Guarantee, the Guarantee or part thereof can be repaid or released. However, it is unclear what obligations are implicated with the Environmental Performance Guarantee. It is suggested to make clarification.

#### 11. Draft regulation 29

It is proposed to add to paragraph 2 the following provision: “during the period when the Contractor reduces or suspends production, the annual fixed fee or royalties paid by the Contractor shall be exempted or deducted appropriately”.

The provision in paragraph 3 that “where the Contractor suspends all production for more than five years, the Council may terminate the exploitation contract and the Contractor shall be required to implement the final Closure Plan” is too arbitrary. The contract should remain valid even after five years of suspension, if the suspension is caused by force majeure. Alternatively, it may provide that the contract can be terminated after five years of suspension on the condition that the Contractor is entitled to priority and preference in exploiting the same area for the same resource.

#### 12. Draft regulation 31

“Article 147 of the Convention and the approved Environmental Management and Monitoring Plan and Closure Plan” mentioned in paragraph 1 can sufficiently cover the Contractor's obligations of reasonable regard for other

marine activities. The phrase “any applicable international rules and standards established by competent international organizations” is unclear and too broad. It is suggested to delete it.

The provision “in particular, each Contractor shall exercise due diligence to ensure that it does not cause damage to submarine cables or pipelines in the Contract Area” creates obligations for the Contractor beyond those set forth in the Convention. It is proposed to change the provision as “in particular, each Contractor should carry out exploitation activities with reasonable regard to submarine cables or pipelines so as to avoid destroying or damaging them”.

#### 13. Draft regulation 33

It is suggested that the phrase “ no later than 24 hours from the incident occurring” in subparagraph 2 (a) of this article be replaced by “24 hours after the time at which it has reasonable grounds to believe that the Contractor should have become aware of the occurrence of the incident”.

#### 14. Draft regulation 35

This regulation provides that following the finding in the Contract Area of any human remains, object or site, of an archaeological or historical nature, and in order to avoid disturbing such human remains, object or site, no further exploration or exploitation shall take place, within a reasonable radius, until the Council makes decision after taking into account the views of various parties. However, if the Council decides to discontinue the exploration and exploitation activities, the Contractor will sustain certain loss. In this case, it seems reasonable to consider compensating the Contractor, including through providing another exploitation area with the same size or value as that of the affected area, or reducing the Contractor’s payments. These issues need to be further studied.



#### 15. Draft regulation 38

The annual report is to be prepared by the Contractor and to be submitted to the Authority. It needs to be made clear that the term “independent competent persons” in subparagraph 2 (h) refers to “independent competent persons appointed or employed by the Contractor”.

### **iv Part IV**

#### 16. Draft regulation 46

There are many ambiguities regarding the “environmental management system” stipulated in this regulation. It is necessary to further clarify who is to establish the environmental management system, what to be included in the system and who shall entrust the independent audit.

#### 17. Draft regulation 47

It is suggested to modify subparagraph 3 (c) as “in accordance with the objectives and measures of the relevant existing regional environmental management plan”. The reason for adding “existing” here is that although the regional environmental management plan can serve as a prerequisite for deep seabed exploitation, its absence should not hinder the application of a Plan of Work .

#### 18. Draft regulation 48

It is suggested to amend subparagraph 3 (b) as “in accordance with the objectives and measures of the relevant existing regional environmental management plan”. The reason for adding “existing” here is that although the regional environmental management plan can serve as a prerequisite for deep seabed exploitation, its absence should not hinder the application of a Plan of Work .

#### 19. Draft regulation 55

The environmental liability trust fund should be remedial and complementary in nature, aiming to prevent, limit, or remedy any environmental damage from activities in the Area. “Education and training programmes in relation to the protection of the Marine Environment” as contained in subparagraph (c) is too broad and may dilute the core objective of the fund. Given that the training issue pertinent to the marine environmental protection could be covered by Contractors in discharging their relevant contract obligations or through other measures, it is suggested to delete the relevant content.

### **v Part V**

#### 20. Draft regulation 57

This regulation implicates the issue whether modification of a Plan of Work by a Contractor constitutes a Material Change. Paragraph 2 provides “the Secretary-General shall consider whether a proposed modification to the Plan of Work constitutes a Material Change in accordance with the Guidelines”, which is inappropriate. Two revisions are proposed. First, “Guidelines” should be replaced by the binding “Standards”. Second, Secretary-General shall not consider whether a proposed modification constitutes a Material Change. It is suggested to be modified as “if the Secretary-General considers that the proposed modification may constitute a Material Change, he or she shall submit such matter to the Commission for consideration. If the Commission considers that the proposed modification constitutes a Material Change, the Contractor shall seek the prior approval of the Council based on the recommendation of the Commission under regulations 12 and 16, before such Material Change is

implemented by the Contractor.”

## **vi Part VII**

### 21. Draft regulation 63

It is suggested that the specific content of “financial incentives” in paragraph 1 be demonstrated, such as whether to set a minimum royalty rate for the first stage of commercial development so as to reduce risks and recover investment earlier, or to reduce the costs of the first group of the Contractors.

### 22. Draft regulation 65

The wording of “in respect of the administration and management” is ambiguous and needs to be clarified.

### 23. Draft regulation 70

Paragraph 3 provides that all payments to the Authority shall be made gross. From the context, it seems more appropriate that the payments are made net. Further clarification is suggested in this regulation.

With respect to paragraph 4, it is proposed to make clear what constitute such “special circumstances” as could allow payment by instalment. In this way, it’s easy for the qualified Contractors to make a choice.

### 24. Draft regulation 71

The quantity of mineral-bearing ore recovered and transported from the Mining Area under paragraph 1 (a) and (b) is measured in wet metric tons, whereas the total quantity of mineral-bearing ore involved in the calculation of royalty payable contained in Appendix IV of the Draft Regulations is measured in metric tons. In view of the big difference between the “wet metric ton” and “dry metric ton” weights of mineral-bearing ores, the relevant statistical methods should be consistent. It is suggested that the problem of

mineral-bearing ore measurement units be further dealt with in the Draft Regulations.

The “value by Mineral” stipulated in subparagraph (b) is difficult to calculate. Given that subparagraph (c) contains specific provisions on value assessment, it is suggested that the word “value” in subparagraph (b) be deleted.

It should be clearly indicated in subparagraph (c) who will appoint “a suitably qualified person” and how to determine the specific qualifications.

#### 25. Draft regulation 74

It is suggested that paragraph 4 specify the period for which the books and records should be kept, and whether they should be kept after the closure.

#### 26. Draft regulation 75

In accordance with Article 153 (5) of the Convention, the Authority’s right to inspect is restricted within the scope of “all installations in the Area used in connection with activities in the Area”. The provision of “inspect, audit and examine any documents, papers, records and data available at the Contractor’s offices” contained in paragraph 3(b) apparently falls outside the scope provided in the Convention. It is proposed to delete relevant content.

#### 27. Draft regulation 78

Paragraph 2 of this regulation provides that “the Secretary-General may adjust the value of such costs, prices and revenues to reflect an arm’s-length value”. Given that the adjustment of related costs, in spite of its importance, is not an urgent matter, it should be dealt with by the Commission or the Finance Committee. The suggested language is as the following: “the Secretary-General may make recommendations to the Commission or the Finance Committee on the adjustment of the value of such costs, prices and revenues.”

## **vii Part VIII**

### 28. Draft regulation 85

Since the date of the commencement of commercial production is the date from which the payment of the annual fixed fee will be paid, it is suggested that paragraph 1 clarify the definition and criteria of “Commercial Production”, such as the proportion of an anticipated production, or a standard for the amounts of output.

The content “at the rate prescribed by the Council under paragraph 2 above” contained in paragraph 2 is a leftover from the previous version of the Draft Regulations. As there is no further reference to “rate” in this regulation, it is suggested that the above-mentioned content be deleted.

At the same time, considering that this regulation is still unclear on how to calculate the annual fixed fee, it is suggested that further clarification be made.

## **viii Part IX**

### 29. Draft regulation 89

Paragraph 3(i) of the regulation stipulates that Confidential Information shall no longer be deemed to be confidential after it is passed to the Secretary-General for a period of 10 years. However, according to the existing provisions of the Draft Regulations, the term of an exploitation contract could be 30 years. Inconsistency occurs between the term of a contract and that of confidentiality. The Confidentiality should be kept throughout the duration of a contract unless the Contractor indicates otherwise. It is suggested to revise this regulation accordingly.

## **ix Part X**

### 30. Draft regulation 94

The Convention does not confer on experts with special status in the formulation of relevant standards in the Area, and it is not appropriate to only emphasize recognized experts. It is suggested that the phrase “recognized experts” be removed.

In terms of procedure, we support the suggestion made by the Commission that the standards shall be approved by the Council and adopted by the Assembly. It is suggested that the relevant content of paragraph 4 of this regulation be adjusted as “Standards adopted by the Council and the Assembly”.

### 31. Draft regulation 95

The Convention does not authorize the Commission or the Secretary-General to formulate legally binding rules. Guidelines issued by the Commission or the Secretary-General should be considered recommendatory in nature and for guidance, without any binding force. In order to avoid improperly imposing legal liability on Contractors resulting from the guidelines, it is proposed that regulation 95 of the Draft Regulations clearly stipulates that “the guidelines are only of a recommendatory nature and does not affect the Contractor's performance of the exploitation contract by means other than the guidelines”.

## **x Part XI**

### 32. Draft regulation 96

Paragraph 2, which allows inspectors to be sent “aboard vessels and installations, whether offshore or onshore” and “offices wherever situated”,

clearly goes beyond the provisions of the Convention. The scope of inspector 's inspection shall be confined to vessels or installations in the Area used in connection with activities in the Area. Therefore, it is suggested that the above-mentioned content be deleted.

Paragraph 3 provides that “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 Secretary-General may, where practicable, exercise the right to conduct an inspection without prior notification.” According to the Convention, it is the Council, not the Secretary-General, that serves as the organ that exercises the power of inspection. The provision of this paragraph not only expands the authority of the Secretary-General, but also deprive sponsoring States of the opportunity to participate in inspection. It is suggested to further clarify “the matter to be so urgent that notice cannot be given”. Otherwise, the above-mentioned content should be deleted.

Paragraph 4 provides that inspectors may inspect “any vessel or installation”, which exceeds the authorization under the Convention. It is suggested this phrase be revised as “vessels or installation used in the Area in connection with activities in the Area”.

In Paragraph 5 (c), the content “access in offices” goes beyond the provisions of the Convention and is proposed to be deleted. Paragraph 5 (f) stipulates that the Contractor “accept the deployment of remote real-time monitoring and surveillance equipment, where required by the Secretary-General”. However, in accordance with the Convention, relevant requirement shall be made by the Council rather than the Secretary-General. It should be amended accordingly.

The exception clause “unless the Inspector has reasonable grounds for

believing that the Contractor is operating in breach of its obligations under an exploitation contract” in Paragraph 6 (b) unduly expands the powers of the inspectors, who might thereby improperly interfere with the legal operations of the Contractor. If the inspectors do “have reasonable grounds for believing that the Contractor's work violates his obligations under the mining contract”, they should report to the Authority immediately rather than take actions without authorization.

### 33. Draft regulation 98

In accordance with Article 162 (2) (z) of the Convention, the function of an inspector is to determine whether the provisions of the Convention, the rules, regulations and procedures of the Authority and the terms and conditions of any contract with the Authority are being complied with by Contractors. The provisions of paragraph 1 (f) and (g), and paragraph 3 and 4 of this regulation, empower the inspectors such powers to seize documents and remove samples, which are clearly beyond the scope of authorization by Convention. It is suggested that the powers and responsibilities of the inspectors be further clarified and the relevant provisions authorizing “law enforcement powers” be deleted.

### 34. Draft regulation 99

Paragraph 1 gives inspectors the power to issue instructions in cases of “emergency” and “breach of the terms of exploitation contracts”, including requiring a suspension in mining activities and the placing of conditions for the continuation of mining activities, which clearly exceed the authorization by the Convention. Such powers should be enjoyed by the Council. In accordance with the Convention and the Exploration Regulations adopted by the Authority, “in case of emergency”, the Council shall issue an emergency order or the



Secretary-General may take temporary measures “pending any action by the Council”. Therefore, the inspector should report to the Authority immediately in case of emergency. Pending any action by the Council, the Secretary-General may take temporary measures as authorized by the Council, which should have a certain duration.

The provision of “or is otherwise in breach of the terms of its exploitation contract” in this paragraph is too broad and not “emergent” in nature. According to the Convention, the Authority may issue written warnings to Contractors in case of breach of contract, and the inspectors are not in a position to issue instructions. It is suggested that relevant content be further clarified and revised.

#### 35. Draft regulation 100

Upon receipt of the inspection report, the Secretary-General shall notify the Contractor and its sponsoring State, as well as the flag State of the vessel under inspection, and shall give the relevant Contractors and States the opportunity to comment or make statements.

According to the Convention, upon the request of the Council, the Commission may also perform the function of inspection. In view of this, it is suggested that the Secretary-General should submit the inspection report, together with the comments or statements of the Contractor and its sponsoring State or flag State, to the Commission for further consideration, who should report the inspection result and make possible recommendations to the Council.

## **xi Annex**

#### 36. Annex I

Paragraph 21 (a) also concerns the competent authority of the Enterprise. If the competent authority is the Authority, it will lead to the situation where the

Authority submits the certification to itself. It is suggested that the content that “attach certification by its competent authority” be deleted, and replaced by a provision where relevant certificate is issued and attached by the Enterprise or its internal bodies (such as the Governing Board).

### 37. Annex IV

The items listed in Environmental Impact Statement in this part are too complex to operate effectively. Firstly, some of the items involve the frontier issues of basic science, such as connectivity, ecosystem function and life-history, which are obviously beyond Contactors’ scientific research capacity and beyond their obligations under the contract. Secondly, the assessment of certain items may not be necessary. According to the Exploration Regulations, the applicant should ensure that relevant installations “are not established where interference may be caused to the use of recognized sea lanes essential to international navigation or in areas of intense fishing activity.” Therefore, neither the exploration area nor the exploitation area would be located within fishing areas or overlapped with sea lanes. Thus it may not be necessary to assess the impact upon fisheries and marine traffic for exploitation. It is proposed therefore that the Environment Impact Statement should delete the unnecessary assessment items. It is also suggested the Environment Impact Statement should differentiate “activities not requiring environmental impact assessment” from “activities requiring environmental impact assessment” in light 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 (ISBA/25/LTC/6) issued by Commission.

Since an exploitation contract area recommended by the Commission for approval will not include an area used by fisheries, it is suggested that paragraph

6.2.1 “Fisheries” be deleted.

Since an exploitation contract area recommended by the Commission for approval will not include an area used as recognized sea lanes essential to international navigation, it is suggested that paragraph 6.2.3 “Tourism” be deleted.

### 38. Annex VII

Paragraph 1 (b) stipulates that environmental management and monitoring plans shall be verified by the report of independent competent persons. The appointment of “independent competent persons” and the effect of their verification and report are not clear and should be further clarified.