Fifth Report of the

CODE PROJECT

Part One:

SMALL PAPERS ON BIG ISSUES

Brief Descriptions and Commentaries on Six Leading Issues Raised by the Most Recent Draft Exploitation Regulations of the International Seabed Authority

1 June 2019

INTRODUCTION

The Code Project is a cooperative enterprise of fifteen scientists and legal scholars from ten different nations. Its mission is to provide analyses of the latest drafts of the rules and regulations that together will comprise the Mining Code of the International Seabed Authority (ISA). This month marks the third year of Code Project publications.

There are two components of this, the fifth and most recent Code Project Report:

- Part One consists of six two-page descriptions and analyses of particularly salient issues raised by the new Draft Exploitation Regulations of 25 March 2019. <ISBA/25/C/WP.1>

- Part Two is an annotated compilation of all the new elements in the 25 March draft.

Attached is the first of those two Code Project components. Its title – *Small Papers on Big Issues* – describes its contents, a collation of brief commentaries and suggestions on topics of special significance to the ISA's Mining Code.

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SMALL PAPERS ON BIG ISSUES

ACRONYMS & ABBREVIATIONS

APEI	Area of Particular Environmental Interest
BEP	Best Environmental Practices
Commission	Legal and Technical Commission
DR	Draft Regulation
EIA	Environmental Impact Assessment
EIS	Environmental Impact Statement
EMMP	Environmental Management and Monitoring Plan
ERA	Environmental Risk Assessment
ISA	International Seabed Authority
REMP	Regional Environmental Management Plan
UNCLOS	United Nations Convention on the Law of the Sea

#1: Regional Environmental Management Plans (REMPs)

Lead Contributors: Aline Jaeckel, Daniel Jones, Andrey Gebruk

There is general agreement that REMPs are necessary elements of the ISA's regime for managing the activities in the Area in accordance with its mandate of environmental protection. The proposition that no mining should occur in any region without a REMP has been endorsed by the Council. It is less clear whether REMPs should be regarded as an intrinsic element of Exploitation Regulations or as an adjunct to them. There also appears to be a consensus that all REMPs should feature Areas of Particular Environmental Interest (APEIs) where no mining can occur. But it is not yet clear how APEIs are to be identified, where they should be placed, and what fraction of the overall regional seabed they should cover.

In February 2019, the Secretary-General posted a report on "Implementation of the Authority's strategy for the development of regional environmental strategies for the Area" <ISBA/25/C/13> in which he described "key approaches to be applied by the Secretariat to facilitate the development of regional environmental management plans." The Secretary-General also proposed a "tentative schedule" for workshops that would inform REMP-writing for key portions of the Mid-Atlantic Ridge, Indian Ocean, Northwest Pacific, and South Atlantic. Under that schedule, workshops would be completed before the end of 2020. No timetable was proposed for the drafting of REMPs or for their consideration by ISA governing bodies.

REMPs in the Draft Regulations

REMPs as Prerequisites. DR 47(3)(c) and 48(3)(b) imply that an application for a Plan of Work cannot be submitted unless a REMP exists for the region in which the work would take place, but they stop short of saying it explicitly. Any ambiguity should be removed. The Regulations should state that an approved REMP is an essential prerequisite to consideration of a Plan of Work in any region in which mining is proposed.

REMPs and EMMPs. DR 47 and 48 would require an applicant's Environmental Impact Statement (EIS) and its Environmental Management and Monitoring Plan (EMMP) to be '*in accordance with the objectives and measures of the relevant regional environmental management plan*'. An additional provision should specify that review of a Plan of Work by the Commission will assess the applicant's plans for environmental protections to verify consistency with the pertinent REMP.

REMPs and Baselines. Regulations should require a contractor to demonstrate that its baseline data studies are informed by, and are consistent with, those of any REMP in its vicinity and that those baseline studies are included in the regional database that will inform subsequent REMPs.

REMP Objectives and Measures. DR 47 should provide more guidance and specific examples to help describe the '*objectives and measures*' that REMPs should contain. Examples include:

(a) Region-specific environmental objectives, targets, and thresholds;
(b) Region-wide monitoring programmes for both contract areas and APEIs;
(c) Special regionally-appropriate management measures (e.g., protecting specific habitats or restricting mine operations during the breeding season of key species);
(d) Regional limits on cumulative environmental impacts;
(e) Facilitation of scientific research in the region.

REMP Updates and Plan of Work Amendments. DR 51's obligation of "*maintaining the currency and adequacy of the EMMP*" should expressly address the implications for a contractor's Plan of Work, including its EMMP, whenever a REMP is updated.

REMP Issues Not Covered under the Draft Regulations

APEI Prohibitions. The Draft Regulations fail to specify that no prospecting, exploration or exploitation can take place within an APEI. This could be remedied by including those prohibitions under DR 15(2)'s list of benthic areas where the Commission cannot recommend approval for exploitation.

APEI Locations. An important reason for the urgency of REMP-writing as a high priority is to minimize the likelihood of exploration contracts being approved for areas that would be optimal for APEIs. The Council could consider requesting Members not to apply for an exploration contract in any region not yet covered by a REMP.

ISA Decision-Making. The Regulations should clarify that a REMP's status as a 'fundamental policy' (DR 2) requires that each organ of the ISA take account of REMPs, and act consistently with REMPs, as it performs its functions under the Regulations.

Process. The draft Regulations do not prescribe a process by which REMPs should be developed, reviewed, and overseen. No timelines are set, and no scenario is described for the establishment and revision of APEIs. The ISA Council should consider a rule that REMPs be based on the regional environmental assessments described in Strategic Direction 3.2 of the ISA's Strategic Plan 2019-2023. The Council should also consider provisions to operationalize the Strategic Plan's recommendations (Strategic Directions 1.2 and 4.3) that the development and implementation of REMPs involve consultations with other relevant bodies such as regional fisheries management organisations and regional-seas planning consortia.

More Science. REMPs will be informed by scientific understanding of both contract areas and areas not covered by contracts. Surveys of both are needed to draw the most effective APEIs. Though there is a gratifying rise in interest among the world's ocean scientists to learn more about the deep sea and the environmental consequences of extracting its minerals, the supply of reputable, relevant deep-sea scientists can't keep up with the demand. In order to avoid delays in essential surveys, the ISA Regulations should require or incentivize contractors to contribute to large-scale regional assessments.

Rare or Fragile Ecosystems. A REMP should define and locate any rare or fragile ecosystem in its region. In doing so, reference may be made to designations used in other governance systems, e.g., 'Ecologically or Biologically Significant Marine Areas' or 'Vulnerable Marine Ecosystems.' Regulations for such rare or fragile ecosystems should set strong protection measures.

#2: Environmental Baselines

Lead Contributors: Daniel Jones, David Billett

To anticipate, monitor, and assess the environmental impacts of mining, it is essential to compile an accurate database of the natural conditions before mining begins. In the case of applicants for an ISA exploitation contract, such a database should incorporate information gathered throughout the entire proposed contract area at multiple times.

The database provides information needed to establish an environmental baseline. Robust and reliable environmental baselines are preconditions of credible contractor proposals for mine development and for monitoring and mitigating environmental damage. Collecting baseline data should be a key component of Best Environmental Practices. An unsatisfactory environmental baseline reduces the reliability of the assessments and plans that build upon it. The environmental baseline informs a contractor's Environmental Risk Assessment (ERA), Environmental Impact Statement (EIS), and Environmental Management and Monitoring Plan (EMMP). Environmental baselines are also needed to inform a contractor's Emergency Response & Contingency Plan and its Closure Plan.

One might assume that ISA exploration contractors have been collecting relevant environmental data over the years, but the ISA's Exploration Regulations make little provision to ensure that those data are adequate. The Commission, in reporting to the Council, has alluded to failures or inadequacies in exploration contractor data-reporting. But without more detailed information, the Council is unable to pursue compliance measures. The consideration by the Council of Exploitation Regulations presents an opportunity to fill the information gap.

Environmental Baseline Studies and the Most Recent Draft of ISA Exploitation Regulations

Although the ISA's 2017 "Discussion Draft" described baseline studies, the main body of the most recent Draft Regulations makes no mention. Baseline data are referenced only in Annexes that relate to the structure of Environmental Impact Statements and to the development of a Closure Plan.

We recommend that the main body of the Draft Regulations be amended to ensure that:

- Applicants for exploitation contracts submit an environmental baseline study that adheres to the standards of "Best Available Scientific Evidence," "Best Available Techniques," and "Best Environmental Practices" as described in Schedule 1 of the Draft Regulations.
- The list of required Environmental Standards (DR 45) include an additional Standard for environmental baseline studies. The new Standard would require contractors to describe comprehensively the ecological characteristics of the entire exploitation contract area, and that:
    - Data should be collected in a scientifically robust manner, particularly regarding the distribution and number of samples and sampling unit sizes;
    - Data should provide a sufficient basis to inform a monitoring plan;
    - Data collection should follow standardized approaches for baseline data collection that would apply to all contractors.

- The Commission scrutinises a contractor's baseline at the scoping phase of the EIA (DR 47).
- Applications for exploitation contracts draw attention to any uncertainties in the baseline data and identify strategies to address those uncertainties.
- Environmental baseline studies and the data upon which they rely are made publicly available (per UNCLOS Article 14(2), Annex III). This mandate should cover raw data, metadata and processed data, integrated into appropriate independent databases.
- Stakeholders be encouraged to review the databases and provide comments and suggestions.
- An application for Exploitation not be recommended for approval unless and until the Commission has satisfied itself as to the adequacy of the baseline data in line with the relevant Standards.

Integration of Environmental Baselines and Environmental Impact Statements

Annex IV of the Draft Regulations provides a standard form for a would-be contractor's Environmental Impact Statement. The language of that standard form should be re-examined to ensure it properly incorporates the categories and quality of environmental baseline data required to provide the essential benchmark against which environmental losses can be measured.

For example:

- Prior to supplying the particularized details demanded by Section 4 of Annex IV, an applicant contractor should be asked to present a more general summary of its environmental baseline work. Requiring a description of research activities at the outset of the EIS allows for a closer focus on the narrower specifics required by sections 4 and 5 of the Environmental Impact Statement.
- Applicants should be required in Section 4 of the Environmental Impact Statement (which sets out the baseline) to factor in data variations at different time intervals. This will signal to applicants that multiple visits to the same site will be required to establish an adequate baseline.

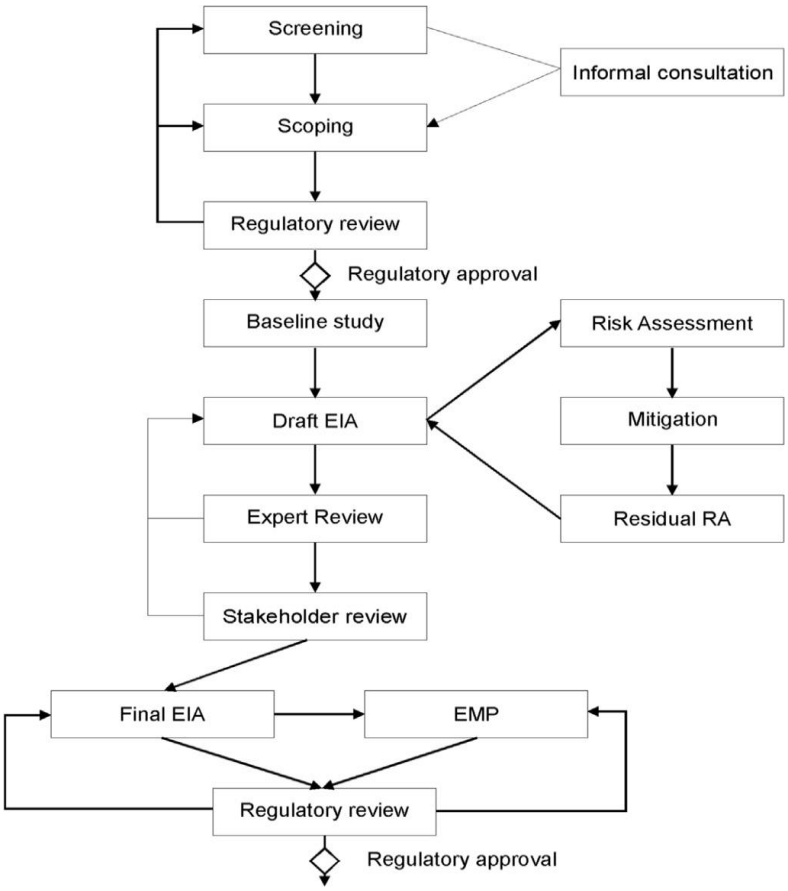
Baselines and Environmental Risk Assessment

Sections 4, 5, 7 and 8 of Annex IV of the Draft Regulations requires a description of the existing physicochemical and biological environment, an assessment of impacts on those environments, and a proposal to mitigate those impacts. The preambles to each of those sections refer to a "*prior environmental risk assessment.*" The same phrase appears in DR 47. Further Regulations or Standards to clarify and detail this requirement would be welcome.

#3: Environmental Impact Assessments (EIAs)

Lead Contributors: Daniel Jones, Laleta Davis Mattis, Duncan Currie

An Environmental Impact Assessment (EIA) is required of ISA contract applicants by UNCLOS and is a direct obligation for sponsoring States. The EIA constitutes an essential mechanism through which the marine environment is protected by enabling decision-makers to identify harmful effects in advance and to fashion rules and procedures to minimize or mitigate those harmful effects. Below is a simplified diagram of the stages of EIA development.



Source: Durden et al., 2018 DOI: 10.1016/j.marpol.2017.10.013

Processes and Stages. DR 47 describes Environmental Impact Assessments (EIAs) but provides scant detail as to the processes by which they would be conducted. There is no language that closely describes the key stages of EIA development where official green-light approvals would be needed before a contractor could move forward in the overall process. The distinct tasks of screening, scoping, and submitting an Environmental Impact Statement appear as features of a barely differentiated flow rather than as key checkpoints.

Responsiveness. Responsibilities, capacitation and procedures for the ISA to manage iterative interaction with the applicant; information-sharing; independent expert review; stakeholder comments – all remain unspecified. The Draft Regulations are silent on the manner in which the ISA is to monitor and manage the EIA process to ensure that it produces relevant information.

Scoping. Scoping is the process through which the ISA and an applicant agree on the content and extent of a planned EIA. An EIA scoping requirement has been re-inserted in DR 47(1), though little detail is provided. Scoping enables early interventions to preclude sub-standard EIA processes, helps an applicant target research resources, and provides some assurance that a future EIS proposal will not be rejected by the ISA for procedural flaws. Given the importance of the scoping stage, the ISA should propose minimal scoping requirements for incorporation as Standards.

Environmental Risk Assessment. The Draft Regulations note the need for an 'environmental risk assessment' (ERA) [DR 47(1)(b); Annex VI 7(2)(b)]. An ERA can constitute an important element of the overall EIA process, particularly in regards to screening, scoping, assessment and mitigation. Further work is needed to clarify ERA timing, roles and requirements.

Timing Issue A. It is anticipated that much, if not most, of a contractor's EIA work will take place under its exploration contract. And yet the rules for EIAs are being placed in the Exploitation Regulations. What would be the ISA response if an exploration contractor had compiled 15-years' worth of historic data, only to find that those data do not meet the requirements of the new regulations?

Timing issue B. The Draft Regulations seem to assume that each exploitation contractor will need one EIA that informs one EIS and one EMMP. But it is not unlikely that mining will occur at multiple stages and/or at various sites within one contract area. The Draft Regulations do not appear to anticipate such mid-contract variations.

EIS Details. The Draft Regulations' requirements for EIS content and underpinning evidence are relatively vague. This imprecision may lead to significant application disparities and insufficiencies. More specific levels of detail should be required.

EMMP Details. DR 48(1) states the purpose and summarises the content of an EMMP. Wording should be added to clarify that EMMPs must include specific plans for monitoring the environmental impacts of mining (not just the effectiveness of the mitigation measures, as currently drafted). The Regulations should also require contractors to compare monitoring data on a year-to-year basis.

Identifying uncertainty. There is scant empirical knowledge about the impact of specific deep-sea mining projects on the environment. The Draft Regulations should require applicants to assess uncertainty in EIA predictions and risk assessments, and to identify proposed methods to address uncertainty.

Project-specific environmental objectives. 'Environmental objectives' are referenced three times in the Draft Regulations [DR 2(e)(i), DR46(2)(a) and Annex VII paragraph 2(a)]. The meaning of the term is not elaborated, but from the nature of the references it would appear that "environmental objectives" implies that each would-be contractor would develop its own environmental objectives for its own Plan of Work. An applicant's 'environmental policy' is also mentioned (Annex IV, section 11 and Annex VII, paragraph 2(d)). More guidance and specificity from the ISA about these objectives and policy requirements should be provided.

#4: Standards and Guidelines

Lead Contributors: Laleta Davis Mattis, Renee Grogan

Mandatory or Recommended?

DR 94 ("Adoption of Standards") indicates that Standards are legally binding. But what does "legally binding" mean in this context? How does the ISA propose to arrive at a final decision on whether there has been a violation of a Standard? What are the repercussions or sanctions when a contractor is found to be in non-compliance with a Standard? What if the non-compliant party is an ISA organ or member State? And if Standards are legally binding, why are they not listed in the definition of 'Rules of the ISA' [Schedule 1 to the Draft Regulations]? The Draft Regulations would benefit from further work to define Standards more clearly and operationalize them more effectively.

DR 95 ("Issue of Guidelines") implies by omission that Guidelines -- intended to "*support the implementation of the Exploitation Regulations from an administrative and technical perspective*" -- are **not** binding. Unlike earlier drafts of the Regulations, the Standard Contract Terms of the most recent draft do not require contractors to "*observe* [Guidelines] *as far as reasonably practicable."*.

If Standards are binding but Guidelines are not, as Draft Regulation 95 would indicate, the references to "Guidelines" that appear throughout the Draft Regulations should be clarified and made consistent with the key terms ("rules," "regulations," procedures") found in Article 145 and elsewhere. The necessity of doing so can be appreciated by comparing the various formulations in which "Guidelines" appears in the Regulations, including:

- 'taking account of' Guidelines [DR 4]
- 'in accordance with' Guidelines [DR 8]
- 'as set out in' Guidelines [DR 18]
- 'as specified in' Guidelines [DR 20]
- 'according to' Guidelines [DR 26]
- 'consistent with' Guidelines [DR 31]
- 'prescribed by' Guidelines [DR 38]
- 'in light of' Guidelines [Schedule 1]

To help ensure that Guidelines are duly observed, the ISA should establish procedures for contractors to demonstrate compliance with the Guidelines absent good cause for not being able to do so. Or the ISA could use Guidelines as a means of compliance assurance: where a contractor can demonstrate its adherence to a Guideline, it could create a presumption that the resulting outcome is compliant with ISA rules. In both cases independent verification by the Commission should be required.

Standards or Guidelines?

Various stakeholders have sought clarity about what content is required by (binding) Standards and what content is merely encouraged by (non-binding) Guidelines. The current Draft Regulations move some important aspects of the regulatory regime away from Standards and into Guidelines:

- Contractor training obligations (DR 7 and DR 37);
- Stakeholder consultations on proposed Environmental Plans (DR 11);
- Commission assessments of an applicant's financial and technical capabilities (DR 13);

- Documents required in an application for contract renewal (DR 20);
- The content of a feasibility study (DR 25);
- Rules to determine the form and amount of Environmental Performance Guarantees (DR 26);
- Requirements for a contractor's safety management system (DR 30) and environmental management system (DR 46);
- "Reasonable regard" for other uses of the Marine Environment (DR 31);
- Contractor insurance policies (DR 36);
- Assessment frameworks for permitted / prohibited mining discharges (DR 50);
- Formats for a contractor's periodic performance assessments of its Environmental Management and Monitoring Plan (DR 52).

Voluntary guidelines may seem to be (and often are) reasonable alternatives to mandatory standards. But they can also present difficulties [*Gerber, L. J. and Grogan, R. L. Challenges of operationalising good industry practice and best environmental practice in deep seabed mining regulation. Marine Policy, 18 September 2018*]. In the context of ISA Regulations, voluntary guidelines could result in failure to achieve a consistent approach to environmental management by all contractors. Guidelines could induce prolonged adjudications by the ISA to determine on a case-by-case basis whether contractors employing differing means have each achieved requisite performance. The ISA might have to shoulder an unanticipated dispute-resolution burden. Particularly in a nascent industry with a limited-resource regulator, it would seem imprudent to rely on a voluntary regime to the degree called for in the latest Draft Regulations.

Development of Standards and Guidelines

Draft Regulation 45 suggests a list of environmental issues that must be covered by Standards. The list appears *ad hoc* and incomplete, however, and it remains unclear why these few environmental matters were selected for inclusion.

During the first half of this year's ISA Annual Session (February 2019), numerous Member States and Observers supported the propositions that *ad hoc* technical working groups be empanelled to assist in developing Standards and Guidelines, and that all ISA stakeholders be afforded the opportunity to present their views on the recommendations submitted by those working groups.

#5: Transparency and Accountability

Lead Contributors: Duncan Currie, Aline Jaeckel

"To ensure that environmental law is effective [it] needs to be nurtured in a manner that builds strong institutions that engage the public, ensures access to information and justice, protects human rights, and advances true accountability for all environmental actors and decision makers."

Environmental Rule of Law: First Global Report, UNEP (2019).

"We need institutions at all levels that are effective, transparent, accountable and democratic."

UN General Assembly Resolution A/RES/66/288 'The Future We Want'

Transparency and accountability are prerequisites of good governance. Their core elements include (i) availability of information; (ii) access to, and participation in, policy deliberations; and (iii) opportunities to challenge decisions and decision-making processes. Transparency enables the collection and distribution of pertinent information, enhances public awareness, and promotes balance among stakeholder interests and influences.

UNCLOS requires the ISA to ensure that mining in the Area is carried out for the benefit of humankind as a whole [Article 140] while preventing damage to the marine environment [Article 145]. The drafting of ISA Exploitation Regulations that comply with both of those mandates presents a valuable opportunity for the ISA to affirm a strong institutional commitment to governance that maximizes transparency and accountability.

Steps Forward

The latest Draft Regulations incorporate important and welcome new elements:

- DR 2's affirmation of the fundamental principles of '*accountability and transparency in decision-making*' and '*encouragement of effective public participation'* (though the latter formulation should substitute '*ensuring*' for '*encouragement of*'').
- DR 3's requirement that the ISA '*develop, implement and promote effective and transparent communication, public information and public participation procedures.'*
- DR 38's requirement that contractor annual reports be published in the Seabed Mining Register.

Suggested Improvements

Stakeholders. DR 94, 95, 107 and Annex IV feature a new term: 'Relevant Stakeholder.' It is a vague formulation with the potential to reduce transparency. The term 'Stakeholder' should be used without qualification.

Timing. DR 11's encouragement of stakeholder reviews of final Environmental Plans is positive and important, but the opportunity to conduct those reviews could come too late to be meaningful. The ISA's 2017 Discussion Paper on environmental regulations envisioned public comments during a contractor's EIA scoping phase (which occurs prior to, and sets the scope of, the EIA). That essential opportunity has been omitted from the current draft.

ISA-led Consultations. DR 47 (Environmental Impact Assessments) should require contractors and sponsoring States to identify and consult with stakeholders during their EIA process. It should also require the ISA to hold separate and independent consultations with stakeholders upon receipt of an applicant's EIS. Public review should be explicitly required for other key ISA regulatory decisions, including renewals of exploitation contracts (DR 20) and approval of a final closure plan (DR 60).

Consideration of Stakeholder Responses. Opportunities to comment should be paired with assurances that comments can inform decision-making. For example: DR 11(3) implies that the Commission must consider public comments on an applicant's environmental plans. But there should be no ambiguity: public comments should be added to the list of required considerations specified in DR 12(4). The Commission should be obliged to provide substantive responses to those comments in its recommendations to the Council.

Environmental Data. DR 2(v) and DR 44(d) promote public access to environmental data. DR 89 establishes a (rebuttable) presumption that environmental data submitted to the ISA are public information. These provisions are welcome, but they need to be operationalized, preferably through legally binding Standards that specify information-disclosure requirements, establish uniform data standards, and facilitate public access. DR 3(a) should be amended to *require* States and contractors to cooperate with the ISA to provide data to the public, not merely to use their "*best endeavours*."

Confidential information. DR 89 allows a contractor (in consultation with the Secretary-General) to declare large swathes of information as confidential. As counterbalance, the Draft Regulations should be amended to:

(a) require a contractor to describe, in general and non-prejudicial terms, any information redacted or withheld on the basis of confidentiality;
(b) establish a procedure for member States and other stakeholders to challenge confidentiality designations or non-disclosures; and
(c) remove the unnecessarily restrictive limitation of 30 days for the Secretary-General to question a contractor designation of confidentiality.

Information to Council. The Draft Regulations should specify the character and level of information to be included in Commission recommendations to the Council on applications for Plans of Work. They should include a record of the Commission's deliberations and its assessments of inputs received (including dissenting views). Commission recommendations should be sufficiently detailed to enable the Council to make considered decisions, and to facilitate stakeholder analyses. Where the Commission recommends approval of a Plan of Work for Exploitation, that Plan of Work and the draft contract should be provided to the Council.

Publication Requirements. The Draft Regulations should require that the following documents be made publicly available:

(i) Key decisions taken by the Council, including their rationales;
(ii) All compliance reports, including inspector reports, and notices of incidents or notifiable events and copies of compliance notices, and
(iii) An ISA annual report summarising major developments for a public audience.

ISA Procedures. The Draft Regulations should establish a general obligation for the ISA to maximize transparency and accountability, including in its procurement of consultants and sub-contractors and in its organisation of meetings and working groups.

Access to Justice. The Draft Regulations make no mention of an administrative review mechanism for ISA decisions. The Council should consider the establishment of a process -- short of formal dispute resolution -- whereby contractors, as well as other stakeholders, could raise points of contention. Such a process would be in addition to, not a substitute for, the formal dispute resolution mechanisms as stipulated in Part XV of UNCLOS.

#6: Liability for Environmental Harm

Lead Contributors: Duncan Currie, Xiangxin Xu

In Search of Detail

Though the Draft Regulations faithfully employ the language of UNCLOS on liability and compensation for environmental harm, they provide scant additional guidance.

Annex X of the draft Regulations [Standard clauses for Exploitation contracts] affirms that contractors are liable 'for the actual amount of any damage […] arising out of its wrongful acts or omissions' (UNCLOS Article 22 Annex III). There is no elaboration of the meanings of 'actual amount', 'damage', 'wrongful acts,' and 'omissions.' Nor is there mention of the legal and administrative mechanisms that would assign responsibility and enforce compensation or remediation. This imprecision invites disputes. Who is liable and according to what standard? Who can sue whom, and on what grounds? What damage is eligible, and what remedies are available? Who decides?

If these crucial points are left to the discretion of individual sponsoring States, without harmonisation by the ISA, there could arise a risk of inconsistent treatment, 'sponsor-shopping', and denial of access to justice. The ISA Council may be well-advised to call upon the Secretariat and Commission to propose more particularized and detailed text. The Council may also want to consider a formal invitation to sponsoring States to share relevant information on what recourse is available in their national legal systems for prompt and adequate compensation for harm that may arise from their sponsored Contractor's activities.

Standards of Liability

A fundamental task is to establish a standard of liability. In an infant industry, where the unforeseen can be assumed, a causation-based standard – as opposed to a fault-based standard – would seem to be the prudent choice. A causation-based standard also incentivizes risk reduction, a particularly important consideration in a context where harm may be irreversible. Under a causation-based standard, a 'wrongful act or omission' (UNCLOS Article 22, Annex III) would mean an act or omission attributable to a contractor that results in damage, irrespective of bad intentions or negligence.

The next task might be to devise standards for assessing and quantifying damages. Recoverable damages could be defined. They might include: costs of reinstatement, lost profits, costs of reasonable measures to prevent further harm, pay-out in lieu of actual reinstatement, and/or measures to compensate for pure ecological loss and harm to the living resources of the Area.

The ISA may also wish to contemplate operationalizing its own liability. According to UNCLOS Article 22, Annex III, the ISA is liable for "wrongful acts" in the exercise of its powers and functions. Should "wrongful acts" be interpreted in the same way for the ISA as for a contractor? Could environmental damages be attributed to ISA wrongful acts? Could the ISA be liable for a contractor's losses resulting from a wrongful contract variation or termination by the ISA?

Transboundary Harm

Stakeholder concerns on the Regulations' approach to possible transboundary harm do not appear to have been addressed in the most recent draft *(see DR 4)*. As matters stand, it is the burden of an affected coastal state to both raise an alarm and provide evidence. This may be challenging if relevant data are held only by the contractor, ISA, and the sponsoring State. A system in which a coastal State would be able to apprehend Serious Harm only after it has occurred does not meet minimum standards of a precautionary approach .

In addition, the Draft Regulations do not address harms which may not meet the threshold of 'serious' but which may nonetheless affect the marine environment and activities within State jurisdiction. There are no provisions for redress, nor is any regulatory action triggered where harm occurs or is likely but where no breach of contract has yet been established.

Environmental Compensation Fund

Draft Regulations 54 and 55 recast the former Environmental Liability Trust Fund into an 'Environmental Compensation Fund'. Yet the purposes of the new Environmental Compensation Fund [DR 55(a)-(e)] make no mention of payments for harm caused, but instead detail purposes unrelated to compensation, such as research, training and education. Perhaps the current formulation combines what were originally envisioned as two funds in earlier drafts: a Liability Fund and a Sustainability Fund. If so, this approach strays from the conviction of many ISA stakeholders that there should be a separate fund to serve as the dedicated source of financial compensation to cover situations in which harm has occurred, but a Contractor is not able to meet the full amount of damages identified. Any 'Environmental Compensation Fund' that omits financial compensation marks a departure from everyday usage.

Perhaps because of this, Commission Note ISBA/25/C/18 states that further discussion on the Fund is warranted. Such a discussion should cover:

(i) rules that spell out Contractors' obligations to make payments into the fund (separate from other ISA fees and payments) before mining commences, and

(ii) rules to govern how the Fund contributions are calculated, collected, and administered, and when and how disbursements or reimbursements can be made.

Effective Control

UNCLOS Article 139 requires ISA contractors either to possess the nationality of States Parties or to exist as entities "effectively controlled" by States Parties or their nationals. A recent Liability Working Group Paper on Effective Control [https://www.cigionline.org/series/liability-issues-deep-seabed-mining-series] observed that UNCLOS treats nationality and effective control as distinct concepts. The authors of that paper noted different possible interpretations of 'effective control': economic control (evidenced by the contractor's corporate structures) or regulatory jurisdiction (evidenced by the contractor's place of incorporation). The Draft Regulations do not provide a process or rules for determining 'effective control'. It would make sense to add them soon to avoid ambiguity or dispute.

Editor's note: This white paper was updated on Aug. 27 2019, to reflect Dr. Aline Jaeckel's change of affiliation to University of New South Wales.

Fifth Report of the

CODE PROJECT

Part Two:

Annotations & Commentary

on ISA Draft Exploitation Regulations of March 2019 (ISBA/25/C/WP.1)

1 June 2019

INTRODUCTION

The Code Project is a cooperative enterprise of fifteen scientists and legal scholars from ten different nations. Its mission is to provide analyses of the latest drafts of the rules and regulations that together will comprise the Mining Code of the International Seabed Authority. This month marks the third year of Code Project publications.

There are two components of this latest Code Project report:

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- Part Two is an annotated compilation of all the new elements in the 25 March 2019 draft.

What follows is the second and weightier of those two Code Project components. It concentrates on those elements of the 25 March Draft Regulations that are new, with reference also to the accompanying note of the Legal and Technical Commission <ISBA/25/C/18>. These new proposed regulations are printed in orange. Commentary by the Code Project appears immediately below, printed in purple.

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Part I Introduction

Regulation 1

Use of terms and scope

1.Terms used in these Regulations shall have the same meaning as those in the ~~Convention.~~Rules of the Authority. […]

5. These Regulations are supplemented by Standards and Guidelines, as referred to in these Regulations and the Annexes thereto, as well as by further rules, regulations and procedures of the Authority, in particular on the protection and preservation of the Marine Environment.

6. The Annexes, Appendices and Schedule 1 to these Regulations form an integral part of these Regulations and any reference to these Regulations includes a reference to the Annexes, Appendixes and definitions in Schedule 1 relating thereto.

UNCLOS mandates the Authority to adopt various 'rules, regulations and procedures' ['RRP'] for the conduct of Activities in the Area. The 1994 Implementing Agreement indicates that these RRP should incorporate applicable 'standards' for the protection and preservation of the marine environment (1994 Agreement, section 1(5)).

DR1(5) refers to "*Standards and Guidelines* ['S&G'] ***as well as****… rules, regulations and procedures of the Authority* ['RRP']" This language suggests that the Regulations will treat S&G and RRP as two distinct sets of instruments, and that S&G are not included within the Regulations' use of the term RRP.

The Regulations also rely repeatedly on the term 'Rules of the ISA', to refer to the different instruments that place binding requirements upon Contractors. This term 'Rules of the ISA' is defined to include RRP, but not S&G.

This terminology bears further examination. It may be argued that UNCLOS does not empower the ISA to produce instruments other than RRPs. If S&G are not deemed to be RRP, their validity may be challenged. There are also places where the draft Regulations refer to RRP or "Rules of the ISA" only, which – if those terms do not include S&G – may be considered too narrowly drafted. In this respect, the various references in the draft Regulations to Standards will need to be re-examined, and/or consideration may be given to amending the defined term 'Rule of the ISA' to include 'Standards'.

This issue is discussed further at DR95, below.

Regulation 2

Fundamental policies and principles

In furtherance of and consistent with Part XI of the Convention and the Agreement, the fundamental policies and principles of these Regulations are, inter alia, to:

The addition of the term 'policies' in DR 2 may bear further discussion. Regulatory instruments are usually designed to implement predetermined policy, rather than being used as a vehicle to elaborate or embody their own policies. In any case, the meaning of '*fundamental policies […] of these Regulations*' remains unclear. Is the intention that concepts listed in DR2 be set above other ISA policies? Is there a distinction between principles and policies? If so, what are the operational implications?

(a) Recognize that the rights in the Resources of the Area are vested in mankind as a whole, on whose behalf the Authority shall act;

(b) Give effect to article 150 of the Convention by ensuring that activities in the Area shall be carried out in such a manner as to foster the healthy development of the world economy and the balanced growth of international trade, and to promote international cooperation for the overall development of all countries, especially developing States, and with a view to ensuring~~, in particular~~:

DR2(b) now repeats Article 150(a)-(j) UNCLOS in full. This seems unnecessary. There may also be unintended consequences: DR2 is cross-referred in DR13(4)(e), which requires the Commission to review an applicant's environmental plans against DR2 policies and principles. Now that it replicates Article 150 UNCLOS, DR2 includes mining production policies, which should not be brought to bear on environmental management decisions.

How Articles 145 and 150 UNCLOS are reflected in DR2, and how this should influence decisions taken under the Regulations, may benefit from a clearer delineation.

(i) ~~The orderly~~The development of the Resources of the Area;

~~(i)~~(ii) Orderly, safe and rational management of the Resources of the Area, including the efficient conduct of activities in the Area and, in accordance with sound principles of conservation, the avoidance of unnecessary waste;

~~(ii)~~(iii) The expansion of opportunities for participation in such activities consistent, in particular, with articles 144 and 148 of the Convention;

(iv) ~~The participation~~Participation in revenues by the Authority and the transfer of technology to the Enterprise and developing States as provided for in the Convention and the Agreement; ~~and~~

(v) Increased availability of the minerals derived from the Area as needed in conjunction with minerals derived from other sources, to ensure supplies to consumers of such minerals;

(vi) The promotion of just and stable prices remunerative to producers and fair to consumers for minerals derived both from the Area and from other sources, and the promotion of long-term equilibrium between supply and demand;

~~(iii)~~(vii) The enhancement of opportunities for all States Parties, irrespective of their social and economic systems or geographical location, to participate in the development of the resources of the Area and the prevention of monopolization of activities in the Area;

The draft Exploitation Regulations do not define 'monopolisation'. This implies a default to the parameters provided by UNCLOS Annex III, Article 6(3)(c). Yet that provision of UNCLOS applies only to developed State sponsors (and not to Contractors, or States operating in reserved areas), only to nodules (and not to crusts or sulphides); and sets an almost unattainable threshold of geographic coverage before monopolisation is deemed to have occurred (e.g. 2% of the Area).

~~(iv)~~(viii) The protection of developing countries from serious adverse effects on their economies or on their export earnings resulting from a reduction in the price of an affected Mineral or in the volume of exports of that Mineral, to the extent that such reduction is caused by activities in the Area;

(ix) The development of the common heritage for the benefit of mankind as a whole; and

(x) Conditions of access to markets for the imports of minerals produced from the resources of the Area and for imports of commodities produced from such minerals shall not be more favourable than the most favourable applied to imports from other sources.

(c) Ensure that the Resources of the Area are Exploited in accordance with sound commercial principles, and that Exploitation is carried out in accordance with Good Industry Practice;

A better formulation for DR2(c) could be '*Ensure that, where Exploitation takes place, the Resources of the Area are developed in accordance with sound commercial principles*…' That wording better reflects UNCLOS [1994 Agreement, Annex, section 6] and would avoid the inference that the Regulations should - as a fundamental policy - '*ensure … Exploitation'*.

(d) Provide for the protection of human life and safety;

(e) Provide, pursuant to article 145 of the Convention, for the effective protection ~~of~~for the Marine Environment from the harmful effects that may arise from Exploitation, in accordance with the Authority's environmental policy ~~and~~, including regional environmental management plans~~, if any~~, based on the following principles:

The deletion of 'if any' in DR2(e) appears to suggest that a Plan of Work for Exploitation cannot be issued for any site unless and until there is a Regional Environmental Management Plan ('REMP') adopted for the relevant region. This is a positive response to stakeholder comments. Yet the point could be more explicitly stated. A new standalone Regulation could detail the role that REMPs should play in the Commission's recommendation and the Council's decision on Plans of Work.

The deletion of 'conservation' in DR2(e) appears to have been prompted by a *'request by the Council to maintain the distinction between "conservation" and "preservation" in the regulations, noting that the Authority's mandate under [UNCLOS] Article 145 is limited to the adoption of rules, regulations and procedures including the protection and conservation of the natural resources of the Area*' [ISBA/25/C/18].

In this regard, it can be noted that:

(a) The LTC's reference to UNCLOS Article 145 in DR2(e) omits the phrase: "….*and the prevention of damage to the flora and fauna of the marine environment*";
(b) UNCLOS offers no definition of 'natural resources of the Area'. 'Natural resources' might be presumed to mean something other than 'resources' of the Area, which is used throughout Part XI, to denote specifically the mineral resources (Article 133 UNCLOS); and
(c) it is unclear why the amendment does not read 'protection and preservation of the marine environment' in keeping with Council instructions, the exploration regulations, and UNCLOS (Articles 197 and 202, and paragraph 5(g) of the Annex to the 1994 Agreement).

A reference to Article 145 (in its entirety), or reproduction of the text of Article 145 in full, would be better than an attempt to paraphrase UNCLOS.

(i) A fundamental consideration for the development of environmental objectives shall be the effective protection ~~and conservation of~~for the Marine Environment, including biological diversity and ecological integrity;

The message of DR2(i) is certainly welcome from an environmental point of view. But its placement in DR2 is confusing. It would be better re-located into a standalone provision regulating how environmental objectives should be set (rather than including a 'fundamental consideration' for a specific activity, in a list of 'fundamental policies and principles' applicable to the Regulations generally).

Who is responsible for 'the development of environmental objectives' (and when, and by what process)? [This point is discussed more thoroughly under DR46(2)(a), below.]

(ii) The application of the precautionary approach, as reflected in principle 15 of the Rio Declaration on Environment and Development; ~~(c) The application of an ecosystem approach; and~~

(iii) The application of an ecosystem approach; ~~(d)~~

'Ecosystem approach' is a welcome reference, but not mentioned or defined elsewhere in the Regulations. What is meant? How, where and by whom should it be applied?

A possible definition could be derived from existing sources, for example –

- Convention on the Conservation and Management of High Seas Fishery Resources in the South Pacific Ocean: "*an integrated approach under which decisions … are considered in the context of the functioning of the wider marine ecosystems."*
- 2003 OSPAR and HELCOM Joint Ministerial Meeting: "*the comprehensive integrated management of human activities based on the best available scientific knowledge about the ecosystem and its dynamics, in order to identify and take action on influences which are critical to the health of marine ecosystems, thereby achieving sustainable use of ecosystem goods and services and maintenance of ecosystem integrity*."

(iv) The application of the polluter pays principle through market-based instruments, mechanisms and other relevant measures; and

The Regulations now include the 'polluter pays principle' ['PPP'] (as used in Principle 16 of the Rio Declaration 1992, and numerous regional conventions, national laws, and OECD instruments).

It is unclear though whether, or why, the PPP is circumscribed by this inserted wording in the Regulations to apply only through 'market-based instruments' (or similar). Further explanation may be helpful, particularly with regard to:

(a) the extent to which the ISA is able to implement market-based instruments, and
(b) why other modalities for implementing the PPP are not included within the scope of this DR2(e)(iv). Regulatory requirements around pollution prevention, liability for harm caused by pollution an, cost-recovery for pollution clean-up would appear to be highly pertinent PPP instruments in this context.

Operative wording in the Regulations may also be necessary for implementation of the PPP in the ISA's regime. Currently PPP is included only as a 'fundamental policy (or principle)' in DR2.

(v) Access to data and information relating to the protection and preservation of the Marine Environment~~, accountability;~~

(vi) Accountability and transparency in decision-making; and

Accountability and transparency should apply to all facets of ISA regulation, not just decision-making. This could be re-worded as "*accountability and transparency in all aspects of ISA governance, decision-making and regulation*".

~~encouragement~~

(vii) Encouragement of effective public participation;

'*Encouragement and facilitation of effective public participation'* would better reflect the Rio Declaration (Principle 10).

(f) Provide for the prevention, reduction and control of pollution and other hazards to the Marine Environment, including the coastline;

(g) Incorporate the Best Available Scientific Evidence into decision-making processes; ~~and~~

(h) 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; and

(i) Ensure that these Regulations ~~shall be interpreted compatibly with these fundamental principles~~, and ~~that all the functions performed under these Regulations shall be undertaken~~any decision-making thereunder, are implemented in conformity with these fundamental policies and principles.

Consideration should be given to separating out paragraph (i) from the rest of DR2. Reading paragraph (i) in conjunction with the wording at the beginning of DR2 (that applies to all the sub-paragraphs) gives a rather circular and ineffective formulation, thus: *''the fundamental policies and principles of these Regulations are…to ensure these Regulations and decision-making thereunder are implemented in conformity with these fundamental policies and principles"*.

This point could also be operationalised elsewhere – e.g. DR 13 ('assessment of applicants') should cross-refer to DR 2.

Regulation 3

Duty to cooperate and exchange of information

In matters relating to these Regulations:

(a) Members of the Authority and Contractors shall use their best endeavours to cooperate with the Authority to provide such data and information as is reasonably necessary for the Authority to discharge its duties and responsibilities under the Convention;

'Best endeavours' wording has been added into DR3(a) and elsewhere. The effect is to reduce the standard of cooperation required from States and Contractors from the previous *absolute* duty to cooperate. An obligation to cooperate is in itself an obligation of conduct. Requiring the parties only to endeavour to cooperate seems an unnecessary watering down of this information-sharing regulation. 'Shall cooperate' (without proviso) is a formulation ISA members have adopted previously, in similar requirements, including in the Exploration Regulations: '*Contractors, sponsoring States and other interested States or entities shall cooperate with the Authority in the establishment and implementation of programmes for monitoring and evaluating the impacts of deep seabed mining on the marine environment.'*

(b) The Authority ~~and,~~ sponsoring States and flag States shall cooperate towards the avoidance of unnecessary duplication of administrative procedures and compliance requirements;

(c) The Authority shall develop, implement and promote effective and transparent communication, public information and public participation procedures~~, in accordance with Good Industry Practice;~~; […]

This seems a sensible deletion, accurately reflecting that 'Good Industry Practice' is a standard applicable to Contractors, not to the ISA.

(f) Members of the Authority and Contractors shall use their best endeavours, in conjunction with the Authority, to cooperate with each other, as well as with other contractors and national and international scientific research and technology development agencies, with a view to:

(i) Sharing, exchanging and assessing environmental data and information for the Area;

~~(i)~~(ii) Identifying gaps in scientific knowledge and developing targeted and focused research programmes to address such gaps;

~~(ii)~~(iii) Collaborating with the scientific community to identify and develop best practices and improve existing standards and protocols with regard to the collection, sampling, standardization, assessment and management of data and information;

(iv) Undertaking educational awareness programmes for Stakeholders relating to activities in the Area; and

~~(iii)~~(v) Promoting the advancement of marine scientific research in the Area for the benefit of mankind as a whole; ~~and~~

~~(iv)~~(vi) Developing incentive structures, including market-based instruments, to support and enhance the environmental performance of Contractors beyond the legal requirements, including through technology development and innovation; and

(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 use their best endeavours, upon the request of the Secretary-General, to 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~~take account of the relevant Guidelines.

Regulation 4

~~Rights~~ Protection measures in respect of coastal States

1.Nothing in these Regulations affects the rights of coastal States in accordance with article 142 and other relevant provisions of the Convention.

2.Contractors shall take all measures necessary to ensure that their activities are conducted so as not to cause Serious Harm to the Marine Environment, including, but not restricted to, pollution, under the jurisdiction or sovereignty of coastal States, and that such Serious Harm or pollution arising from Incidents in its Contract Area does not spread into areas under the jurisdiction or sovereignty of a coastal State.

3.Any coastal State which has grounds for believing that any activity under a Plan of Work in the Area by a Contractor is likely to cause Serious Harm or a threat of Serious Harm to its coastline or to the Marine Environment under its jurisdiction or sovereignty may notify the Secretary-General in writing of the grounds upon which such belief is based. The

Secretary-General shall ~~provide the Contractor and its sponsoring State or States with a reasonable opportunity to examine the evidence, if any, provided by the coastal State as the basis for its belief. The Contractor and its sponsoring State or States may~~immediately inform the Commission, the Contractor and its sponsoring State or States of such notification. The Contractor and its sponsoring State or States shall be provided with a reasonable opportunity to examine the evidence, if any, and submit their observations thereon to the Secretary-General within a reasonable time.

4.If the Commission determines, taking account of the relevant Guidelines, that there are clear grounds for believing that Serious Harm to the Marine Environment is likely to occur, ~~the Secretary-General shall issue a compliance notice in accordance with regulation 101~~it shall recommend that the Council issue an emergency order pursuant to article 165(2)(k) of the Convention.

5.If the Commission determines that the Serious Harm or threat of Serious Harm to the Marine Environment, which is likely to occur or has occurred, is attributable to the breach by the Contractor of the terms and conditions of its exploitation contract, the Secretary-General shall issue a compliance notice pursuant to regulation 103 or direct an inspection of the Contractor's activities pursuant to article 165 (2) (m) and part XI of these Regulations.

Allocation of responsibilities (from the Secretary-General to the Commission) has been amended in this DR4 to reflect comments made by stakeholders. Other changes were not made, such as:

(a) provision to address harms that do not meet the threshold of 'serious' but which may nonetheless affect the marine environment and activities in State jurisdictions;

(b) amendment of the 'likely to occur' threshold, to avoid setting an unreasonably high hurdle for action to protect the marine environment;

(c) shifting the onus of identifying harm or likely harm, to avoid imposing sole responsibility on the coastal state (which is unlikely to have access to the modelling or monitoring data of the Contractor, sponsoring State and the ISA);

(d) compensation in the event that harm has occurred, including harm not due to breach of contract or violation of other ISA rules by the Contractor;

(e) provision for Contractors to consult with Coastal States prior to submitting a Plan of Work;

(f) a parallel provision addressing the potential for harm beyond national waters: an obligation is owed to the international community, in addition to coastal States.

The reference to (non-binding) 'Guidelines' in DR4(4) could be amended to (binding) 'Standards'.

Part II Applications for approval of Plans of Work in the form of contracts

Regulation 7

Form of applications and information to accompany a Plan of Work

The Exploration Regulations envisage Contractors establishing impact reference zones (IRZs) and preservation reference zones (PRZs) for monitoring and evaluating the environmental impacts of any future Exploitation. However, PRZ and IRZs are barely referenced in the draft Exploitation Regulations. Although Annexes IV and VII (respectively) do require locations of IRZs and PRZs to be proposed in the EIS and EMMP prepared for an application for Exploitation, there is no corresponding Regulation requiring their designation, or setting rules or parameters for their size, design, management, monitoring or reporting.

[…] 2. Each applicant, including the Enterprise, shall, as part of its application, provide a written undertaking to the Authority that it will:

a. Accept as enforceable and comply with the applicable obligations created by the ~~Rules~~provisions of Part XI of the Convention, the rules, regulations and procedures of the Authority, the decisions of the organs of the Authority and the terms of its contract with the Authority; […]

It is unclear why 'Standards' – which are designated as 'legally binding' by DR94(4) – have not been included in this DR7(2)(a) lists of instruments that create enforceable obligations upon Contractors.

3. An application shall ~~also be~~be prepared in accordance with these Regulations and accompanied by the following, ~~prepared in accordance with the Guidelines, where applicable~~: […]

The reasons for the deletion of '*in accordance with the Guidelines…*' [on applications] are unclear. Other sub-paragraphs in this Regulation continue to refer to Guidelines on matters relevant to application procedure and/or content.

4. Where the proposed Plan of Work proposes two or more non-contiguous Mining Areas, the Commission ~~shall~~may require separate documents under paragraphs 3 (d),(h) and (i) above for each Mining Area, unless the applicant demonstrates that a single set of documents is appropriate ~~according to~~taking account of the relevant Guidelines.

The draft Regulations appear to envisage that an EIS and EMMP will be submitted at application stage to cover any and all anticipated mining projects in the area covered by the contract. The Regulations do not obviously enable an applicant to submit, or the ISA to review and decide upon, separate EIS and EMMP for different mining projects within the same contract area (e.g. different sites, or different methodologies), at different times mid-way through the contract term.

Section 2 Processing and review of applications

~~Draft regulation~~Regulation 10

Preliminary review of application by the Secretary-General

1.The Secretary-General shall review an application for approval of a Plan of Work and shall determine whether an application is complete for further processing, and in the case of more than one application for the same area and same Resource category, determine whether the applicant has preference and priority in accordance with article 10 of annex III to the Convention. […]

~~Draft regulation~~Regulation 11

Publication and review of the Environmental Plans

1.The Secretary-General shall, within ~~seven~~7 Days after determining that an application for the approval of a Plan of Work is complete under regulation 10:

(a) Place the Environmental ~~Impact Statement, the Environmental Management and Monitoring Plan and the Closure Plan~~Plans on the Authority's website for a period of 60 Days, and invite members of the Authority and Stakeholders to submit comments in writing ~~in accordance with~~taking account of the relevant Guidelines; and

(b) ~~Provide~~ Request the Commission to provide its comments on the Environmental Plans within the comment period.

(a) The Secretary-General shall within 7 days following the close of the comment period, provide the comments submitted by members of the Authority ~~and~~, Stakeholders, the Commission and any comments by the Secretary-General to the applicant for its consideration

Note: These amendments enable the Commission to provide comments to the Applicant on its EIS, EMMP and Closure Plans at this early stage, simultaneously with ISA member States and other stakeholders, and prior to conducting its formal review of the Application (at which point the Commission has another opportunity to recommend modifications or amendments to the plans: see DR 11(5) and DR 14, below).

~~; and~~

2.~~Consult with the~~. The applicant~~, who~~ shall consider the comments and may revise the Environmental Plans or provide responses in ~~response~~reply to the comments ~~made by members of the Authority, Stakeholders~~and shall submit any revised plans or ~~the Secretary-General~~responses within a period of ~~60~~30 Days following the close of the comment period.

~~2.~~3. The Commission shall, as part of its examination of an application under regulation 12 and assessment of applicants under regulation 13, examine the Environmental Plans or revised plans in the light of the comments made under paragraph 2 above, together with any responses by the applicant, and any additional information provided by the Secretary-General.

References here to Regulation 12 and 13 are outdated since these two Regulations have been merged into a single DR13 in the latest draft Regulations.

It may be helpful to clarify DR11(3) by amending the drafting as follows: '*in light of the comments ~~made~~ submitted in accordance with paragraph ~~2~~1, together with any responses by the Applicant provided under paragraph 2*.'

The Regulations do not indicate how (from whom or when) the Commission will receive copies of the comments submitted by States parties, Stakeholders and the Secretary-General (which the Commission are required by Regulation 11(3) to consider in their review of the application, and by Regulation 11(5) to summarise).

~~3.~~4. Notwithstanding the provisions of regulation 12 (~~3~~2), the Commission shall not consider an application for approval of a Plan of Work until the Environmental Plans have been published and reviewed in accordance with this regulation.

~~4.~~5. ~~———~~The Commission shall prepare a report on the Environmental Plans. The report shall include details of the Commission's determination under regulation 13(4)(e) as well as a summary of the comments or responses made under regulation 11(2). The report shall also include any amendments or modifications to the Environmental Plans recommended by the Commission under regulation 14. Such report on the Environmental Plans or revised plans shall be published on the Authority's website and shall be included as part of the reports and recommendations to the Council pursuant to regulation 15.

Earlier commentary to DR11(3) also applies here.

In the last round of submissions, several Stakeholders suggested that, in addition to summarising Stakeholder comments in its report to Council, the Commission should also provide its response to those comments.

It may also be helpful to elaborate further how this new DR11(5) [requirement for the Commission to publish a report including its recommendation for amendment to Environmental Plans] integrates with DR14(1) and (2) [power for the Commission bilaterally to request the applicant to amend its plans]. DR 11(5) may be better located in DR15, to reflect that the report is produced and published after the Commission has completed its consideration of an application, and before (or at the same time as?) the Commission submits its recommendation to the Council.

Section 3 Consideration of applications by the Commission

Regulation 12
General

~~1.~~The Commission shall examine applications in the order in which they are received by the Secretary-General. […]

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~~manner in which the proposed Plan of Work contributes to realizing benefits for mankind as a whole.

Should the DR2 'Fundamental Principles [and Policies] be included in DR12(4)'s list of '*principles, policies and objectives*…' to which the Commission is required to regard, in considering a proposed Plan of Work? Are there intended to be '[strategic] environmental objectives' established by the ISA that should also be referenced here?

It is unclear why '*the extent to which*' terminology (which speaks to quantum) has been replaced here by '*the manner in which*' (which speaks to modality), in relation to the benefits to mankind that will be realised. It seems logical that the manner in which benefits are realised should be the same for any contract (royalties, training, technology transfer etc). But the extent / quantum of those benefits is likely to differ from contract to contract, and should be a factor in the Commission's review (and cost-benefit analysis) of any application.

Regulation 13
Assessment of applicants

This DR13 subsumes what once was DR14 'Consideration of the Environmental Plans by the Commission'. It could now be more accurately entitled 'Assessment of applicants **and applications'**.

[…]

3. In considering the technical capability of an applicant, the Commission shall determine in accordance with the Guidelines whether the applicant has or will have:

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;

b) The technology and procedures necessary to comply with the terms of the Environmental Management and Monitoring Plan and the Closure Plan, including the technical capability to monitor key environmental parameters and to modify management and operating procedures when appropriate;

c) Established the necessary risk assessment and risk management systems to effectively implement the proposed Plan of Work in accordance with Good Industry Practice, Best Available Techniques and Best Environmental Practices and these Regulations, including the technology and procedures to meet health, safety and environmental requirements for the activities proposed in the Plan of Work;

Note: The wording 'Best Environmental Practices' has been removed from the definition of 'Good Industry Practice' in this version of the Regulations (see Schedule 1, below). This is why 'Best Environmental Practices' has been added into the text, alongside 'Good Industry Practice' here (and elsewhere in the Regulations).

4.The Commission shall determine if the proposed Plan of Work:

[...]

(d) Provides for Exploitation activities to be carried out with reasonable regard for other activities in the Marine Environment, including, but not limited to, navigation, the laying of submarine cables and pipelines, fishing and marine scientific research, as referred to in article 87 of the Convention; and

Provides, under the Environmental Plans ~~by the Commission~~

~~1.The Commission shall, as part of its examination of an application under regulation 12 and assessment of applicants under regulation 13, examine the Environmental Plans in the light of the comments made by members of the Authority and Stakeholders, any responses by the applicant and any additional information or comments provided by the Secretary-General.~~

~~2.~~(e) ~~The Commission shall determine whether the Environmental Plans provide~~, for the effective protection ~~of~~for the Marine Environment in accordance with ~~article 145 of the Convention, including through the application of a precautionary approach and Good Industry Practice.~~ the rules, regulations and procedures adopted by the Authority, in particular the fundamental policies and procedures under regulation 2.

~~3. The report of the Commission on the Environmental Plans, and any amendments or modifications thereto recommended by the Commission, shall be published on the Authority's website and shall be included as part of the report and recommendations to the Council pursuant to regulation 16.~~

Below are a number of separate comments relating to DR13(4).

(1) 'Fundamental policies and procedures' in DR13(4)(e) should read 'Fundamental principles [and policies] ~~and procedures~~'

(2) DR13(4) in general and DR13(4)(e) in particular cover the point at which the Commission decides whether or not to recommend the approval of a Plan of Work for Exploitation from an environmental point of view. The Commission must ask whether the environmental impacts likely to result from the mining (as forecast in the EIS) are judged to be acceptable. The answer to that question will be complex, important and potentially controversial. It will depend on both technical insights and legal interpretations, as well as value judgements (on behalf of [hu]mankind). The Regulations could provide more guidance as to the relevant factors, data, thresholds and values to guide the Commission in making this determination – recognising that the Commission is an advisory committee of technical expert individuals, not an aggregation of representatives of specific populations or stakeholders. It would seem sensible for the Regulations to require Standards or Guidelines to be issued on these points. These may include stipulations on the technical composition of the Commission, and may encourage the use of outside experts and consultations. As the Commission observed in its note accompanying the draft Regulations: "*The Commission recognised the merit of engaging with external experts in supplementing its work and expertise of the Commission, but that this should be discretionary and not mandatory. The Commission noted that such recourse would also be related to the composition of the Commission at the particular time, and its constituent expertise*." [ISBA/25/C/18]

(3) It would be more appropriate for DR13(4)(e) to limit its reference to the principles in DR2 to those relevant to the review of Environmental Plans, namely DR2(e), (f) and (g). And/or the Commission and the Council should be required to assess proposed Plans of Work in their entirety (not only the environmental aspects) against all the DR2 principles.

(4) The reference in DR13(4)(e) to DR2 appears, via DR2(e) to suggest that:

(i) the Commission cannot conduct its review of an application unless and until there is a REMP adopted for the relevant region, and

(ii) the Commission should consider the extent to which the proposed Plan of Work complies with or otherwise takes into account the relevant REMP, in assessing an application.

These two points could be more clearly stated to avoid ambiguity or dispute. Further, the Commission should not recommend approval of any application deemed to be non-conforming with the relevant REMP (for example, by proposing exploration or exploitation activities within a designated Area of Particular Environmental Interest). Stakeholders have repeatedly held up the view that there should be no mining without a REMP in place, both in their 2018 submissions and at ISA Council meetings.

Regulation 14
Amendments to the proposed Plan of Work

1.~~1.~~ At any time prior to making its recommendation to the Council and as part of its consideration of an application under regulation 12, the Commission may:

~~(a)~~ Request the applicant to provide additional information on any aspect of the application within

(a) 30 Days of the date when the application is first considered; and

(b) Request the applicant to amend its Plan of Work, or propose specific amendments for consideration by the applicant where such amendments are considered necessary to bring the Plan of Work into conformity with the requirements of these Regulations ~~and Good Industry Practice~~.

[…]

~~Draft regulation 16~~Regulation 15

Commission's recommendation for the approval of a Plan of Work

1.If the Commission determines that the applicant meets the criteria set out in regulations 12 (4) and 13, ~~and that regulation 14 (2) is complied with,~~ it shall recommend approval of the Plan of Work to the Council.

It is crucial that the Commission (and thus the Council) retains a general discretion to approve or disapprove the Plan of Work. Currently if it meets criteria in DR 12(4) and 13, it must recommend approval. The Regulations should also include situations in which applications may or, in some circumstances must, be disapproved (see UNCLOS Article 165(2)(l) and 162(2)(x), for example)

If reasonable and practical mitigation measures are insufficient to achieve the DR2 fundamental principles (including the effective protection of the marine environment and protection and preservation of rare and fragile ecosystems and the habitat of depleted, threatened or endangered species), then the Plan of Work should not be approved. Likewise, if the environmental baseline data is inadequate, the Plan of Work should not be approved. These are just two examples

[…]

~~1.~~2. The Commission shall not recommend approval of a proposed Plan of Work if part or all of the area covered by the proposed Plan of Work is included in: […]

DR15(2) lists areas in which a Plan of Work for Exploitation cannot be recommended for approval. Areas of Particular Environmental Interest ('APEI's) should join this list. APEIs are intended to be identified though ISA strategic and regional environmental management planning as no-mining zones, but will have no regulatory force unless mining is prohibited within them in the Regulations.

~~2.~~3. The Commission shall not recommend the approval of a proposed Plan of Work if it determines that:

a. ~~Another qualified applicant has a preference and a priority in accordance with article 10 of annex III to the Convention; or~~or […]

DR15(3) lists narrow circumstances in which a Plan of Work for Exploitation cannot be recommended for approval (in summary: where it would interfere with another party's contract claim). DR15(3) should also include the circumstance where the Commission finds itself unable to determine that the applicant or Plan of Work meets the approval criteria set out in the relevant regulations.

DR15 could also be expanded to require the Commission to provide the Council with sufficient detail as to the Plans of Work, and a record of the Commission's deliberations (including dissenting views), in order to facilitate informed decision-making about whether or not to approve the Plan of Work.

Part III Rights and obligations of Contractors

Regulation 18

Rights and exclusivity under an exploitation contract

[…]

4. The Authority, in consultation with a Contractor, shall ensure that no other entity operates in the Contract Area for a different category of Resources in a manner which might interfere with the rights granted to the Contractor.

5. An exploitation contract shall provide for security of tenure and shall not be revised, suspended or terminated except in accordance with ~~articles 18 and 19 of annex III to the Convention.~~the terms of the exploitation contract.

As amended, DR18(5) provides that revision, suspension or termination of contracts can only occur in accordance with the terms of the contract. The implications of this amendment may be far-reaching and could benefit from further consideration. The Plan of Work constitutes part of the contract and the Regulations contain various circumstances and procedures for amending it during the contract term. For example, in DR60(4) the Commission can unilaterally require amendments to a deficient Closure Plan. Conversely, the standard contract terms (section 16, in Annex X) permit amendment to the contract only in more limited circumstances, and where both ISA and Contractor consent. This amendment therefore has potential to create conflict between the Regulations and the contract terms. Better regulatory control may result from the ISA seeking to maximise its legal powers to revise, suspend or terminate a contract and Plan of Work, not reducing them.

7. In relation to Exploration activities in the Contract Area conducted under an exploitation contract, the applicable Exploration Regulations shall continue to apply and as set out in the relevant Guidelines. In particular, the Contractor shall be expected to continue to show due diligence in conducting Exploration activities in the Contract Area, together with the payment of applicable fees and the reporting of such activities and its results to the Authority in accordance with the applicable Exploration Regulations~~.~~, including under regulation 38(2)(k).

DR18(7) contains a new insertion to indicate that Guidelines will further elaborate aspects of the Exploration Regulations which should also apply to an Exploitation Contractor. This point would certainly benefit from further unpacking and cross-reference to specific Exploration Regulations, to avoid ambiguity or dispute.

The Regulations might also:

(a) indicate whether all Exploitation Contractors are required to conduct Exploration activities (in different locations to, but simultaneously with) their Exploitation activities, or whether this is optional,

(b) include details of planned Exploration activities within the list of information required for an application for a Plan of Work for Exploitation, and

(c) clarify the application process to commence exploitation in a mining site located within an existing Exploitation contract, but where that site was not covered by the original EIS and Plan of Work.

~~**Draft regulation 21**~~ **Regulation 20**

Term of exploitation contracts

1. Subject to the provisions of section 8.3 of the exploitation contract, the maximum initial term of an exploitation contract is 30 years~~. The Authority and the Contractor may agree to a shorter period in the light~~, taking account of the expected economic life of the Exploitation activities of the Resource category set out in the Mining Workplan~~.~~ and including a reasonable time period for construction of commercial-scale mining and processing systems.

DR20(1) has been confusingly re-drafted. The sub-clause that commences '*taking account of…*' speaks to criteria for determining the length of the contract term. But wording indicating that a term of less than 30 years may be set has been removed. Re-inserting language into DR20(1) that indicates or even encourages the possibility of a shorter term may provide comfort to stakeholders concerned with the ISA's ability to improve regulatory standards as scientific knowledge improves over time.

2. An application to renew an exploitation contract shall be made in writing addressed to the Secretary-General and shall be made no later than one year before the expiration of the initial period or renewal period, as the case may be, of the exploitation contract.

~~2.~~3. The Contractor shall supply such documentation as may be specified in the Guidelines. If the Contractor wishes to make any changes to a Plan of Work and such changes are Material Changes, the contractor shall submit a revised Plan of Work.

The Commission, in its cover note to the draft Regulations [ISBA/25/C/18], stated that it: "*took note of stakeholder comments of the need for a greater level of scrutiny at the time of a renewal application, including the submission of a revised plan of work*." This note is not well-reflected in the amended DR20, which gives the **Contractor** the power to decide whether or not to submit a new Plan of Work. This is likely to make the decision a commercial (rather than regulatory) one. While a streamlined contract renewal process can be desirable, an appropriate level of regulatory control should be retained.

It is difficult to see how the ISA could access information adequate for the extension of an Exploitation contract without first requiring submission and review of a new or materially amended Plan of Work, particularly given that:

(i) the Contractor is legally bound to adhere to its Plan of Work and is not legally bound to comply with other paperwork that may be supplied under DR20(3) – and nor indeed to supply it, as Guidelines do not have legally binding force;

(ii) the previous Plan of Work would have been timebound within the initial contract period, and therefore would need alteration to extend beyond that time period;

(iii) there are likely to be new and unanticipated developments to take into account in renewal decisions that take place some 30 years after the original application; and

(iv) DR20 does not limit the number of contract renewals that may be granted and sets a presumption in favour of renewal (see DR20(6), which contains only limited circumstances in which a renewal will not be granted). As currently drafted, the Regulations could allow infinite contract extensions without any new Plan of Work being submitted, nor any consultation with Stakeholders.

The Regulations could therefore be amended to:

(a) require a new Plan of Work upon application to renew an Exploitation contract, unless it is determined to be unnecessary by the Council (upon recommendation from the Commission, who will draw upon criteria set by Standards or Guidelines), and

(b) clarify that Regulation 57 applies where a new Plan of Work is submitted under a renewal application.

4. The Commission shall consider such application to renew an exploitation contract at its next meeting, provided the documentation required under paragraph ~~2~~3 has been circulated at least 30 Days prior to the commencement of that meeting of the Commission.

~~3.~~5. In making its recommendations to the Council under paragraph 6 below, including any proposed amendments to the Plan of Work or revised Plan of Work, the Commission shall take account of any report on the review of the Contractor's activities and performance under a Plan of Work under regulation 58.

It is notable that reviews under DR58 are conducted by the Contractor itself (and the ISA Secretariat), and may not have occurred in up to five years prior to the extension application. It would seem sensible to include other items in the DR20(5) list that the Commission should take into account in considering a renewal application, including at least: performance assessments under DR58, annual reports, inspection reports, compliance notices, sponsoring State monitoring and compliance data, whistle-blower reports, and third-party legal actions against the Contractor for harm caused. There should also be a public comment period.

~~4.~~6. The Commission shall recommend to the Council the approval of an application to renew an exploitation contract, and 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;

(b) The Contractor is in compliance with the terms of its exploitation contract and the Rules of the Authority~~;~~, including the rules, regulations and procedures adopted by the Authority to ensure effective protection for the Marine Environment from harmful effects which may arise from activities in the Area;

(c) The exploitation contract has not been terminated earlier; and

(d) The Contractor has paid the applicable fee in the amount specified in appendix II.

The criteria for assessing an application for extension of a contract contained in DR20(6) are narrowly focused on Contractor behaviour. As currently drafted, absent a breach, a Contractor can obtain ten-year contract renewals almost by default. This presumption impedes the Council's oversight based on regional or strategic issues, for example consideration of cumulative or unforeseen impacts. The extension should be discretionary.

~~5.~~7. Each renewal period shall be a maximum of 10 years. […]

Regulation 21

Termination of sponsorship

Each Contractor shall ensure it is sponsored by a sponsoring State or States, as the case may be, throughout the period of the exploitation contract in accordance with regulation 6~~.~~, and to the extent necessary to comply with regulations 6(1) and (2).

1.A State may terminate its sponsorship by providing to the Secretary-General a written notice describing the reasons for terminating its sponsorship. Termination of sponsorship takes effect no later than 12 months after the date of receipt of the notification by the Secretary-General, ~~unless~~save that where such termination is due to a Contractor's non-compliance under its terms of sponsorship, termination of sponsorship shall take effect no later than 6 months after the date of such notification ~~specifies a later date~~.

Where a State terminates sponsorship on the grounds of Contractor's non-compliance, the ISA might wish to reserve the right to conduct further inquiry, or its own review of the Contractor's operations and compliance.

2.In the event of termination of sponsorship, the Contractor shall, within the period referred to in paragraph 2 above, obtain another sponsoring State or States in accordance with the requirements of regulation 6, and in particular in order to comply with regulation 6 (1) and (2). Such State or States shall submit a certificate of sponsorship in accordance with regulation 6. The exploitation contract terminates automatically if the Contractor fails to obtain a sponsoring State or States within the required period.

3.A sponsoring State or States is not discharged from any obligations accrued while it was a sponsoring State by reason of the termination of its sponsorship~~.~~, nor shall such termination affect any legal rights and obligations created during such sponsorship.

4.The Secretary-General shall notify the members of the Authority of a termination or change of sponsorship.

5.After a sponsoring State has given a written notice in accordance with paragraph 2 above, the Council, based on the recommendations of the Commission ~~and taking into~~which shall take account of the reasons for the termination of sponsorship, may require the Contractor to suspend its mining operations until such time as a new certificate of sponsorship is submitted.

~~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.~~

It is not clear why this residual liability wording was deleted from DR21.

It is difficult to see how DR21 as currently drafted takes proper account of the requirement for a Contractor to possess the nationality or be effectively controlled by the nationals of its sponsoring State (UNCLOS Article 153(2)). Obtaining a new sponsoring State may not be straightforward. To have met the nationality / effective control requirement for its previous sponsorship, a Contractor would be incorporated in and/or owned by nationals of, the first sponsoring State. Obtaining a second sponsoring State would most likely necessitate a significant change in corporate status (e.g. incorporation in the new sponsoring State) or a change of control, either effectively rendering the Contractor a new entity or transferee, or without 'effective control' under Article 153(2).

Regulation 24 Change of control

1. For the purposes of this regulation, a "change in control" occurs where there is a change in 50 per cent or more of the ownership of the Contractor, or of the membership of the joint venture, consortium or partnership, as the case may be, or a change in 50 per cent or more of the ownership of the entity providing an Environmental Performance Guarantee. ~~The terms and conditions of the transferee's exploitation contract shall be those set out in the standard exploitation contract annexed to these Regulations that is in effect on the date that the Secretary-General or a duly authorized representative executes the assignment and novation agreement.~~

Several Member States in 2018 submissions requested clarification on the meaning of 'change of control' and 'effective control'. This provision could still benefit from re-examination. A change in control does not require a change in 50% of the ownership. A change in control can occur with any change in ownership: if one party owns 49.9%, a change of control could take place if that party acquires a further 0.2% ownership)

~~**Draft regulation 25**~~

~~**Change of control**~~

1.

2.Where there is a change of control of the Contractor, or there is a change of control in any entity providing an Environmental Performance Guarantee on behalf of a Contractor, the Contractor shall, where practicable, notify the Secretary-General in advance of such change of control, but in any event within 90 Days thereafter. The Contractor shall provide the

Secretary-General with such details as he or she shall reasonably request of the change of control.

3.After consulting the Contractor or entity providing the Environmental Performance Guarantee, as the case may be, the Secretary-General may:

(a) Determine that, following a change of control of the Contractor or the entity providing the Environmental Performance Guarantee, the Contractor will continue to be able, and in particular will have the financial capability, to meet its obligations under the exploitation contract or Environmental Performance Guarantee, in which case the contract shall continue to have full force and effect; or

~~(a)~~(b) In the case of a Contractor, treat a change of control as a transfer of rights and obligations in accordance with the requirements of these Regulations, in which case regulation ~~24~~23 shall apply; or

~~(b)~~(c) In the case of an entity providing an Environmental Performance Guarantee, require the Contractor to lodge a new Environmental Performance Guarantee in accordance with regulation ~~27~~26, within such time frame as the ~~SecretaryGeneral~~Secretary-General shall stipulate.

4.Where the Secretary-General determines that following a change of control, a Contractor may not have the financial capability to meet its obligations under its exploitation contract, the Secretary-General shall inform the Commission accordingly. The Commission shall make a report of its findings and recommendations to the Council. ~~For the purposes of this regulation, a "change in control" occurs where there is a change in 50 per cent or more of the ownership of the Contractor, or of the membership of the joint venture, consortium or partnership, as the case may be, or a change in 50 per cent or more of the ownership of the entity providing an Environmental Performance Guarantee.~~

A change of control may result in a new entity owning or performing the Exploitation contract. As such, the considerable discretionary power retained by the Secretary-General in this DR24 might benefit from additional checks, or Standards and Guidelines. A decision regarding financial capability may be better reserved for the Commission or other expert body. The examination should not be restricted to financial capability. Effective control is another important criterion.

Section 2 Matters relating to production

~~Draft regulation 26~~Regulation 25

Documents to be submitted prior to production

1. 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, the Secretary-General shall consider whether any Material Change needs to be made to the Plan of Work in accordance with regulation ~~55~~57 (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.

DR25(1) requires submission of a feasibility study 12 months before mining commences, and gives the Contractor an opportunity to revise the Plan of Work at that point. It is unclear why the submission of the feasibility study is not required at the application stage. The Contractor is likely to have conducted feasibility studies prior to applying for Exploitation. It seems onerous and uncertain to review of a Plan of Work so soon after the initial contract execution. The Regulations could be amended to enable an applicant to include its feasibility study at contract application stage.

2. Where, as part of a revised Plan of Work, the Contractor delivers a revised Environmental Impact Statement, Environmental Management and Monitoring Plan and Closure Plan under paragraph 1 above, regulation 57(2) shall apply mutatis mutandis to such Environmental Plans if the modification to the Environmental Plans constitute a Material Change, and such Environmental Plans shall be dealt with in accordance with the procedure set out in ~~regulations~~regulation 11~~ and 14~~.

DR25(2) appears to require a revised Plan of Work to undergo a full consultation, Commission review and Council decision (under DRs 57, and 11-14) only if environmental plans are altered at this stage. An entity could thereby obtain a contract based on unsupported or estimated feasibility information, and then request changes to its Mining or Financial Plan based on subsequent assessments of prospectivity or recovery rates. This could significantly reduce the proceeds derived by the ISA (and humankind), without stakeholder input or an opportunity for the Council to re-consider its original decision.

3. Provided that, where applicable, the procedure under ~~regulations~~regulation 11~~ and 14~~ has been completed, the Commission shall, at its next meeting, provided that the documentation has been circulated at least 30 Days before the meeting, examine the Feasibility Study and any revised Plan of Work supplied by the Contractor under paragraph 1 above, and in the light of any comments made by members of the Authority, Stakeholders and the Secretary-General on the Environmental Plans.

4. If the Commission determines that the revised Plan of Work, including any amendments thereto dealt with in accordance with regulation ~~15~~14, continues to meet the requirements of ~~regulations~~regulation 13~~ and 14 (2),~~ it shall recommend to the Council the approval of the revised Plan of Work. […]

It would be helpful if DR25 also covered what happens if the Commission determines that the revised Plan of Work does *not* meet the necessary requirements.

~~Draft regulation 29~~Regulation 28

Maintaining Commercial Production

~~1.~~ The Contractor shall maintain Commercial Production in accordance with the exploitation contract and the Plan of Work annexed thereto and these Regulations. A

1. Contractor shall, consistent with Good Industry Practice, ~~optimize~~manage the recovery of the Minerals removed from the Mining Area at rates contemplated by the Feasibility Study.

2. The Contractor shall notify the Secretary-General if it:

(a) Fails to comply with the Plan of Work; or

(b) Determines that it will not be able to adhere to the Plan of Work in future.

Notwithstanding paragraph 1 above, the Contractor shall temporarily reduce or suspend production whenever such reduction or suspension is required to protect the Marine Environment from Serious Harm or a threat of Serious Harm or to protect human health and safety. A Contractor shall notify the Secretary-General of

such a reduction or suspension of production as soon as is practicable and no later than 72 hours after production is reduced or suspended.

It may be helpful to clarify who is responsible to determine (on what evidence and against what criteria) whether reduction or suspension of production '*is required to protection the Marine Environment*…etc' for the purposes of DR28. The ISA may elect to take a more active regulatory control here, rather than relying upon the **Contractor** to notify the ISA of the threat.

Regulation 29

Reduction or suspension in production due to market conditions

1.Notwithstanding regulation ~~29~~28, a Contractor may temporarily reduce or suspend production due to market conditions but shall notify the Secretary-General thereof as soon as practicable thereafter. Such reduction or suspension may be for a period of up to 12 months.

2.If the Contractor proposes to continue the reduction or suspension for more than 12 months, the Contractor shall ~~submit to~~notify the Secretary-General in writing, and 30 Days prior to the end of the 12-month period, giving its reasons for seeking a further reduction or suspension of that length of time. The Commission shall, upon

~~1.~~ 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.

~~2. The reduction or suspension may be for a period of up to 12 months, but the~~The Contractor may apply for more than one suspension.

~~The Contractor shall temporarily reduce or suspend production whenever such reduction or suspension is required to protect the Marine Environment or to protect human health and safety. A Contractor shall notify the Secretary-General of such a reduction or suspension of production as soon as is practicable and no later than 72 hours after production is reduced or suspended.~~

~~2.~~3. In the event of any suspension in mining activities, the Contractor shall continue to monitor and manage the ~~project area~~Mining Area in accordance with the Closure Plan~~, as modified~~. Where suspension continues for a period of more than 12 months, the Commission may require the Contractor to submit a final Closure Plan in accordance with regulation ~~58.~~ 60. Where the Contractor suspends all production for more than 5-years, the Council may terminate the exploitation contract and the Contractor shall be required to implement the final Closure Plan.

The insertion in DR29(3) enabling the Council to terminate an exploitation contract after a suspension in production of more than five years, needs to be mirrored by an equivalent insertion into section 12 ['Suspension and termination of Contract and penalties'] of Annex X ['Standard Clauses for Exploitation Contracts'].

~~3.~~4. A Contractor shall notify the Secretary-General as soon as it recommences any mining activities, and no later than 72 hours after such recommencement, and, where necessary, shall provide to the Secretary-General such information as is necessary to demonstrate that the issue triggering a reduction or suspension has been addressed. The Secretary-General shall notify the Council that production has recommenced.

~~**Draft regulation 31**~~

~~**Optimal Exploitation under a Plan of Work**~~

~~1. In pursuance of regulation 2 (2) (a) relating to the efficient conduct of activities, and the avoidance of unnecessary waste, and to ensure that the Resources are being mined optimally in accordance with the Mining Workplan, a Contractor shall, in accordance with Good Industry Practice:~~

~~(a) Avoid inefficient mining practices; and~~

~~(b) Minimize the generation of waste in the conduct of Exploitation in the Area.~~

~~2. A Contractor shall include in its annual report under regulation 40 such information and reports as the Secretary-General requests, in accordance with the Guidelines, to demonstrate that the Contractor is meeting the obligation in paragraph 1 above under the Mining Workplan.~~

~~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 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.~~

~~4. Members of the Authority shall, to the best of their abilities, assist the SecretaryGeneral through the provision of data or information in connection with this regulation where processing, treatment and refining of ore from seabed mining occurs under their jurisdiction and control.~~

Note: The Commission advises that this deletion has been made in light of: (i) Stakeholder concerns over enforcement challenges; (ii) a concern that the draft regulation potentially modified proper procedures for the review and modification of Plans of Work; and (iii) because the requirements it sought to impose should already be captured in the requirement for Contractors to employ 'Good Industry Practice' in any event [ISBA/25/C/18].

Section 3 Safety of life and property at sea

~~**Draft regulation 32**~~**Regulation 30**

Safety, labour and health standards

[…]

6. A Contractor shall implement and maintain a safety management system taking account of the relevant Guidelines.

Note: The Commission indicates that it intends to elaborate this DR30 in July 2019, and upon receipt of a report from the Secretariat [ISBA/25/C/18].

Section 4 Other users of the Marine Environment

Regulation 31

Reasonable regard for other activities in the Marine Environment

Contractors shall, consistent with the relevant Guidelines, carry out Exploitation under an exploitation contract with reasonable regard for other activities in the Marine Environment in accordance with article 147 of the Convention and the approved Environmental Management and Monitoring Plan and Closure Plan and any applicable international rules and standards established by competent international

organizations. 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.

1. ~~Other~~The Authority, in conjunction with member States, shall take measures to ensure that other activities in the Marine Environment shall be conducted with reasonable regard for the activities of Contractors in the Area.

These seem like sensible insertions: recognising that Guidelines would assist Contractors in meeting this duty of 'reasonable regard for other activities', and that reciprocal responsibilities should be allocated to the ISA and States for the Contractors' benefit.

Section 5 Incidents and notifiable events

Regulation 32
Risk of Incidents

A Contractor shall reduce the risk of Incidents as much as reasonably practicable, to the point where the cost of further risk reduction would be grossly disproportionate to the benefits of such reduction~~.~~, and taking into account the relevant Guidelines. The reasonable practicability of risk reduction measures ~~should~~shall be kept under review in the light of new knowledge and technology developments and Good Industry Practice~~.~~, Best Available Techniques and Best Environmental Practices. In assessing whether the time, cost and effort would be grossly disproportionate to the benefits of further reducing the risk, consideration ~~should~~shall be given to best practice risk levels compatible with the operations being conducted.

~~**Draft regulation 35**~~**Regulation 33**

Preventing and responding to Incidents

The Contractor shall not proceed or continue with Exploitation if it is reasonably foreseeable that proceeding or continuing would cause or contribute to an Incident, or prevent the effective management of such Incident.

1. The Contractor shall, upon becoming aware of an Incident:

(a) Notify its sponsoring State or States and the Secretary-General immediately, but no later than 24 hours from the incident occurring;

It is possible that an Incident could occur without the Contractor's immediate knowledge. The DR33(1)(a) notification requirement could be re-drafted to refer to the time at which the Contractor becomes aware of the incident's occurrence, rather than the actual time of occurrence.

~~(a)~~(b) Immediately implement, where applicable, the Emergency Response and Contingency Plan approved by the Authority for responding to the Incident;

(c) Undertake promptly ~~any~~, and within such timeframe stipulated, any instructions received from the Secretary-General in consultation with the sponsoring State or States, flag State, coastal State or relevant international organizations, as the case may be;

~~(b)~~(d) Take any other measures necessary in the circumstances to limit the adverse effects of the Incident; and

~~(c)~~(e) Record the Incident in the Incidents Register, which is a register to be maintained by the Contractor on board a mining vessel or Installation to record any Incidents or notifiable events under regulation ~~36~~34.

2. The Secretary-General shall report any Contractor that fails to comply with this regulation to its sponsoring State or States and the flag State of any vessel involved in the Incident for consideration of the institution of legal proceedings under national law.

~~**Draft regulation 36**~~The Secretary-General shall report such Incidents, and measures taken to the Commission and the Council at their next available meeting.

This insertion of this new DR33 Secretary-General reporting requirement to the Commission and Council is helpful.

Regulation 34

Notifiable events

Two different processes are described for responding to Incidents [DR33] and Notifiable Events [DR34]. Examining the definitions of these two categories reveals a large degree of overlap, albeit expressed in slightly different terms:

- 'Incidents' include: death or serious injury, loss of a person from a ship, endangerment to the ship or people, collision or material damage to a ship, potential and incurred Serious Harm to the environment, and damage to submarine cables.
- 'Notifiable events' include a: fatality, missing person, occupational injury or illness, vessel collision, hazardous substance leak, contact with fishing gear or submarine cable.

Including both of these separate but overlapping defined terms and specifying separate regimes for each, may be unnecessary and confusing.

[…]

7. Where a complaint is made to a Contractor concerning a matter covered by these Regulations, the Contractor shall record the complaint and shall report it to the Secretary-General within 7 Days of the complaint being received.

Section 6 Insurance obligations

Regulation 36

Insurance

1.A Contractor shall obtain and thereafter at all times maintain, and cause its subcontractors to obtain and maintain, in full force and effect, ~~and cause its subcontractors to maintain, appropriate~~ insurance ~~policies, with internationally recognized and~~with financially sound insurers satisfactory to the Authority, of such types, on such terms and in such amounts in accordance with applicable international maritime practice ~~and~~, consistent with Good Industry Practice and as specified in the relevant Guidelines.

2.Contractors shall include the Authority as an additional assured. A Contractor shall use its best endeavours to ensure that all insurances required under this regulation shall be endorsed to provide that the underwriters waive any rights of recourse, including subrogation rights against the Authority in relation to Exploitation.

3.The obligation under an exploitation contract to maintain ~~appropriate~~ insurance ~~policies~~as specified in the Guidelines is a fundamental term of the contract. Should a Contractor fail to maintain the insurance required under these Regulations, the Secretary-General shall issue a compliance order under regulation ~~101.~~ 103. The Secretary-General shall notify the

Council at its next available meeting of such failure, and the corrective measures taken by the Contractor.

4.A Contractor shall not ~~materially modify~~make any material change or terminate any insurance policy without the prior consent of the Secretary-General.

5.A Contractor shall notify the Secretary-General immediately if the insurer terminates the policy or modifies the terms of insurance.

6.A Contractor shall notify the Secretary-General immediately upon receipt of claims made under its insurance ~~policies~~.

7. ~~A~~A Contractor shall provide the Secretary-General at least annually with evidence as to the existence of such insurance under regulation 38(2)(i).

The Commission advises that it anticipates further amendment to DR36 following a report by the Secretariat on insurance requirements and market availability [ISBA/25/C/18]. Points to consider in the meantime may include:

(i) whether DR36(1) should incorporate a process for approval of insurance policies to avoid a Contractor being left in a situation of uncertainty as to whether or not it may be inadvertently in breach of this fundamental contract term; and
(ii) whether the Secretary-General is the appropriate decision-maker, as provided in DR36(4), as to when a Contractor can make a material change to or terminate any insurance policy.

Section 8 Annual reports and record maintenance

Regulation 38

Annual report

[…]

3. Annual reports shall be published in the Seabed Mining Register, except for Confidential Information, which shall be redacted.

DR38's requirement for Contractors' annual reports to be published is a positive addition. Further consideration could be given to:

(i) a requirement for the publication of inspector reports, notice of incidents or notifiable events, and compliance notices, and
(ii) formalising in the Regulations the ISA's review process for annual reports, following their receipt.

Regulation 39

Books, records and samples

[…]

3. ~~A~~To the extent practical, a Contractor shall keep, in good condition, a representative portion of samples or cores, as the case may be, of the Resource category together with biological samples obtained in the course of Exploitation until the termination of the exploitation contract. Samples shall be maintained ~~in accordance with the Guidelines.~~taking into account the relevant Guidelines which shall provide the option for the Contractor to maintain samples itself or to have such maintenance performed on its behalf in whole or in part by other agencies. […]

Section 9 Miscellaneous

Regulation 42

~~**Disclaimer**~~

~~A Contractor shall not, and shall not permit any person, firm or company or State-owned entity controlling, controlled by or under common control with the Contractor or a subcontractor to, in any manner, claim or suggest, whether expressly or by implication, that the Authority or any official thereof has, or has expressed, any opinion with respect to the Mineral Resource in the Contract Area. No statement to that effect shall be included in or endorsed on~~**Restrictions on advertisements, prospectuses and other notices**

No statement shall be made either in any prospectus, notice, circular, advertisement, press release or similar document issued by the Contractor, ~~any affiliated company or any subcontractor that refers directly or indirectly to the exploitation contract.~~or to the knowledge of the Contractor, or in any other manner or through any other medium, claiming or suggesting, whether expressly or by implication, that the Authority has or has formed or expressed an opinion over the commercial viability of Exploitation in the Contract Area.

~~**Draft regulation 45**~~**Regulation 43**

Compliance with other laws and regulations

~~1.~~Nothing in an exploitation contract shall relieve a Contractor from its lawful obligations under any national law to which it is subject ~~by reason of effective control, incorporation or otherwise~~, including the laws of a sponsoring State and flag State.

1.~~Contractors shall comply with all laws and regulations, whether domestic, international or other, that apply to its conduct of activities in the Area.~~ […]

No explanation has been provided as to why the second paragraph of DR43, requiring Contractors to comply with all relevant domestic and international laws, has been deleted. This risks diminishment of the ISA's ability to exercise regulatory control over Contractors, particularly where a flag State lacks the capacity or will to implement enforcement measures.

Part IV Protection and preservation of the Marine Environment

Section 1 Obligations relating to the Marine Environment

~~**Draft regulation 46**~~**Regulation 44**

General obligations

The Authority, sponsoring States and Contractors shall each, as appropriate, plan, implement and modify measures necessary for ensuring the effective protection ~~of~~for the Marine Environment from harmful effects ~~under article 145 of~~in accordance with the ~~Convention~~rules, regulations and procedures adopted by the Authority in respect of activities in the Area. To this end, they shall:

(a) Apply the precautionary approach, as reflected in principle 15 of the Rio Declaration on Environment and Development, to the assessment and management of risk of harm to the Marine Environment from Exploitation in the Area;

~~(a) Ensure~~Apply the ~~application of~~ Best Available Techniques and Best

(b) Environmental ~~Practice~~Practices in carrying out such measures;

(c) Integrate Best Available Scientific Evidence in environmental decisionmaking, including all risk assessments and management undertaken in connection with

environmental assessments, and the management and response measures taken under or in accordance with ~~Good Industry Practice;~~Best Environmental Practices;

(d) Promote accountability and transparency in the assessment, evaluation and management of Environmental Effects from Exploitation in the Area, including timely release of and access to relevant environmental data and information~~; and~~ and opportunities for stakeholder participation.

~~Develop incentive structures~~**Regulation 45**

Development of Environmental Standards

Environmental Standards shall be developed in accordance with regulation 94 and shall include the following subject matters:

(a) Environmental quality objectives, including ~~market-based instruments that support and enhance the~~ on biodiversity status, plume density and extent, and sedimentation rates;

DR45(a)'s list of proposed environmental quality objectives would benefit from the preface: "*including* ***but not limited to***" as this is a somewhat *ad hoc* and brief list.

(b) Monitoring procedures; and

~~(b)~~(c) Mitigation measures.

More explanation as to the difference between 'Environmental Standards' and 'Standards' could be helpful.

This list may need to be reviewed following discussion (and the ISA's review of the May 2019 Pretoria workshop outcomes). For example, '*Mitigation measures*' may be better expressed as '*Mitigation of environmental harm*' as a Standard on mitigation may be outcome-focussed, rather than prescriptive as to 'measures'.

Regulation 46

Environmental Management System

1. A Contractor shall implement and maintain an environmental management system taking account of the relevant Guidelines.

2. An environmental management system shall be:

(a) Capable of delivering site-specific environmental objectives and Standards in the Environmental Management and Monitoring Plan;

(b) Capable of cost-effective, independent auditing by recognized and accredited international or national organizations; and

~~(a)~~(c) Permit effective reporting to the Authority in connection with environmental performance ~~of Contractors, including technology development and innovation.~~ .

Consideration could be given to amending DR 46(1) to refer to well-established existing international standards in this area. For example: "*A Contractor shall implement and maintain an environmental management system, **consistent with ISO 14001 or other similar internationally recognised standard**, and taking account of the relevant Guidelines*."

Is the reference to '***Standards** in the Environmental and Monitoring Plan*' [DR46(2)(a)] correct? According to Schedule 1 and DR94, Standards are legally binding instruments adopted by Council. It is unclear how these could be found in a Contractor's Plan.

'Environmental objectives' are referenced three times in the draft Regulations [DR 2(e)(i), DR46(2)(a) and Annex VII paragraph 2(a)]. The meaning of that term is not elaborated, but from the nature of those references, it appears they refer to and envisage every Contractor developing its own environmental objectives for each Plan of Work. Elaboration of when and how these objectives are set might be helpful. Consideration should also be given to the ISA's setting of its own strategic environmental objectives, and requiring that Plans of Work be evaluated against those objectives. A Contractor-led, project-specific approach to environmental objectives, without additional standard-setting by the ISA, could lead to different standards for environmental performance for different Contractors. It is also possible that environmental objectives determined by a Contractor will miss elements critical to protection of the marine environment. ISA leadership is needed here.

DR46(2)(b) may benefit from further consideration. The provision as worded does not incorporate a requirement that auditing must occur, and it is unclear why 'cost-effective' is included in this sub-paragraph. A reformation could be: "*Audited by an independent, recognised and accredited international or national organisation on a periodic basis, as agreed in the EMMP.*"

Section ~~1 bis~~

2 Preparation of the Environmental Impact Statement and the Environmental Management and Monitoring Plan

~~Environmental Management and Monitoring Plan~~

~~Draft regulation 46 bis~~

Regulation 47

Environmental Impact Statement

1. The purpose of the Environmental Impact Statement (EIS) is to document and report the results of the environmental impact assessment process~~, which identifies~~ (EIA process). The EIA process:

(a) Identifies, predicts, evaluates and mitigates the biophysical, social and other relevant effects of the proposed mining operation~~. It is the result of several activities, which include an environmental risk assessment to determine the main issues and impacts, an impact analysis to predict the nature and extent of the Environmental Effects of the mining operation and the identification of measures to manage such effects within acceptable levels.~~;

(b) Includes at the outset a screening and scoping process, which identifies and prioritises the main activities and impacts associated with the potential mining operation in order to focus the EIS on the key environmental issues. This should include an environmental risk assessment;

(c) Includes an impact analysis to describe and predict the nature and extent of the Environmental Effects of the mining operation; and

~~(b)~~(d) Identifies measures to manage such effects within acceptable levels, including through the development and preparation of an Environmental Management and Monitoring Plan.

This EIA / EIS section of the draft Regulations (DR47) benefits from helpful additional detail, including the re-introduction of a scoping phase. But questions remain regarding the EIA process across the Exploration and Exploitation phases, and details of how scoping will be carried out.

'Scoping' usually refers to an assessment of the adequacy of a planned EIA and baseline datasets before an EIA is undertaken. It is important as it enables early intervention to correct sub-standard EIA processes, and helps Contractors avoid expending resources on unnecessary or misguided research. Moreover, it provides comfort that a future EIS will not be rejected by the ISA for procedural flaws. As such, the scoping procedure should be further elaborated, setting out details of the scoping report requirements, mandatory stakeholder engagement and public consultation process, a process for gaining additional information, and where necessary, independent scientific advice, and an approval process (before the EIA progresses). In its note, the Commission suggested that "*requirements for such scoping stage, including associated processes, should be detailed under the exploration regime*." [ISBA/25/C/18] This makes sense where the necessary activities will in practice be carried out under an Exploration contract. The Commission does not indicate what instrument or organ of the ISA will do this.

'Screening' is not explained further in the Regulations, but in environmental law the term usually refers to the assessment of which types of activities trigger an EIA requirement (and which can be performed without an EIA). The screening function is currently covered to some extent by document ISBA/19/LTC/8 'Recommendations for the guidance of Contractors for the assessment of the possible environmental impacts arising from exploration for marine minerals in the Area'. Priority should be given to supplementing this existing framework with a commitment that is (a) legally binding, and (b) applies to EIAs that are required for Exploitation applications, and/or EIAs that may take place during an Exploitation contract.

DR47 is silent as to who is responsible within the ISA for overseeing the EIA process (which should involve frequent regulator-proponent contact unlikely to be satisfied by the ISA's current structure of semi-annual meetings). Nor does DR47 contain any stipulations about who carries out the EIA, nor a requirement for public review and/or hearings.

See Code Project Short Paper June 2019: EIA

2. An applicant or Contractor, as the case may be, shall prepare an ~~Environmental Impact Statement~~EIS in accordance with this regulation.

3. ~~The Environmental Impact Statement~~The EIS shall be in the form prescribed by the Authority in annex IV to these Regulations and shall be:

(a) Inclusive of a prior environmental risk assessment;

(b) Based on the results of the ~~environmental impact assessment;~~EIA process;

(c) In accordance with the objectives and measures of the relevant regional environmental management plan~~, if any~~; and

See earlier commentary for DR2(e) regarding need for more explicit Regulations regarding REMPs.

(d) Be prepared in accordance with the applicable Guidelines, Good Industry Practice, Best Available Scientific Evidence, Best Environmental Practices and Best Available Techniques.

To avoid ambiguity, the Regulations should also expressly state that for the purposes of EIA/EIS, 'Best Environmental Practices' includes the collection of adequate quantity and quality baseline data. The ISA should issue Standards to provide further details as to the baseline data that are required from Contractors.

See Code Project Short Paper June 2019: Baselines

Section 23 Pollution control and management of waste

~~Draft regulation 48~~**Regulation 50**

Restriction on Mining Discharges

1.A Contractor shall not dispose, dump or discharge into the Marine Environment any Mining Discharge, except where such disposal, dumping or discharge is permitted in accordance with:

(a) The assessment framework for Mining Discharges as set out in the Guidelines; and

(b) The Environmental Management and Monitoring Plan.

2.~~However, the Contractor need not comply with the obligation in paragraph~~Paragraph 1 above ~~where action~~shall not apply if such disposal, dumping or discharge into the Marine Environment is ~~necessary~~carried out for the safety of ~~life~~the vessel or Installation or the ~~preservation~~safety of ~~property from serious damage~~human life, provided that ~~any action shall be so conducted as~~all reasonable measures are taken to ~~minimize~~minimise the likelihood of ~~injury to life or~~ Serious Harm to the Marine Environment, and shall be reported forthwith to the Authority.

Further clarification was previously requested by several Member States on the thresholds proposed in this Regulation. DR50(2) sets a low threshold ("*all reasonable measures*" taken to minimise "*the likelihood of Serious Harm to the Marine Environment*") to permit dumping of otherwise non-compliant Mining Discharges for the purposes of safety of property or life. Where such dumping takes place, Contractors should rather be required to minimise all environmental harm (not only that which meets the Serious Harm threshold).

The draft Regulations contain no specific provisions for environmental assessment, mitigation or monitoring following accidental discharges.

Section 34

Compliance with Environmental Management and Monitoring Plans and performance assessments

Regulation 51

Compliance with the Environmental Management and Monitoring Plan

A Contractor shall, in accordance with the terms and conditions of its Environmental Management and Monitoring Plan and these Regulations:

(a) Monitor and report annually under regulation 38(2)(g) on the

(a) Environmental Effects of its activities on the Marine Environment, and manage all such effects as an integral part of its Exploitation activities~~;~~ as set out in the Standards referred to in regulation 45;

~~(b)~~ Implement all applicable Mitigation and management measures to protect the Marine Environment~~; and~~

~~(a)~~(b) as set out in the Standards referred to in regulation 45; and (c) Maintain the currency and adequacy of the Environmental Management and Monitoring Plan during the term of its exploitation contract in accordance with ~~Good Industry Practice~~Best Available Techniques and Best Environmental Practices and taking account of the relevant Guidelines.

~~**Draft regulation 50**~~**Regulation 52**

Performance assessments of the Environmental Management and Monitoring Plan

A Contractor shall conduct performance assessments of the Environmental Management and Monitoring Plan to assess:

(a) The compliance of the mining operation with the plan; and

(b) The continued appropriateness and adequacy of the plan, including the management conditions and actions attaching thereto.

~~1.~~ The frequency of a performance assessment shall be~~:~~

~~(a) In~~ in accordance with the period specified in ~~its~~the approved Environmental Management and Monitoring Plan~~; or~~

~~(b) Every two years; or~~

~~(c) As agreed to in writing by the Commission,~~

~~taking into consideration the nature of the Resource category in question~~. […]

Several Member States in 2018 submissions expressed concern regarding the frequency of performance assessments, noting that regular assessments may be necessary in an environment with high levels of uncertainty. Assessment frequency has now been left to a schedule that will be proposed by the Contractor in the EMMP (for approval by the Council at application stage). No further guidance is given. If the frequency is set incorrectly at the application stage, a revision of the EMMP would be required. It would seem more sensible to include in DR52 a back-stop minimum duration between reviews, perhaps every two years. It may also be prudent to empower the ISA to request *ad hoc* performance assessments, such as after occurrence of an Incident or Notifiable Event, receipt of an unsatisfactory annual report, or issuance of a compliance notice.

Consideration should be given to the possibility of the ISA carrying out the compliance assessment, rather than the Contractor. Assessments should provide for public comment.

9. ~~**Draft regulation 51**~~The Commission shall report annually to the Council on such performance assessments and any action taken pursuant to paragraphs 5 to 8 above by it or the Secretary-General. Such report shall include any relevant recommendations for the Council's consideration.

This is a helpful addition. Reporting requirements are generally important to ensure that the Council receives all monitoring and compliance information necessary for it to perform its regulatory role as the executive body of the ISA mandated to 'control activities in the Area' [Article 162, UNCLOS]

Section 45 Environmental ~~Liability Trust~~Compensation Fund

The name of the DR54 Fund has been amended to reflect its intended purpose of paying out compensation for harm that may be incurred as a result of Contractor activities. Curiously, the purposes of the fund (DR55) have not been amended to include compensation, nor to remove the other non-compensatory-related purposes contained in sub-paragraphs (b)-(e). These latter purposes may better be addressed via a separate fund.

The Commission acknowledges this section needs more discussion: "*The Commission has asked that the secretariat reflect on the discussions around this topic, with a view to advancing the rationale, purpose and funding of such fund, and how to ensure the adequacy of such fund through its funding*." [ISBA/25/C/18].

Key policy questions to be addressed might include:

(i) Whether a reversion to a previous draft's two separate funds may make sense: (1) to compensate for damages, as per the ITLOS Advisory Opinion liability gap; and (2) for other 'sustainability' type purposes (education, research, environmental purposes).

(ii) How the fund(s) are financed, how the money (and interest generated) will be managed and by whom, when disbursements, reimbursements or refunds can be made, what is the process for accessing the fund, what standard of proof is required, and what type of damages and purposes are eligible.

Regulation 55

Purpose of the Fund

The main purposes of the Fund will include:

(a) The funding of the implementation of any necessary measures designed to prevent, limit or remediate any damage to the Area arising from activities in the Area, the costs of which cannot be recovered from a Contractor or sponsoring State, as the case may be;

(b) The promotion of research into methods of marine mining engineering and practice by which environmental damage or impairment resulting from Exploitation activities in the Area may be reduced;

(c) Education and training programmes in relation to the protection of the Marine Environment;

(d) The funding of research into Best Available Techniques for the restoration and rehabilitation of the Area; and

(e) The restoration and rehabilitation of the Area when technically and economically feasible and supported by Best Available Scientific Evidence.

Part V Review and modification of a Plan of Work

~~**Draft regulation 56**~~ **Regulation 57**

Modification of a Plan of Work by a Contractor

1.A Contractor shall not modify the Plan of Work annexed to an exploitation contract, except in accordance with this regulation.

2.A Contractor shall notify the Secretary-General if it wishes to modify the Plan of Work. 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. If the Secretary-General considers that the proposed modification constitutes a Material Change ~~in accordance with the Guidelines~~, the Contractor shall seek

the prior approval of the Council based on the recommendation of the Commission under regulations 12 and 16, and before such Material Change is implemented by the Contractor.

3.Where the proposed modification under paragraph 2 above relates to a Material Change in the Environmental Management and Monitoring Plan or Closure Plan, such plans shall be dealt with in accordance with the procedure set out in regulation 11–, prior to any consideration of the modification by the Commission.

4.The Secretary-General may propose to the Contractor a change to the Plan of Work which is not a Material Change to correct minor omissions, errors, or other such defects. 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.

Several Member States in November 2018 submissions called for further clarity as to what constitutes a "Material Change", and voiced concerns over the role of the Secretary-General in making that determination. To avoid granting unnecessarily wide discretion to the Secretary-General, it may be sensible to introduce Standards into this DR57 (which under DR94 are legally binding and approved by Council), or a requirement to report to Council any approval or proposal issued by the Secretary-General under DR57. Member State submissions also recommended that the sponsoring State be informed of changes to a Plan of Work, that the Commission be involved in changes to a Plan of Work, and highlighted the need for increased transparency in the process. In addition, the ISA should be able to propose a change to the Plan of Work in the same way, not only a Contractor.

Part VI Closure plans

~~Draft regulation 57~~Regulation 59

Closure Plan

[…]

2. The objectives of a Closure Plan are to ensure that:

a. The closure of mining activities is a process that is incorporated into the mining life cycle and is conducted in accordance with Good Industry Practice~~;~~, Best Environmental Practices and Best Available Techniques; […]

Best practice for closure plans includes scheduling relevant scientific studies to inform closure throughout the mine life. This requirement could be more explicitly reflected in DR59.

f. Any restoration or rehabilitation commitments will be fulfilled in accordance with predetermined criteria or standards; and

3. The Closure Plan shall cover the main aspects prescribed by the Authority in annex VIII to these Regulations.

4. A Contractor shall maintain the currency and adequacy of its Closure Plan in accordance with Good Industry Practice, Best Environmental Practices, Best Available Techniques and the relevant Guidelines.

5. The Closure Plan shall be updated each time there is a Material Change in a Plan of Work, or, in cases where no such change has occurred, every five years~~.~~ and be finalised in accordance with regulation 60(1).

Regulation 60

Final Closure Plan: cessation ~~or suspension~~ of production

1.A Contractor shall, at least 12 months prior to the planned end of Commercial Production ~~or any suspension of activities in the Mining Area under regulation 30~~, or as soon as is reasonably practicable in the case of any unexpected cessation ~~or suspension~~, submit to the Secretary-General, for the consideration of the Commission, a final Closure Plan, if such cessation ~~or suspension~~ requires a Material Change to the Closure Plan, taking into account the results of the monitoring and data and information which has been gathered during the exploitation phase.

2.The Commission shall ~~consider~~examine the final Closure Plan at its next meeting, provided that it has been circulated at least 30 Days in advance of the meeting.

~~1. The~~If the Commission ~~shall:~~

3.~~Approve~~determines that the final Closure Plan~~; or~~ meets the requirements under regulation 59 it shall recommend approval of the final Closure Plan to the Council.

4.~~Suggest~~If the Commission determines that the final Closure Plan does not meet the requirements under regulation 59, the Commission shall require amendments to the final Closure Plan as a condition for approval of the plan~~;~~.

~~4.~~5. The Commission shall give the Contractor written notice of its decision under paragraph 4 above and provide the Contractor opportunity to make representations, or to submit a revised final Closure Plan for the Commission's consideration, within 90 Days of the date of notification to the Contractor.

~~5.~~6. ~~Reject the final Closure Plan in the event that the amendments are not made by the Contractor.~~At its next available meeting, the Commission shall consider any such representations made or revised final Closure Plan submitted by the Contractor when preparing its report and recommendation to the Council, provided that the representations have been circulated at least 30 Days in advance of that meeting.

~~6.~~7. The Commission shall review the amount of the Environmental Performance Guarantee provided under regulation ~~27~~26.

8. ~~**Draft regulation 59**~~The Council shall consider the report and recommendation of the Commission relating to the approval of the final Closure plan.

Note: DR60 has been amended to reflect that the regulatory decision-making body of the ISA is the Council, not the Commission.

Regulation 61

Post-closure monitoring

1.~~Upon cessation or suspension of activities in the Mining Area, a~~A Contractor shall implement the final Closure Plan in accordance with the conditions of its implementation, and shall report to the Secretary-General on the progress of such implementation, including the results of monitoring under paragraph 2 below~~.~~ as set out in the final Closure Plan.

2.The Contractor shall continue to monitor the Marine Environment for such period after the cessation ~~or suspension~~ of activities as is set out in the final Closure Plan. […]

Adding a specified minimum time-period for post-closure monitoring to DR61 would improve certainty for all stakeholders, including Contractors (monitoring for 5-years vs. in perpetuity, for example, would have very different cost implications).

Part VII Financial terms of an exploitation contract

Note: The Commission indicates that, save for minor amendments to the regulatory text (as shown below), the latest draft Regulations have not been amended to reflect matters relating to the development of an economic model and associated financial terms for future Exploitation contracts, pending further discussion on that topic.

Section 2 Liability for and determination of royalty

Regulation 65

Secretary-General may issue Guidelines

1.The Secretary-General may, from time to time, issue Guidelines in accordance with regulation ~~93~~95 in respect of the ~~calculation~~administration and ~~payment~~management of royalties prescribed in this Part.

2.The Secretary-General shall consider all requests for the clarification of any Guidelines issued under paragraph 1 above, or on any other matter connected with the ~~determination~~administration and management of a royalty and its payment.

Regulation 75

Audit and inspection by the Authority

1. The ~~Authority~~Secretary-General may audit the Contractor's records. […]

The Secretary-General would need to retain auditor competence in order to implement DR75.

Regulation 76

Assessment by the Authority

1.Where the Secretary-General determines, following any audit under this Part, or by otherwise becoming aware that any royalty return is not accurate and correct in accordance with this Part, the Secretary-General may, by written notice to a Contractor, request any additional information that the Secretary-General considers reasonable in the circumstances, including the report of an auditor.

2.A Contractor shall provide such information requested by the Secretary-General within 60 Days of the date of such request together with any further information the Contractor requires the Secretary-General to take into consideration.

3.The Secretary-General may, within 60 Days of the expiry of the period prescribed by paragraph 2 above, and after giving due consideration to any information submitted under paragraph 2, make an assessment of any royalty liability that the Secretary-General considers ought to be levied in accordance with this Part.

4.The Secretary-General shall provide the Contractor with written notice of any proposed assessment under paragraph 3 above. The Contractor may make written representations to the Secretary-General within 60 Days of the date of such written notice. The Secretary-General shall consider such representations and shall confirm or revise the assessment made under paragraph 3 above.

~~3.~~5. The Contractor shall pay any such royalty liability within 30 Days of the date of the determination made by the Secretary-General under paragraph 4.

~~4.~~6. Except in cases of fraud or negligence, no assessment may be made under this regulation after the expiration of ~~10~~6 years from the date on which the relevant royalty return is lodged.

Section 5 Anti-avoidance measures

Regulation 77

General anti-avoidance rule

1. Where the Secretary-General reasonably considers that a Contractor has entered into any scheme, arrangement or understanding or has undertaken any steps which, directly or indirectly:

(a) Result in the avoidance, postponement or reduction of a liability for payment of a royalty under this Part;

(b) Have not been carried out for bona fide commercial purposes; ~~and~~or

(c) Have been carried out solely or mainly for the purposes of avoiding, postponing or reducing a liability for payment of a royalty,

then the Secretary-General shall determine the liability for a royalty as if the avoidance, postponement or reduction of such liability had not been carried out by the Contractor and in accordance with this Part.

2. ~~**Draft regulation 76**~~The Secretary-General shall provide the Contractor with written notice of any proposed determination under paragraph 1 above. The Contractor may make written representations to the Secretary-General within 60 Days of the date of such written notice. The Secretary-General shall consider such representations and shall determine the liability for a royalty for the original or revised amount.

3.The Contractor shall pay any such royalty liability within 30 Days of the date of the determination made by the Secretary-General under paragraph 2.

Section 6 Interest and penalties

Regulation 80

Monetary penalties

Subject to regulation ~~101~~103 (6), the ~~Secretary-General~~Council may impose a monetary penalty in ~~the amount specified in appendix III to these Regulations in~~ respect of a violation under this Part~~, as specified in appendix III~~.

Note: DR80 has been amended to reflect that the regulatory decision-making body of the ISA is the Council, not the Secretary-General.

Part VIII Annual, administrative and other applicable fees

Section 1 Annual fees

Regulation 84

Annual reporting fee

1.A Contractor shall pay to the Authority, from the effective date of an exploitation contract and for the term of the exploitation contract and any renewal thereof, an annual reporting fee as determined by a decision of the Council from time to time~~.~~, based on the recommendation of the Finance Committee. […]

This addition to DR84 better reflects the role of the Finance Committee (1994 Agreement, Annex, Section 3(7): "*decisions by the Assembly or the Council having financial or budgetary implications shall be based on the recommendations of the Finance Committee*.")

Regulation 85

Annual fixed fee

A Contractor shall pay an annual fixed fee from the date of commencement of Commercial Production in a Contract Area.

1. ~~The annual fixed fee shall be computed by multiplying the total size of the Contract Area in square kilometres, as identified in an exploitation contract, by an annual rate per square kilometre denominated in United States dollars. The Council shall establish such annual rate for each Calendar Year.~~ The amount of the fee shall be established by the Council as required by section 8(1)(d) of the Agreement. […]

This text may require further amendment, noting that the Commission "*considers that this matter would benefit from continued discussion in July 2019*." [ISBA/25/C/18]

Section 2 Fees other than annual fees

Section 3 Miscellaneous

Part IX Information-gathering and handling

~~**Draft regulation 87**~~**Regulation 89**

Confidentiality of information

[…]

3. ~~Other data and information deemed to be~~ "Confidential Information ~~under the law of the sponsoring State.~~" does not mean or include data and information that: […]

provided that following the expiration of a period of 10 years after it was passed to the Secretary-General, Confidential Information shall no longer be deemed to be such unless otherwise agreed between the Contractor ~~that submitted it can demonstrate to the satisfaction of~~and the Secretary-General ~~that it continues to satisfy the definition of Confidential Information~~, and save any data and information relating to personnel matters under ~~this~~ paragraph 2(b) above.

DR89(3) gives the Secretary-General discretion to agree with a Contractor that data may remain confidential beyond ten years following its submission to the ISA (where otherwise there is a presumption towards disclosure). This discretionary power (and the SG's power to make or uphold confidentiality designation more generally) could be circumscribed or supported by safeguards. These could include Standards or Guidelines that assist the Secretary-General's decision-making; a requirement to report to the Council, in general and non-prejudicial terms, any information withheld as a result of the Secretary-General's agreement under DR89; and a process (for stakeholders) for challenging that decision, such as an accessible and simplified administrative dispute procedure.

The process in DR 89(4) could be amended also to allow objection by the Secretary-General at any time. Thirty days may be too short: the documents may be read, or an issue may arise, weeks or months after their submission.

[…]

~~**Draft regulation 88**~~**Regulation 90**

Procedures to ensure confidentiality

3. The Commission shall protect the confidentiality of Confidential Information submitted to it pursuant to these Regulations or a contract issued under these Regulations. In accordance with the provisions of article 163 (8), of the Convention, members of the Commission shall not disclose or use, even after the termination of their functions, any industrial secret, proprietary data which are transferred to the Authority in accordance with article 14 of annex III to the Convention or any other Confidential Information coming to their knowledge by reason of their duties for the Authority.

4. The Secretary-General and staff of the Authority shall not disclose or use, even after the termination of their functions with the Authority, any industrial secret, proprietary data which are transferred to the Authority in accordance with article 14 of annex III to the Convention or any other Confidential Information coming to their knowledge by reason of their employment with the Authority.

[…]

~~**Draft regulation 90**~~**Regulation 92**

Seabed Mining Register

1.The Secretary-General shall establish, maintain and publish a Seabed Mining Register in ~~which~~accordance with the Standards and Guidelines. Such register shall ~~be published~~contain:

(a) The names of the Contractors and the names and addresses of their designated representatives;

(b) The applications made by the various Contractors and the accompanying documents submitted in accordance with regulation 7;

~~(a)~~ The terms of the various exploitation contracts in accordance with

(c) regulation ~~18~~17;

(d) The geographical extent of Contract Areas and Mining Areas to which each relate;

(e) The category of Mineral Resources to which each relate;

(f) All payments made by Contractors to the Authority under these Regulations;

(g) Any encumbrances regarding the exploitation contract made in accordance with regulation ~~23~~22;

(h) Any instruments of transfer; and

(i) Any other details which the Secretary-General considers appropriate (save Confidential Information).

DR38(3)'s requirement for annual reports to be published on the Seabed Mining Register should be reflected in DR92. Other items of public interest could also be included in the register, such as:

- copies of equivalent documents pertaining to *exploration* contracts,
- details of amounts mined,
- incident and notifiable event notices and reports,
- compliance notices,
- details of other ISA compliance related interventions,
- inspection reports.

2.The Seabed Mining Register shall be publicly available on the Authority's website.

As noted by 2018 Stakeholder submissions, additional text could be included in the Regulations to promote accessibility of the Register and other public information. Additions could include specification as to the format(s) and language(s) in which the information will be made available, and stipulation that access to the information on the Register will be open to all, and free of charge.

Part X General procedures, Standards and Guidelines

Regulation 94

Adoption of Standards

The Commission shall, taking into account the views of recognized experts, relevant Stakeholders and relevant existing internationally accepted standards, make recommendations to the Council on the adoption and revision of Standards relating to Exploitation activities in the Area, including but not limited to standards relating to:

(a) Operational safety;

(b) The conservation ~~and Exploitation~~ of the Resources; and

(c) The protection of the Marine Environment, including standards or requirements relating to the Environmental Effects of Exploitation activities, and referred to in regulation 45.

"Relevant Stakeholders' is not a term that was used in previous drafts of the Regulations, but is now found in DR94 [Standards], DR95 [Guidelines] and DR107 [Review of Regulations]. It implies a narrower category than 'Stakeholders', which is defined as '*persons with an interest of any kind in, or who may be affected by, the proposed or existing Exploitation activities under a Plan of Work in the Area, or who has relevant information or expertise'*. As all "Stakeholders" have an interest in or are affected by exploitation activities, the "relevant" qualifier is likely unnecessary and could be deleted to avoid confusion**.**

2.The Council shall consider and approve, upon the recommendation of the Commission, the Standards, provided that such Standards are consistent with the intent and purpose of the Rules of the Authority. If the Council does not approve such Standards, the Council shall return the Standards to the Commission for reconsideration in the light of the views expressed by the Council.

3.The Standards contemplated by paragraph 1 above may include both qualitative ~~or~~and quantitative standards and include the methods, process or technology required to implement the Standards.

~~**Draft regulation 93**~~Standards adopted by the Council shall be legally binding on Contractors and the Authority and may be revised at least every 5 years from the date of their adoption or revision, and in the light of improved knowledge or technology.

It is helpful to have clarity in the Regulations that Standards will be legally binding [DR94(3)]. Further explanation as to the meaning of 'legally binding' in this context may be useful however. Who will determine compliance and is there any appeal to such a determination? What are the repercussions or sanctions available where a Contractor is found to be in non-compliance with Standards? What if the non-compliant party is an ISA organ or member State?

Regulation 95

Issue of ~~guidance documents~~Guidelines

1.The Commission or the Secretary-General shall, from time to time, issue ~~guidance documents (~~Guidelines~~)~~ of a technical or administrative nature~~ for the guidance of Contractors in order to assist in~~, taking into account the views of relevant Stakeholders. Guidelines will support the implementation of these Regulations from an administrative and technical perspective.

Might other organs of the ISA also be empowered to issue Guidelines? For example, the Economic Planning Commission (in relation to compensation or other measures of economic adjustment assistance for developing States whose economies are adversely affected by mining in the Area).

2.The full text of such Guidelines shall be reported to the Council. Should the Council find that a Guideline is inconsistent with the intent and purpose of the Rules of the Authority, it may request that the guideline be modified or withdrawn.

3. The Commission or the Secretary-General shall keep under review such Guidelines in the light of improved knowledge or information.

The Regulations do not indicate the status or import of Guidelines. There is no general wording requiring Contractors to apprise themselves of Guidelines, or to take account of them in their conduct. Text has been deleted from the Standard Contract Terms requiring Contractors to "*observe, as far as reasonably practicable, any guidelines which may be issued by the Commission or the Secretary-General from time to time*" (section 3(c), Annex X). Yet many important aspects of the regime appear to have been relegated to Guidelines, for example (in the first three sections of the Regulations alone):

- the content of the training plan (DR7(g)),
- the process for stakeholder consultation on proposed Environmental Plans (DR11(1)(a)),
- Commission's assessment of applicant's financial and technical capabilities (DR13(2) and (3)),
- documents required in an application for contract renewal (DR20),
- the required content of a feasibility study (DR25),
- determining the required form and amount of the Environmental Performance Guarantee (DR26),
- required aspects of a Contractor's safety management system (DR30(6))

The ISA could require Contractors to demonstrate compliance with the Guidelines except on a showing of good cause for the departure. Or the ISA could use Guidelines as a means of compliance assurance, i.e. adherence to a Guideline, while not mandatory, provides a measure of comfort guarantee that the relevant outcome will meet ISA rules.

As noted above, terminology is important. If guidelines are part of the ISA's "rules, regulations and procedures" this needs to be made clear. If so, they will need to be recommended by the Commission adopted provisionally by Council and approved by Assembly [UNCLOS Articles 160(2)(ii), 62(2)(o), and 165(2)(f)]

See Code Project Short Paper June 2019: Standards and Guidelines

Part XI Inspection, compliance and enforcement

Section 1 Inspections

Regulation 96

Inspections: general

1. The Council shall establish appropriate mechanisms for inspection as provided for in article 162 (2) (z) of the Convention.

The Regulations could detail more precisely what aspects of Contractor conduct or outcomes are to be inspected, pursuant to this Part XI, Section 1 of the Regulations. The Commission notes that "*due to time constraints, the Commission did not have opportunity to consider* [the implementation of an inspection mechanism in the Area] *in detail and will do so at its subsequent meetings, following which it will present recommendations to the Council*." A workshop aimed to stimulate discussions about ISA inspections will be held on 20 July 2019 in Kingston, sponsored by the Pew Charitable Trusts.

2. The Contractor shall permit the Authority to send its Inspectors who may be accompanied by a representative of its State or other party concerned in accordance with article 165 (3) of the Convention, aboard vessels and Installations, whether offshore or onshore, used by the Contractor to carry out Exploitation activities under an exploitation contract, as well as to enter its offices wherever situated. To that end, Members of the Authority, in particular the sponsoring State or States, shall assist the Council, the Secretary-General and Inspectors in discharging their functions under the Rules of the Authority.

[…]

6. Inspectors shall ~~follow~~:

a. Follow all reasonable instructions and directions pertaining to the safety of life at sea given to them by the Contractor, the captain of the vessel or other relevant safety officers aboard vessels and Installations; and ~~shall avoid~~

~~a.~~b. To the maximum extent possible, refrain from any undue interference with the safe and normal operations of the Contractor and of vessels and Installations unless the Inspector has reasonable grounds for believing that the Contractor is operating in breach of its obligations under an exploitation contract.

~~The Secretary-General shall report acts of violence, intimidation, abuse against or the wilful obstruction~~

Regulation 97

Inspectors: general

The Council, based on the recommendations of the Commission, shall determine the relevant qualifications and experience appropriate to the areas of duty of an Inspector under this Part.

1.The Commission shall make recommendations to the Council on the appointment, supervision and direction of Inspectors, including an inspection programme and schedule, under the inspection mechanism established by the Council in regulation 96(1).

2.The Secretary-General shall manage and administer such inspection programme, including the terms and conditions of the appointment of Inspectors, at the direction of the Council.

To meet its duty under DR97(1), the Regulations could stipulate that the Commission must include within its membership persons with expertise in relation to inspections (or appointment and oversight of inspectors), or that the Commission refers to such external expertise where relevant. Standards detailing requirements for inspector selection and management would also seem sensible, to assist the Commission, Council and Secretariat undertake the respective roles required of them by DR97.

Regulation 98

Inspectors' powers

An Inspector may, for the purposes of monitoring or enforcing compliance with the Rules of the Authority and the terms of the exploitation contract: […]

(e) Inspect or test any machinery or equipment under the supervision of the Contractor or its agents or employees that, in the Inspector's opinion, is being or is intended to be used for the

purposes of the Exploitation activities~~;~~, unless such inspection or testing will unreasonably interfere with the Contractor's operations;

(f) Seize any document, article, substance or any part or sample of such for examination or analysis that the Inspector may reasonably require;

(g) Remove any representative samples or copies of assays of such samples from any vessel or equipment used for or in connection with the Exploitation activities;

(h) Require the Contractor to carry out such procedures in respect of any equipment used for or in connection with the Exploitation activities as may be deemed necessary by the Inspector~~; and~~, unless such procedures will unreasonably interfere with the Contractor's operations; and

[…]

The list of inspector powers should include obtaining access to real-time monitoring data.

6. An Inspector shall be bound by strict confidentiality provisions and must have no conflicts of interest in respect of duties undertaken, and shall conduct his or her duties in accordance with the Authority's code of conduct for Inspectors and inspections approved by the Council.

DR 98(6) could benefit from elaboration to clarify who has responsibility for identifying conflicts, by what process, and how such conflicts will be managed.

Regulation 100
Inspectors to report

1.At the end of an inspection, the Inspector shall prepare a report, setting out, inter alia, his or her general findings and any recommendations for improvements in procedures or practices by the Contractor. The Inspector shall send the report to the Secretary-General, and the Secretary-General shall send a copy of the report to the Contractor and to the sponsoring State or States and, if appropriate, the ~~flag~~relevant coastal State or States and the flag State.

~~1.~~2. The Secretary-General shall report annually to the Council on the findings and recommendations following the inspections conducted in the prior Calendar Year, and shall make any recommendations to the Council on any regulatory action to be taken by the Council under these Regulations and an exploitation contract.

~~2.~~3. The Secretary-General shall report acts of violence, intimidation, abuse against or the wilful obstruction or harassment of an Inspector by any person or the failure by a Contractor to comply with this regulation to the sponsoring State or States and the flag State of any vessel or Installation concerned for consideration of the institution of proceedings under national law.

The Regulations could reserve the ISA the power to take regulatory action if its inspectors are intimidated etc. by Contractors, rather than deferring exclusively to the relevant State [DR100(3)].

Section 3 Enforcement and penalties

~~**Draft regulation 101**~~**Regulation 103**

Compliance notice and termination of exploitation contract

1. At any time, if it appears to the Secretary-General on reasonable grounds that a Contractor is in breach of the terms and conditions of its exploitation contract, the Secretary-General shall issue a compliance notice to the Contractor requiring the Contractor to take such action as may be specified in the compliance notice.

2. A compliance notice shall:

(a) Describe the alleged breach and the factual basis for it; and

~~(a)~~ Require the Contractor to take remedial action or other such steps as the ~~Authority~~Secretary-General considers appropriate to ensure compliance within a specified time period~~; and~~

(b) ~~In respect of a violation specified in appendix III to these Regulations, impose the applicable monetary penalty~~. […]

5. If a Contractor, in spite of warnings by the Authority, fails to implement the measures as set out in a compliance notice and continues its activities in such a way as to result in serious, persistent and wilful violations of the fundamental terms of the contract, Part XI of the Convention and the rules, regulations and procedures of the Authority, the Council may suspend or terminate the exploitation contract by providing written notice of suspension or termination to the Contractor in accordance with the terms of the exploitation contract.

6. In the case of any violation of an exploitation contract ~~not specified in appendix III to these Regulations~~, or in lieu of suspension or termination under paragraph 5 above, the Council may impose upon a Contractor monetary penalties proportionate to the seriousness of the violation ~~in accordance with the Guidelines.~~. […]

The Regulations could require all compliance notices and subsequent warnings to be reported to Council and published on the Seabed Mining Register.

It is not clear why the reference to Guidelines (in relation to the Council's imposition of monetary penalties for contractual violations) has been deleted here.

Part XIII Review of these Regulations

~~Draft regulation 105~~Regulation 107

Review of these Regulations

1.Five years following the approval of these Regulations by the Assembly, or at any time thereafter, the Council shall undertake a review of the manner in which the Regulations have operated in practice.

~~1.~~If, in the light of improved knowledge or technology, it becomes apparent that these Regulations are not adequate, any State party, the Commission or any
2.Contractor through its sponsoring State may at any time request the Council to consider, at its next ordinary session, revisions to these Regulations.

3.The Council shall establish a process that gives relevant Stakeholders adequate time and opportunity to comment on the proposed revisions to these Regulations, save for the making of an amendment to these Regulations that has no more than a minor effect or that corrects errors or makes minor technical changes.

The Commission notes that DR107(3) has been added to make "*provision for the involvement of relevant stakeholders in any future amendments to the regulations.*" And that "*the process for such participation will need to be outlined in guidelines*." However, Guidelines are not referenced in the inserted text.

As commented earlier under DR94, the word 'relevant' (before 'Stakeholders') should be deleted.

4.In the light of that review, the Council may adopt and apply provisionally, pending approval by the Assembly, amendments to the provisions of these Regulations, taking into account the recommendations of the Commission or other subordinate organs ~~concerned~~.

Annex X Standard clauses for exploitation contract

Section 3 Undertakings

[…]

3.3 The Contractor shall, in addition:

(a) Comply with the Regulations, as well as other Rules of the Authority, as amended from time to time, and the decisions of the relevant organs of the Authority;

(b) Accept control by the Authority of activities in the Area for the purpose of securing compliance under this Contract as authorized by the Convention;

~~Observe, as far as reasonably practicable, any guidelines which may be issued by the Commission or the Secretary-General from time to time in accordance with the Regulations;~~

It is unclear why this requirement for Contractors to observe Guidelines as far as reasonably practicable has been deleted. See earlier commentary to DR95, regarding issuance of Guidelines

(c) Pay all fees and royalties required or amounts falling due to the Authority under the Regulations, including all payments due to the Authority in accordance with Part VII of the Regulations; and

(d) Carry out its obligations under this Contract with due diligence, ~~efficiency and economy,~~including compliance with ~~due regard to~~ the ~~effect of its activities on~~rules, regulations and procedures adopted by the Authority to ensure the effective protection for the Marine Environment, and ~~while~~ exercising reasonable regard for other activities in the Marine Environment.

Section 9

Renewal

9.1 The Contractor may renew this Contract for periods not more than 10 years each, on the following conditions:

(a) The resource category is recoverable annually in commercial and profitable quantities from the Contract Area;

~~(a)~~(b) The Contractor is in compliance with the terms of this Contract and the Rules of the Authority, including ~~obligations with regard~~rules, regulations and procedures adopted by the Authority to ~~the~~ensure effective protection ~~of~~for the Marine Environment from harmful effects which may arise from activities in the Area;

~~(b)~~(c) This Contract has not been terminated earlier; and

~~(c)~~(d) The Contractor has paid the applicable fee in the amount specified in appendix II to the Regulations.

[…]

Section 11

Termination of sponsorship

11.1 If the nationality or control of the Contractor changes or the Contractor's sponsoring State or States, as defined in the Regulations, terminates its sponsorship, the Contractor shall promptly notify the Authority~~.~~, and in any event within 90 Days following such changes or termination.

11.2 In either such event, if the Contractor does not obtain another sponsor meeting the requirements prescribed in the Regulations which submits to the Authority a certificate of sponsorship for the Contractor in the prescribed form within the time specified in the Regulations, this Contract shall terminate forthwith.

Section 12

Suspension and termination of Contract and penalties

12.1 The Council may suspend or terminate this Contract, without prejudice to any other rights that the Authority may have, if any of the following events should occur: ~~(a)~~ […]

(c) If the Contractor knowingly or recklessly or negligently provides the Authority with information that is false or misleading; […]

Section 13

Obligations on Suspension or following Expiration, Surrender or Termination of a Contract

13.1 In the event of termination, expiration or surrender of this Contract, the Contractor shall: […]

(c) 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.~~ […]

13.3 Upon termination of this Contract, any rights of the Contractor under the Plan of Work and in respect of the Contract Area also terminate.

Appendix I Notifiable events

In respect of an Installation or vessel engaged in activities in the Area, notifiable events for the purposes of regulation 36 include:

1. Fatality of a person.
2. Missing person.
3. Occupational Lost Time illness.
4. Occupational ~~injuries~~Lost Time injury.
5. Medical evacuation (MEDEVAC).
6. Fire/explosion resulting in an injury or major damage or impairment.
7. Collison resulting in an injury or major damage or impairment.

8. Significant leak of hazardous substance.

9. Unauthorized Mining Discharge.

10. Adverse environmental conditions with likely significant safety and/or environmental consequences.

11. ~~Threat~~Significant threat or breach of security.

12. Implementation of Emergency Response and Contingency Plan.

13. Major impairment/damage compromising the ongoing integrity or emergency preparedness of an Installation or vessel.

14. Impairment/damage to safety or environmentally critical equipment.

15. ~~Contact~~Significant contact with fishing gear.

16. Contact with submarine pipelines or cables.

Appendix III _____Monetary penalties

~~**Prescribed amount (United States dollars)**~~

~~Penalty in respect of any underdeclaration or underpayment in respect of a royalty [ ]~~

~~Penalty in respect of any failure to deliver or furnish a royalty return [ ]~~

~~Penalty in respect of false royalty returns and information [ ]~~

~~Failure to submit an annual report (regulation 4038) [ ]~~

Schedule 1 Use of terms and scope

"Best Available Techniques" means the latest stage of development, and state-of-the-art processes, of facilities or of methods of operation that indicate the practical suitability of a particular measure for the prevention, reduction and control of pollution and the protection of the Marine Environment from the harmful effects of Exploitation activities, taking into account the ~~criteria~~guidance set out in the applicable Guidelines.

"Best Environmental Practices" means the application of the most appropriate combination of environmental control measures and strategies, that will change with time in the light of improved knowledge, understanding or technology, taking into account the ~~criteria~~guidance set out in the applicable Guidelines.

In the Regulations' definition of 'Best Environmental Practices' (BEP), no objective is given for determining the '*most appropriate*' measures. One objective could be protection of the Marine Environment. Further elaboration could also be provided as to the meaning of '*measures and strategies*'. How is BEP inter-related with Best Available Techniques (BAT)? Is the latter subsumed in the former, or are they distinct and non-overlapping? The current definition also lacks explicit reference to international best practices.

"Good Industry Practice" means the exercise of that degree of skill, diligence, prudence and foresight which would reasonably and ordinarily be expected to be applied by a skilled and experienced person engaged in the marine mining industry and other related extractive industries worldwide~~, including Best Environmental Practice, the performance and process requirements under the rules, regulations and procedures of the Authority and applicable Standards that may be adopted by the Authority from time to time.~~.

Note: The Commission determined that, rather than incorporate 'Best Environmental Practices' within then definition of 'Good Industry Practice,' it would be better to develop the two concepts independently. This has been reflected in the Schedule 1 definitions, and also throughout the revised Regulations, where references to 'Best Environmental Practices' have been inserted alongside references to 'Good Industry Practice' as appropriate.

"Incident" means ~~a situation~~an event, or sequence of events where activities in the Area result in:

~~(a)~~ A marine Incident or a marine casualty as defined in the Code of International Standards and Recommended Practices for a Safety Investigation into a Marine Casualty or Marine Incident (Casualty ~~(b)~~(a) Investigation Code, effective 1 January 2010);

~~(c)~~ Serious Harm to the Marine Environment or to other existing legitimate sea uses, whether accidental or not, or a situation in which such Serious Harm to the Marine Environment is a reasonably ~~Harm to the Marine Environment is a reasonably~~ foreseeable consequence of the situation; and/or

~~(d)~~(b)

~~(e)~~ Damage to a submarine cable or pipeline, or any ~~installation or floating platform.~~

~~(f)~~(c) Installation.

"Installations" includes, insofar as they are used for carrying out activities in the Area, structures, platforms, ~~equipment and surface and bottom devices,~~ whether stationary or mobile~~, including unmanned submersibles~~.

It is unclear why the definition of 'Installations' has been narrowed so as now to include only structures and platforms, and to remove equipment and unmanned submersibles from its scope. This will have implications each time 'Installations' is used throughout the Regulations, for example DR30(1)(a): "*The Contractor shall ensure at all times that all vessels and Installations operating and engaged in Exploitation activities are in good repair, in a safe and sound condition …*"

"Marine Environment" includes the physical, chemical, geological and biological ~~and genetic~~ components, conditions and factors which interact and determine the productivity, state, condition and quality and connectivity of the marine ecosystem(s), the waters of the seas and oceans and the airspace above those waters, as well as the seabed and ocean floor and subsoil thereof.

Explanation as to the reason and implications behind the removal of 'genetic' components from the definition of 'Marine Environment' would be helpful. Does this deletion imply that genetic material is not considered to form part of the Marine Environment for the purposes of the Regulations (including those provisions that seek to protect the Marine Environment from harm from Exploitation)?

Consideration should be given to adding to the definition: 'species, biodiversity and ecosystems'.

"Material Change" means a change ~~(which is not minor or administrative)~~ to the basis on which the original report, document or plan, including a Plan of Work, was accepted or approved by the Authority, and includes changes such as physical modifications, the availability of new knowledge or technology and changes to operational management that are to be considered in the light of the Guidelines.

"Metal" means any metal contained in a Mineral.

"Mining Discharge" means any sediment, waste or other effluent directly resulting from Exploitation, including shipboard or Installation processing immediately above a mine site of Minerals recovered from that mine site.

"Reserved Area" means ~~an area~~any part of the Area designated by the Authority as a reserved area in accordance with article 8 of annex III to the Convention.

"Rules of the Authority" means the Convention, the Agreement, these Regulations and other rules, regulations and procedures of the Authority as may be adopted from time to time.

It would be helpful for the Regulations to clarify expressly whether or not 'Rules of the Authority' includes Standards (or Guidelines). The term is used repeatedly and significantly throughout the Regulations: for example, the Commission must apply the Rules of the Authority in reviewing a proposed Plan of Work (DR12(4)), and a contract will be renewed provided the Contractor is not in breach of the Rules of the Authority. If Standards are not encompassed in those provisions, it is important for all parties to know, but would weaken the status and import of Standards.

The term "Serious Harm to the Marine Environment" needs definition.

Editor's note: This white paper was updated on Aug. 27 2019, to reflect Dr. Aline Jaeckel's change of affiliation to University of New South Wales.