The Secretary-General
International Seabed Authority
Kingston, Jamaica
Via email to consultation@isa.org.jm

Dear Secretary-General,

Attached as Annex 1 please find my response (in *italics*) to the consultation described below. I am writing in my personal capacity, and I grant permission to have my response made publicly available. I appreciate this opportunity to contribute to the work of the Authority.

Sincerely yours,

Philomène Verlaan JD PhD FIMarEST
Oceanographer and Attorney-at-Law
Email:pverlaan@gmail.com

Annex I

Response to ISA Consultation on Draft Exploitation Regulations (ISBA/23/LTC/CRP3/rev & ISBA/23/C/12)

General Questions

1. Do the draft regulations follow a logical structure and flow?

It seems so to me.

2. Are the regulatory provisions as presented clear, concise, and unambiguous as to their intended need and requirement?

Overall, yes, with the exceptions noted below under Other Comments.

3. Is the content and terminology used and adopted in the draft Regulations consistent and compatible with the provisions of the Convention, the 1994 Implementing Agreement?

Overall, yes, with two exceptions noted below (reprised below under Other Comments).
DR 2(6). *This is inconsistent with marine scientific research (MSR) rights and freedoms under the Convention (LOSC), including those set out in DR 1 (4). Applicants must be able to include information obtained under MSR rights and freedoms.*
DR 75 1(e). *LOSC Annex III Art. 14(2) does not use 'proprietary' to describe equipment - delete 'proprietary'. (See also q 4(a) below.)*

4. Do the draft Regulations provide for a stable, coherent and time bound framework to facilitate regulatory certainty for contractors to make the necessary commercial decisions in relation to exploitation activities?

Overall yes, but more time lines/deadline specificity needed in DR 18, DR 82(2).

5. Is an appropriate balance achieved between the content of the draft Regulations and that of the contract?

Unable to suggest response because the meaning of this question is unclear to me.

6. *Exploration regulations and regime:* are there any specific observations or comments that the Council or other stakeholders wish to make in connection with their experiences, learnings or best practices under the exploration regulations and process that would be helpful for the Authority to consider in advancing the exploitation framework?

Not at present.

Specific Questions

1. *Role of sponsoring States*: draft Regulation 91 provides for a number of instances where such States are required to secure compliance of a contractor.

a. What additional obligations, if any, should be placed on sponsoring States to secure compliance by contractors whom they have sponsored?

None at present.

2. *Contract area*:

a: For areas within a contract area, not identified as mining areas, what due diligence obligations should be placed on a contractor as regards continued exploration activities? (Such obligations could include a programme of activities covering environmental, technical, economic studies, reporting obligations i.e. similar activities and undertakings under an exploration contract).

It should not be assumed that a contractor will continue exploration once exploitation has started. An option for the contractor to cease exploration for the duration of the exploitation contract should be available. If the contractor is planning to continue exploration activities after exploitation commences, there are two options. 1) The exploration activities should either be subject to a new contract - if the previous exploration contract has ended. 2) The current exploration contract should be reviewed and amended as necessary, in accordance with the applicable regulations governing exploration.

b. As to Contract Area and Mining Area(s), are these concepts and definitions clearly presented in the draft regulations?

Yes.

3. ***Plan of work****:* there appears to be confusion over the nature of a Plan of Work and its relevant content. To some degree this is the result of the use of 1970/1980s terminology in the Convention. Some guidance is needed as to:

a. What information should be contained in the Plan of Work?

The current group of required Annexes to the application for a Plan of Work for Exploitation sets out all the information necessary.

b. What should be considered supplementary plans?

Why is this question being asked? The draft Regulations and the LOSC/IA do not contain this concept. The process is complicated enough already without introducing this new item. Adding this option will also make it much more difficult to ensure the required level playing field and equal treatment among contractors.

c. What should be annexed to an exploitation contract versus what documentation should be treated as informational only for the purposes of an application for a Plan of Work?

All information attached to an application for a Plan of Work should be annexed to an exploitation contract. See also the rejection of the "supplementary plans" concept above, for the same reason. If the contractor considers the information relevant to its application, even if it is not required by the Regulations, it must be a formal part of the application (and the eventual contract) and subject to scrutiny by the ISA.

d. Equally, the application for the approval of a plan of work anticipates the delivery of a pre-feasibility study: has this been planned for by contractors?

I am not privy to the information requested.

e. Is there a clear understanding of the transition from prefeasibility to feasibility?

The transition is not clear to me, as a reviewer, but it might be clear to contractors. This reviewer considers that a clear understanding of the transition is not one that can be easily derived from the draft Regulations as written. It is necessary to ensure a level playing field of understanding in the draft Regulations. For example, there seems to be a distinction between transition <u>studies</u> and transition <u>status</u>. A transition seems to refer to a feasibility <u>status</u>. What constitutes <u>transition</u> must be defined. The draft Regulations refer only to Studies. There is no definition in Schedule I of a Pre-Feasibility Study, although Annex II sets out what must be in it. The current definition of Feasibility in Schedule I, which addresses only a Study, seems to be circular, as it refers only to DR 29, which does not define it and furthermore refers to Recommendations, which I cannot find on this point as such (please advise if I have overlooked them), unless the ISA is referring to "Annex V: Reporting Standard of the International Seabed Authority for Mineral Exploration Results Assessments, Mineral Resources and Mineral Reserves (https://www.isa.org.jm/reporting-templates)" which does define them. If the latter is the case, the draft Regulations need to be amended to reflect Annex V, and contractors especially need to review both these draft Regulations and Annex V to ensure they are consistent and reasonable.

4. ***Confidential information****:* this has been defined under draft Regulation 75. There continues to be diverging views among stakeholders as to the nature of confidential information, with some stakeholders

considering the provisions too broad, others too narrow. It is proposed that as exhaustive a list as possible be drawn up identifying non-confidential information.

Good idea, but keep the list clearly as open-ended for both addition and subtraction, with a clear procedure to propose, discuss and add amendments.

a. Do the Council and other stakeholders have any other observations or comments in connection with confidential information / confidentiality under the regulations?

*With regard to **DR 75 1(e).** LOSC Annex III Art. 14(2) does not use 'proprietary' to describe equipment - delete 'proprietary'.*

5. ***Administrative review mechanism**:* as highlighted by ISA Discussion Paper No.1, there may be circumstances where, in the interests of cost and speed, an administrative review mechanism could be preferable before proceeding to dispute settlement under Section 5, Part XI of the Convention. This could be of particular relevance for technical disputes, and determination by an expert or panel of experts.

a. What categories of disputes (subject-matter) should be subject to such a mechanism?

Environmental, geological, financial, economic, commercial, engineering, technological disputes are all eligible types of dispute. However, not legal disputes, or any dispute whatsoever that requires interpretation of the language of the LOSC/IA. These must be the sole preserve of lawyers specialized in law of the sea. This is necessary to try to avoid the problems faced by the Commission on the Limits of the Continental Shelf.

b. How should experts be appointed?

*Consult and apply the most appropriate of the selection procedures for the experts themselves used by, for example, Arbitral Tribunals, the Permanent Court of Arbitration, the International Centre for Settlement of Investment Disputes, to ensure the very highest **technical** quality of experts with regard to the subject matter. Technical competence is the gold standard, and is not to be subjugated to and weakened by criteria irrelevant to that competence. The parties to the dispute should propose and preferably agree on at least three experts. If they do agree, then the choice of experts is final and requires no further administrative or procedural (e.g., by the Council) confirmation for their appointment. If the parties cannot agree, engage the ITLOS (Seabed Disputes Chamber)to make the final choice of experts from a list agreed by the parties.*

c. Should any expert determination be final and binding?

Not on the parties to the contract/dispute. An option to appeal to the Seabed Disputes Chamber should be available. But its review should be final and binding.

d. Should any expert determination be subject to review by, say, the Seabed Disputes Chamber?

Only if the parties to the contract/dispute are unhappy with the result. See also answer above to (c). In other words, the expert determination accepted by the parties cannot be second-guessed by the LTC or other organs of or State-parties to the ISA .

6. ***Use of exploitation contract as security***: draft Regulation 15 provides that an interest under an exploitation contract may be pledged or mortgaged for the purpose of raising finance for exploitation activities with the prior written consent of the Secretary-General. While this regulation has generally been welcomed by investors,

a. What additional safeguards or additional considerations, if any, should the Commission consider?

This is outside my area of expertise.

7. ***Interested Persons and public comment****:* for the purposes of any public comment process under the draft Regulations, the definition of "Interested Persons" has been questioned as being too narrow.

a. How should the Authority interpret the term "Interested Persons"?

The concept of "Interested Persons"(IP) should not be confused with or equated to the legal concept of "standing".

The requirement to include credentials is useful: a) for the ISA and other bodies (e.g., contractors, sponsoring States) assessing the submitted information, b) for those who are thinking of making of a submission as an initial self-selecting triage and c) as an essential part of the record of what was presented to the ISA in its decision-making process on the plan of work, should its decision be challenged.

However, the current definition in Schedule I should have "in the opinion of the Authority" removed. It adds a risk for potential challenge (see below) as well as adding unnecessary procedural complexity (e.g., does a potential submitter first need to obtain the ISA's view on whether it is an IP? And who takes that decision? The LTC, to be confirmed by the Council? Surely the ISA has more than enough to do already). Otherwise the definition is acceptable.

The ISA should continue its present practice of placing draft regulatory items for public consultation on its website for <u>anyone</u> - regardless of whether they fit the IP definition - to respond to when those items have reached the level of ripeness for external comment. This is because good ideas can and do spring from the most unlikely places. Also, because the LOSC designates the Area and its resources as the common heritage of mankind, it is likely to be legally tricky to exclude parts of mankind from a consultation process on the Area and its resources conducted via open invitation on the web to submit written submissions. Note that "member of mankind" is therefore an acceptable credential in this limited context, and if anyone puts that down in their submission, the chances of them having read the LOSC are probably large enough for that to suffice.

However, in these written public consultation calls, the ISA should make it clear that submissions <u>must</u> be accompanied by the submitter's name, address, and (self-assessed) IP credential information, and that the submission will be published on the ISA's website.

If the submitter wishes their personal details to remain anonymous <u>on the ISA's website</u>, then the current excellent practice by responsible news media to publish the submission (such as in letters to the editor) but withhold the submitter's personal details with the following statement "name, address and credentials supplied" should be implemented by the ISA. <u>But in no case should the submission itself, once received by the ISA, ever be unpublished on the web, even if the ISA considers that the submitter is not an IP within its definition.</u>

The ITLOS decision not to permit NGOs to formally submit and argue <u>amicus</u> briefs in the 2011 Advisory Opinion on sponsoring State responsibilities is a helpful precedent here. Please note that I do not agree with the ITLOS decision on this point with regard to the denial of the opportunity to NGOs to submit and argue their case formally. The ITLOS published the NGO briefs in a separate section on their website, which approach I do support.

If the level of written input to a public consultation threatens to become overwhelming and unmanageable, the issue can be revisited then. Meanwhile, the current IP definition (even if the ISA opinion clause remains in it) does not in fact exclude anyone from making a written submission.

Public consultations involving actual in personam *meetings and oral testimony are a different matter and not addressed in my response here.*

b. What is the role and responsibility of sponsoring States in relation to public involvement?

It should be remembered that neither the LOSC nor the IA require public involvement in the decision-making process by the ISA or by sponsoring States on applications to the ISA for plans of work for exploitation (or exploration, or for activities in the Area in general). The sponsoring State is therefore not required under the LOSC/IA to engage in public consultations on plans of work submitted by its sponsored contractor. What a sponsoring State is required to do under its own Constitution and legislation is a different matter and not addressed here in this response.

However, if the ISA issues a call for written public input on a matter, then the ISA could request sponsoring States to publicize that call. This could be done, e.g., in the same way that these States publicize such calls on their own domestic issues for which such consultation is required under national legislation (e.g., in their official National Gazette or similar). For sponsoring States that do not have a national legislative process to involve their public in consultations on domestic issues, the ISA could request them to make the appropriate arrangements within their own systems to inform their nationals of the opportunity to comment. In general the ISA should request all its member States to publicize all ISA calls for public comment, and States should comply as per, e.g., LOSC Art. 138 (general conduct of States in relation to the Area).

The draft Regulations expect contractors to submit in their applications descriptions of "any" public consultations they have had, although DR 17(e) correctly does not require, but only "encourages" public consultation by contractors and sponsoring States. Therefore, contractors should be able, without prejudice to the merits of their application, to submit an application for a plan of work without having engaged in prior public consultation themselves.

Because the ISA has not issued any guidelines/recommendations/standards for conducting public consultations by contractors in this context, there is no common standard and therefore no level playing field for contractors with regard to public consultations conducted under their own auspices or those of their sponsoring State. Therefore, for those contractors that do choose to engage in prior public consultation, those consultations may at most only be noted by the ISA (LTC/Council/Assembly) in considering the plan of work. They may not be assessed or compared between contractors.

c. To what degree and extent should the Authority be engaged in a public consultation process?

Further to the comment in (b) above, it should be remembered that neither the LOSC nor the IA requires public involvement, and that includes public consultation, in the decision-making processes by the ISA (or by sponsoring States) with regard to activities in the Area, which includes plans of work. Thus engaging in a public consultation process at all is the ISA's sole prerogative, for which it can set the terms as it sees fit.

Furthermore, it should be remembered that IA Annex Section 1(15) requires the Authority to "adopt … any additional rules, regulations and procedures necessary to ***facilitate*** *[emphasis supplied] the approval of a plan of work for exploration or exploitation;".*

In the context of approving plans of work, the ISA must be guided by the LOSC/IA, and as per IA Annex Section 1(15) cited above, rules, etc., governing public consultation cannot impede the required facilitation of the approval of the plan of work. With regard to plans of work, therefore, the ISA must decide whether inviting public views on a plan of work is likely to assist it in facilitating its approval, and if so, how that is best achieved. It must also remember that the "equal treatment of contractors"

requirement under the LOSC/IA entails that if one plan of work is submitted for public consultation, all of them must be so submitted, and in the same way.

In the present context, the ISA should therefore engage in public consultation to the extent necessary to assist it in achieving the policies relating to activities in the Area set out in LOSC Article 150, as further elaborated with regard to facilitating approval of plans of work specifically in IA Annex Section 1(15).

With regard to plans of work, this reviewer considers that one round of public consultation by the ISA on a given plan of work will suffice. This consultation should therefore occur at the moment where the input from it can provide maximum information, and therefore maximum benefit, to the ISA's decision-making process on a plan of work. At present, the draft Regulations require two rounds of public consultations to be organized by the ISA, one at the Environmental Scoping stage and one at the Environmental Impact Statement stage. This seems excessive and duplicative, and as it will add at least one year and considerable expense to the approval process, is unlikely to be facilitative within the meaning of the LOSC/IA. The contractors and the ISA should consult together to decide at which single point public consultation will be most useful to both in order to best inform the ISA's decision-making process. The draft Regulations should reflect this.

Other Comments

DR 2(6). *This is inconsistent with MSR freedoms, including those set out in DR 1 (4). Applicants must be able to include information obtained under MSR freedoms.*

DR 10(3). *'Area' is too broad - this needs to be redefined in anti-trust (competition law) terminology, analogizing from 'relevant market' concepts there to either defining 'a relevant part of the Area' or at least using that language here. Bear in mind that even the CCFZ as a whole is likely to be too broad in terms of being 'a relevant part of the Area'. Ditto for* ***DR 16 (7).***

DR 23(5) *Delete 'on a continuous basis'. Impractical and unenforceable. "Monitoring in accordance with the EMMP" is sufficient.*

DR 27(2). *Shouldn't 'exploration' be 'exploitation' here?*

DR 30(1); DR 33(2). *Need to define "optimize recovery".*

DR 34(3). *As this list already contains some of IMO's marine environmental Conventions, the others should be added here as well, e.g., Anti-fouling, Ballast Water, OPRC/HNS, as well as the London Convention/ Protocol - which latter are not IMO Conventions but relevant here.*

DR 40(3). *'or' must become 'and'.*

DR 42(1). *Add before "of the Authority": 'or contractors or subcontractors or other individuals operating under the auspices'.*

DR 75 1(e). *LOSC Annex III Art. 14(2) does not use 'proprietary' in this way here - delete 'proprietary'.*

DR 82(2). *Needs to be more specific on time; 'reasonable' insufficient.*

DR 84. *A confidentiality requirement is necessary here.*

DR 84(2). *Avoiding a conflict of interest includes an inspector not having the nationality of any Sponsoring State or Contractor State or State-Owned Enterprise. This is proposed for inclusion.*

* * *

Schedule 1 - Use of Terms -

- With regard to the definition of **"Exploitation"** and **"Exploitation Activities",** I suggest including a qualification with regard to "processing and transportation systems" such as by adding "in the Contract Area", and deletion of "for the production and marketing of metals".

- The definition of **"Good Industry Practice"** doesn't seem to me to be very rigorous or to require the highest standards of industry practice.

- In the definition **"Monitor" or "Monitoring**", I suggest replacing "targets" with "baseline".

- In the definition **"Resources"** I suggest deleting "just".