
Comments on the Draft Regulations on Exploitation of Mineral Resources in the Area (ISBA/23/C/12)*

The following Comments are provided by SJTU-Center for Polar and Deep Ocean Development (PDOD) according to documents issued by International Seabed Authority (ISA) entitled the Note by the Secretariat of Draft Regulations on Exploitation of Mineral Resources in the Area.

PDOD was established in 2013 in devotion of the research of deep sea laws and policies. PDOD has been recognized as an observer of ISA in August 2017. PDOD appreciates positive attitudes and dedicated spirit of ISA in developing Regulations on Exploitation of Mineral Resources in the Area (the Regulations), and appreciates efforts made by ISA Secretary General Mr. Michael Lodge and ISA Legal and Technical Commission. PDOD provides following comments and suggestions on the draft Regulations after adequate studies of the Draft Regulations on Exploitation of Mineral Resources in the Area (the draft Regulations, ISBA/23/LTC/CRP.3*) issued by ISA on August 10th, 2017.

General questions

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

(1) The draft Regulations appear to lack logics on certain aspects of the structure. For instance, the rights and obligations of Contractors are unbalanced. Part V of the draft Regulations stipulated obligations of Contractors, without specifying rights of Contractors. The most significant obligation of Contractors lies in environmental protection by all necessary measures, which has been adopted in Part IV Environmental Matters. Thus, PDOD suggests the obligations of Contractors in Part V be combined into the part of exploitation contract if the draft Regulations do not stipulate rights of Contractors.

(2) Current draft Regulations did not fully implement the United Nations Convention on the Law of the Sea (UNCLOS) and Agreement

* Translated copy.



Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea (the Agreement). For instance, the Enterprise shall be the organ of ISA carrying out activities in the Area directly, including transporting, processing, and marketing of minerals recovered from the Area. The draft Regulations should have had but lack clear provisions on the rights, obligations and responsibilities of the Enterprise.

2. Are the intended purpose and requirements of the regulatory provisions presented in a clear, concise and unambiguous manner?

The provisions of the draft Regulations are insufficient to be clear and unambiguous. For instance, polymetallic sulphides, polymetallic nodules and cobalt-rich ferromanganese crusts are different kinds of mineral resources, and there are differences between acreages of contracts-covered areas, exploitation method and annual fees. It should be more appropriate to establish regulations respectively. The draft Regulations combine 3 different types of resources, and might cause confusions due to lacking of distinctions.

3. Is the content and terminology used and adopted in the draft regulations consistent and compatible with the provisions of the United Nations Convention on the Law of the Sea and the 1994 Agreement relating to the implementation of Part XI of the Convention?

There are issues of inconsistencies with the content and terminology in the draft Regulations with UNCLOS and the Agreement. For instance, the draft Regulations overlooked financial benefit sharing regime provided in the Agreement(Annex II, Section 8, Article 1), and we do not see adequate causes not to consider this regime at present.

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?

Exploitation activities of mineral resources in the Area shall be proceeded under laws and regulations, ISA shall improve the certainty of



supervision on mineral resources in the Area, and shall develop a stable and consistent supervision procedure.

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

UNCLOS and the Agreement grant the legal effect of the Regulations, so the content of Regulations has a nature of universality. However, the exploration contracts between Contractors and ISA have the nature of privity although these contracts demonstrate similar content. Besides, contracts are only binding between certain contractual parties. The content of exploration contracts shall be reflected in the draft Regulations in the first place, however, some content of standard exploration contracts demonstrates no corresponding provisions in the draft Regulations, which should be considered, such as the issue of Contractors rights.

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, or best practices under the exploration regulations and process that would be helpful for ISA to consider in advancing the exploitation framework?

Development of the draft Regulations shall follow thorough discussions based on the principle of consultation and consensus. Planning of the completion time of the Regulations appears to be inappropriate. Instead, the enacting process of the Regulations shall be proceeded from reality and reflect the principle of consultation and consensus.

The current Exploration Regulations have been produced respectively for polymetallic nodules, polymetallic sulphides, and cobalt-rich ferromanganese crusts. The draft Regulations, however, do not specify different types of resources. Polymetallic nodules, polymetallic sulphides, and cobalt-rich ferromanganese crusts have different characteristics of their own, and their mining sites covered by contracts are of different acreages and annual fees. Thus, it is desirable to consider adding annexes to the draft Regulations to regulate different types of resources.



Specific questions

1. *Role of sponsoring States*: draft regulation 91 provides for a number of instances that States are required to ensure the compliance of a contractors. What additional obligations, if any, should be placed on sponsoring states to ensure compliance by contractors that they have sponsored?

UNCLOS and the Agreement provide regulations on Sponsoring State liabilities. International Tribunal for the Law of the Sea (ITLOS) Seabed Disputes Chamber provides further guidelines for Sponsoring State Liabilities in the Advisory Opinion in Request for the Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area (Advisory Opinion of Case No. 17) . Thus, the draft Regulations shall comply with the aforementioned treaties and rules.

4. *Confidential information*: Do the Council and other stakeholders have any other observations or comments in connection with confidential information or confidentiality under the regulations?

This has been defined under draft regulation 75. There continue to be diverging views among stakeholders as to the nature of “confidential information”. Some stakeholders consider the provisions too broad, whereas others too narrow. It is proposed that an exhaustive possible list be drawn up identifying non-confidential information.

The protection of confidential information is essential for Contractors. Besides, ISA shall also take into account the proper management and publication of materials categorized as “non-confidential”. Certain procedures and principles are to be complied with when ISA discloses non-confidential materials submitted by Contractors.

5. *Administrative review mechanism*: as highlighted in the discussion papers No. 1 and 2, there may be circumstances where for the interests of cost and speed, an administrative review mechanism should be preferable before proceeding to dispute settlement under Part XI, section 5, of the Convention. This could be of particular relevance for technical disputes



and determination by an expert or panel of experts. What categories of disputes (in terms of subject matter) should be subject to such a mechanism? How should the experts be appointed? Should any expert determination be final and binding? Should any expert determination be subject to review by, for example, the Seabed Disputes Chamber?

During the exploitation phase of mineral resources of the Area, parties including Contractors, ISA, and so forth may be faced with disputes. In which case, disputing parties shall be involved in negotiations and consultations. When certain negotiation process yields no results, disputing parties may move on to negotiate the establishment of a panel to resolve the dispute. Thus, the administrative review mechanism shall add a procedural prerequisite to provide disputing parties with a chance of direct negotiations and consultations. Written consents of disputing parties to the establishment of a panel shall be attained.

Other Issues

1. Due Regards with Other Types of Activities in the Area

First, “Due regard” implies a reciprocal relationship, rather than unilateral regards of one party to the other. ISA shall strengthen communications and consultations with relevant international organizations so as to reflect reciprocity in the legal documents of these organizations for their understanding and support for the activities of the Area. Second, when issues of “due regard” occur, responsibilities and obligations of ISA, the Contractor and its sponsoring state shall be specified respectively. ISA is the competent agency with the responsibility of communications and meditations to develop an environment for contractors’ exploration and exploitation activities of the Area.

2. Schedule for Developing the Draft Regulations

Development of the draft Regulations relates to substantial contents of environmental protection, sharing of financial and other economic benefits, Contractors’ rights and obligations, and so forth, which calls for substantial workload and discussions. Therefore, the development of the



上海交通大学

极地与深海发展战略研究中心

SJTU-CENTRE FOR POLAR AND DEEP OCEAN DEVELOPMENT

draft Regulations shall advance gradually in accordance with the objective rules and principles, rather than subjective desires and undue immaturity.

Center for Polar and Deep Ocean Development

Shanghai Jiao Tong University

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