ACOPS

ADVISORY COMMITTEE ON PROTECTION OF THE SEA

Draft ISA Exploitation Regulations: ISBA/25/C/WP.1/*Comments*

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INTRODUCTION

These comments relate only to those draft regulations where the Legal and Technical Commission (LTC) made changes since the previous version (ISBA/24/LTC/WP.1/Rev.1) of these draft regulations on which ACOPS has comments, or where the LTC has not addressed the comments submitted to the ISA in September 2018 by the present commentator on that previous version. The latter comments are reprised below [underlined] insofar as they were not expressed in plenary.

The asterisked[*] *comments* [*italicized*] were also made in plenary and submitted in writing to the Secretariat by the present commentator during the 25th meeting of the ISA Council (15-19 July 2019) under agenda item 11: "Consideration and adoption of the draft regulations on the exploitation of mineral resources in the Area". The absence of a comment on a draft regulation or a draft Annex does not imply either approval or disapproval of that draft regulation or draft Annex.

We offer our comments in order to facilitate the practical implementation of these Regulations, bearing in mind that these Regulations will be legally binding, must comply with the applicable law (in particular the 1982 UN Convention on the Law of the Sea and its 1994 Implementing Agreement), and are subject to judicial interpretation. ACOPS appreciates the opportunity to contribute to the work of the ISA.

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COMMENTS

PART I

**Draft Regulation (DR) 2: Fundamental policies and principles: ***_Re the discussion in plenary on DR 2(b) on Law of the Sea Convention (LOSC) Art. 150: we recall the words of H.E. Ambassador M.C.W. Pinto of Sri Lanka who said in 1978 that one of the purposes of Art. 150 is "to compel a dialogue between producers and consumers." LOSC Art. 150 illustrates that the Authority has many competing interests to balance._

Noting that the LTC implemented our comments submitted in September 2018, we have no further comments on this DR.

DR 3: Duty to cooperate and exchange of information

DR 3(g): *_It is in context of the above quote from Ambassador Pinto that we voice our concern here. We recall that Section 7 of the Part XI Implementing Agreement (IA) refers to economic assistance to developing countries with regard to the effects on their economies of activities in the Area. This is of_

crucial importance in implementing, inter alia, *LOSC Art. 150. As drafted, however, DR 3(g) will be impossible to implement.*

Legal problems that immediately arise include, e.g., how to implement this without discriminating between contractors? The ISA cannot legally require this information from only some contractors; all contractors must be required to provide it. Next, all the land-based producers must be required to produce similar information, because the ISA cannot discriminate, or be thought to be discriminating, in their favour by not subjecting them to this requirement as well. Furthermore, the views of land-based producers on the possible effects of DSM in the Area are essential to obtain a complete picture of the "relevant market" (a well-known anti-trust concept, the definition and application of which is recommended to the regulator).

The problems are further compounded by the fact that some contractors are also themselves and/or have interests in land-based production operations. Also, how will sensitive commercial information belonging to the contractors and the land-based producers be protected? Potential anti-trust consequences must here be considered as well (for example, sharing of this type of information between competitors is particularly sensitive and maybe prohibited outright in certain jurisdictions). How and by whom will the responses be evaluated? Will the responses be public, and if not, why not?

Finally, we note that the phrase "use their best endeavours" is not recommended in legally binding instruments, because even if, as here, it is prefaced with a mandatory "shall", this clause remains essentially unenforceable in practice. It is recommended to delete DR 3(g).

Our original objection to DR 3(g) (reprised below insofar as it has not been also expressed in plenary above) has been addressed in part by weakening the "shall" to "shall use their best endeavours", but this change still does not address the *ultra vires*, level playing field and implementation issues we raised, to which we now add the issue of Contractors who are also land-based producers and/or have interests in land-based production operations. We further note that DR 3(a) could, under appropriate circumstances, be invoked should the Authority find it impossible to accomplish its duties under Section 7 of the Annex to the IA of the LOSC without enlisting the help of the Contractors.

We can find no specific power in the LOSC or the Implementing Agreement (IA) for the ISA to require this of the contractors. Even if some residual or implied power to this effect could be found in either of these instruments, it would be impossible to implement.

PART II

DR 12: General

DR 12(3):: **This appears to be an effort to reprise the Art. 150(i) requirement ("ensuring ... the development of the common heritage for the benefit of mankind as a whole") in the context of setting criteria for evaluating Plans of Work by the LTC. The many problems with the highlighted portion include:*

First, the precise LOSC language of Art. 150(i) is not used. Legally binding documents (such as the LOSC/IA) must not be paraphrased in their implementing instruments (such as the exploitation Regulations). Paraphrasing will not operate to change the text or the meaning of the governing instrument. It is the governing instrument that will prevail if the text of the implementing instrument is submitted to judicial or arbitral scrutiny. It is necessary for the Regulations to implement what is actually written in the governing instrument, not what one might have wished had been written.

Second, even if the correct legally binding language under Art. 150(i) were used here, there is no definition of what "the development of the common heritage for the benefit of mankind as a whole" means. It is necessary to be precise and specific in these Regulations, in order to facilitate their predictability, implementation, and enforcement.

Third, even if this phrase were to be adequately defined in these Regulations for the regulatory purpose set out herein, it is unlikely that the LOSC may legally be interpreted so as to cause a Plan of Work alone to bear the entire burden of that Art. 150(i). This is in part because this phrase is only one of many criteria (see, e.g., Part XI Sections 1 and 2) to which activities in the Area must be subject under the LOSC. Hence why single out this one criterion in these Regulations for special attention in evaluating Plans of Work? This selective focus in itself is likely to be incompatible with the LOSC.

Fourth, even if this one criterion could legally be singled out for special focus, Art. 150(i) must apply to all Plans of Work, because Art. 150 sets out "policies relating to activities in the Area", not just to exploitation. This has at least two legally problematic consequences:

a) Art. 150(i) also applies to, for example, exploration (this is also a form of "development of the common heritage" that can "benefit mankind as a whole"), and it is noted here that Plans of Work for exploration are not subject to specific evaluation for this criterion under the current Exploration Regulations.

b) It is also unlikely that Art. 150(i) can be applied "uniformly" (as required by LOSC Annex III Art. 17(1)) and that the requirement itself is "non-discriminatory" (LOSC Annex III Art. 6(3)). This is in part because with each additional application for a Plan of Work - including for exploration - the circumstances (e.g., economic, environmental, commercial) surrounding that application will be different from those obtaining for the previous applications. (The difficulties this poses for the development of Regional Environmental Management Plans and the assessment of cumulative impacts are noted but not further addressed here.)

It is therefore recommended to amend DR 12(3) to have a full stop after 'Agreement'.

The above comments were also made in our written submission to the ISA on the previous version of the draft regulations and are not reprised here.

DR 13: Assessment of applicants

DR 13(1)(e): **Our concern here relates to the language "or can demonstrate it will have", which we will refer to as the "future capability" option. It is not at all clear that such a 'future capability' facility - which is at least implicit, if not explicit, in the "will have" criterion - is compatible with the LOSC (see, e.g., Annex III Art. 13(1)(c)). Furthermore, many implementation questions immediately arise. These include the following. How and when will this 'future capability' be determined? What is the cut-off date? How will it be decided which contractors will benefit from what is essentially a relaxation of the financial and technical requirements that are supposed to be applicable to all? How will the requirement that the ISA must treat contractors uniformly and without discrimination be met under these circumstances?*

If this 'future capability' option is to be retained, although we ***recommend that it be deleted****, this part of the DR requires much more detailed elaboration on how it will work in practice.*

DRAFT

The above comments were also made our written submission to the ISA on the previous version of the draft regulations and are not reprised here. We note as well that our objection to Regulation 13(1)(e) has not been satisfied by substitution in the current text of the language "or can demonstrate it will have" for the "or will have" original. Although the amendment testifies to the validity of our objection, it does not cure the issues raised therein, as set out above.

DR 13(1)(f): Our objection to DR 13(1)(f) (reprised below) has not been addressed. We add here two further comments in support of our recommendation to delete DR 13(1)(f).

a) The criterion - if retained - must read "commercial viability" as per LOSC Annex III Art.17(2)(b)iii, because "economic viability" is not found in the LOSC.

b) The criterion of "commercial viability", according to the LOSC ***only*** relates to setting the contractual duration of exploitation, which in DR 20 the Authority has set at an initial maximum of 30 years. It can be shorter, by mutual agreement. It is incompatible with the LOSC - and makes no sense - to also make this criterion an element in the assessment of the suitability of the *applicant* for an exploitation contract, which is what is being done here in this DR 13.

This first presents a problem of legal competence. Where in the LOSC/IA is the ISA given the power to substitute its economic - i.e., commercial - judgement for that of the contractor? Next, if the *ultra vires*/legal competence issue raised above is overcome, how will 'economic viability' be defined and by whom will it be determined whether it has been credibly demonstrated? Where will the ISA find the appropriate expertise to advise it? The evaluation of the economic viability of a commercial enterprise, especially an emerging one, is very difficult, as venture capitalists, fund managers, investors, accountants, bankers and others for whom this type of evaluation is their profession will attest. Even some long-established companies have collapsed shortly after and despite apparently having been given a clean bill of health by their auditors.

DR 13(1)(f) also illustrates an overall problem permeating these draft Regulations, i.e., they currently require the making of commercial judgments by a regulatory body for which we can find no authority in the LOSC/IA and for which, even if some such power could be implied, the regulator (regardless of whether it is the LTC or the Council) is neither equipped nor qualified. Furthermore, it is likely to be impossible to apply these requirements to contractors uniformly and without discrimination.

DR 13(3)(a): Noting that the LTC implemented our comments submitted in September 2018, we have no further comments on this part of the DR.

DR 13(4)(a): Our objection (reprised below) to DR 13(4)(a) has not been addressed. Furthermore, in that the "commercial viability" criterion is here applied to assessing the *Plan of Work*, rather than the *applicant*, as in DR 13(1)(f), its inclusion here makes more sense, in that the Authority is asking the applicant to justify its request for a given contract term. This is arguably compatible with the LOSC but the actual feasibility, let alone the credibility of an applicant doing this for 30 years in the future are open to question. Even so, this still runs afoul of the other objections made under DR 13(1)(f) above. It is recommended to delete DR 13(4)(a).

See comments made under DR 13(1)(f) above re economic - which here should also be "commercial" (not "economic") - viability and *ultra vires*/substantive legal competence aspects. These comments also apply with regard to the determination of technical achievability.

DR 13(4)(b): Our objections (reprised below) to DR 13(4)(b) have not been addressed. It is recommended to delete DR 13(4)(b). The same problems set out above for DR 13(1)(f) and DR 13(4)(a) apply here.

PART III

DR 20 (former DR 21) Term of exploitation contracts: DR 20(6)(a): **How will be 'commercial and profitable quantities' be defined and by whom will it be determined whether this has been credibly demonstrated? What is the difference between 'commercial' and 'profitable'?*

See also our comments made under **Annex X Section 9.1(a).**

DR 21 (former DR 22): Termination of sponsorship
We note with approval deletion of former DR 22(7), given the objections we made. We also note that the LTC is awaiting a report by the Secretariat on this DR.

DR 25 (former DR 26): Documents to be submitted prior to production
DR 57 (former DR 55): Modification of a Plan of Work by a Contractor (from PART V)

We note that the LTC is awaiting more discussion with stakeholders on DR 25 and a report by the Secretariat on DR 57. We reprise our comments on the previous version with regard to DR 25(1) and DR 57(2) & (4): These two draft regulations are considered together here because they represent the same problem: the issues of *ultra vires* and substantive competence raised in **DR 13(1)(f)** above with regard to two ISA regulatory bodies - i.e., the LTC and the Council - but here the problem occurs with regard to the role and functions assigned to the Secretary-General.

Where in the LOSC/IA is the power assigned to the Secretary-General and where is the expertise in the Secretariat or in the Secretary-General to consider, let alone decide, on the need, if any, of Material Changes or non-Material Changes in a Plan of Work? LOSC Art. 166(3) assigns **administrative** functions to the Secretary-General. **[Emphasis supplied.]** It is not at all clear to us that the tasks assigned to the Secretary-General in these two draft regulations are administrative, especially with regard to Material Changes. See also discussion under **DR 76 (Part VII)** below. Furthermore, how will this process ensure transparency and uniform and non-discriminatory treatment of Contractors?

These tasks are the responsibility of the LTC under the LOSC/IA, which must then make the appropriate recommendations to the Council, on which the Secretary-General must act. See also comments made under **DR 13(1)(f)** above re *ultra vires*/substantive legal competence issues with regard to the role and functions assigned to the Secretary-General under these draft Regulations.

The Secretary-General could perhaps be accorded the option to propose to the LTC that certain (Material and/or non-Material) Changes to a Plan of Work may be needed and to advise the Contractor accordingly so that the Contractor can prepare a response for the LTC and (eventually) the Council to consider. However, we are unable to find in the LOSC/IA any basis for the Secretary-General alone to engage in such consultations with the Contractor and to take such decisions alone, without consulting the LTC and the Council. Furthermore, how will this process ensure transparency and uniform and non-discriminatory treatment of Contractors? This proposed process is also not clear in light of **DR 25(4)-(6)**.

DR 28 (former DR 29) Maintaining Commercial Production: Noting that the LTC implemented our comments submitted in September 2018, we have no further comments on this DR.

DR 29 (former DR 30): Reduction or suspension in production due to market conditions
We note that the LTC is awaiting a report by the Secretariat on DR 29. We reprise our comments on the previous version with regard to the current **DR 29(2)**: This is another example of the combined *ultra vires*/substantive legal competence problem with regard to commercial judgements by regulatory bodies described under **DR 13(1)(f).**

Former DR 31: Its deletion is noted with approval, given the many objections we made.

DR 30 (former DR 32): **Safety, labour and health standards**
Noting that the LTC implemented our comments submitted in September 2018, we have no further comments on this DR.

DR 32 (former DR 34): Risk of Incidents
Noting that the LTC implemented our comments submitted in September 2018, we have no further comments on this DR.

DR 36 (former DR 38): Insurance
Noting that the LTC implemented our comments submitted in September 2018, we have no further comments on this DR as currently drafted; however, we note that the LTC is awaiting a report by the Secretariat.

DR 39(3) Books, Records and Samples: **This has been fatally weakened - i.e., made essentially unenforceable, by the addition of the qualifying language "to the extent practical". This loophole must be closed by the deletion of that language and the reversion to the original language from the previous version (former DR 41(3)). This type of qualifying language is not recommended for use in legally binding instruments. Furthermore, we recommend that at the end of the contract, these samples be required to be transferred to an institution with public access to enable their further study. Under no circumstances must they be discarded. Where analytical methodology requires the destruction of samples, records must reflect this.*

PART IV

DR 44 (former DR 46): General obligations
We note that the LTC needs further information on the role of the Authority and the Sponsoring States with regard to this DR as a whole. We concur and suggest that more information is also required on the role of Contractors.

We further note that this DR is addressed to three different parties/bodies - the Authority, Sponsoring States, and Contractors. Each party/body has different powers, rights and duties under the LOSC with regard to the four obligations (a)-(d) set out in this DR. These obligations cannot be imposed in a single blanket Regulation that is not specifically differentiated for each party/body. Each obligation must be carefully defined for and allocated to the appropriate party/body/parties/bodies for implementation and enforcement. This is essential for regulatory clarity and predictability, and to maintain a level playing field for all Contractors. Consequently we await this further information before offering a final view.

We reprise our comments on the previous version with regard to the current **DR 44(d)**: It is recommended to replace "Promote" with "Require". This is consistent with Fundamental Principle 5(d) of these DRs.

DRAFT

DR 50(2) (former DR 48(2)): Restriction on Mining Discharges: **We recommend that DR 50(2) be mostly replaced with the language, adjusted mutatis mutandis, from Article 8(1) of the 1996 Protocol to the 1972 Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter (which closely follows Article V of the 1972 Convention covering the same topic (LC/LP)), as follows:*
[We did not read this language in plenary as it was too long; we recommended using language drawn from the LC/LP and said we would provide it to the Secretariat, which we did, as follows.]
Proposed Revised DR 50(2): However, the Contractor need not comply with the obligation in paragraph 1 above when it is necessary to secure the safety of human life or of vessels, aircraft, platforms or other man-made structures at sea in cases of force majeure caused by stress of weather, or in any case which constitutes a danger to human life or a real threat to vessels, aircraft, platforms or other man-made structures at sea if disposal, dumping or discharge into the Marine Environment of any Mining Discharge appears to be the only way of averting the threat and if there is every probability that the damage consequent upon such disposal, dumping or discharge into the Marine Environment of any Mining Discharge will be less than would otherwise occur. Such disposal, dumping or discharge into the Marine Environment of any Mining Discharge shall be conducted so as to minimize the likelihood of damage or injury to human or marine life or Serious Harm to the Marine Environment and shall be reported forthwith to the Authority.

PART V

DR 57 (former DR 55): Modification of a Plan of Work by a Contractor: see above with discussion under DR 25.

DR 58 (former DR 56): Review of activities under a Plan of Work

DR 58(1): We reprise our comments on the previous version. See also comments made under **DR 13(1)(f), DR 25, DR 57 and DR 76** re issues relating to *ultra vires*/substantive legal competence with regard to the role and functions assigned to the Secretary-General under these DRs in this context.

Furthermore, it is not clear why the occurrence of the listed events/circumstances triggering a review are to be a matter of "opinion", and the opinion of only one individual at that. Why isn't the occurrence of these events/circumstances required to be a matter of demonstrable fact instead, to which any stakeholder is able to draw the attention of the Authority? Why is the initial avenue via "discussions" between the Secretary-General and the Contractor? Why is the decision on whether or not to conduct such a review to be taken at the sole discretion of the Secretary-General? How will this process ensure transparency and uniform and non-discriminatory treatment of Contractors? Why are any modifications limited to the Plan of Work? There may also be ramifications for "the exploitation contract or the activities under the exploitation contract" as set out in **DR 58(5**), and requiring modification as well. As currently drafted, **DR 58(1)** and **DR 58(5)** are inconsistent with each other in this respect.

It would be much simpler and far less prone to legal complications to just require a review if one of the listed events/circumstances has occurred as a matter of demonstrable fact, and to enable the requisite modifications to be made to the Plan of Work, the exploitation contract or to the activities under the exploitation contract accordingly.

DR 58(1)(e): Noting that the LTC implemented our comments submitted in September 2018, we have no further comments on this part of the DR.

DR 58(5): We reprise our comments on the previous version. See comments made under **DR 13(1)(f), DR 25, DR 58 and DR 76** re issues relating to *ultra vires*/substantive legal competence with regard to the

role and functions assigned to the Secretary-General under these draft Regulations in this context. See also comments made above under **DR 58(1)** re the transparency and uniform/non-discriminatory issues raised by the process set out herein. It is recommended that the LTC and the Sponsoring State be included in the list of those permitted to make such a request. "Discussions" as a process will require careful definition.

PART VI

DR 59 (former DR 57): Closure Plan
Further to our comments on the previous version:
DR 59(1): if "residual environmental effects" are those effects that remain after all impact minimisation and mitigation strategies have been employed, this definition must be spelled out, and as must the difference between these effects and "natural Environmental Effects", which latter must also be defined.
DR 59(2)(e): what are "residual **negative** Environmental Effects"? [*Emphasis supplied.*] How are these different from "residual Environmental Effects?

DR 60 (former DR 58): Final Closure Plan: cessation or suspension of production
Noting that the LTC implemented our comments submitted in September 2018, we have no further comments on this DR.

PART VII

Noting that the LTC is awaiting further information on this Part, we reprise our comments on the previous version.

DR 62 (former DR 60): Equality of treatment: A definition of "comparable" in this context is needed.

DR 75 (former DR 73: Audit and inspection by the Authority: Provision must be made for the exemption of documents subject to attorney-client privilege.

DR 76 (former DR 74): Assessment by the Authority [*Emphasis supplied.*]
General comment on the imprecise use of "the Authority": this is a pervasive problem with these draft Regulations. It is often unclear as to what specific body or organ is intended to actually undertake the task(s) set out. This lack of clarity is also at the root of the many *ultra vires*/legal competence issues raised in these comments, and especially with regard to the role and functions of the Secretary-General. See also comments made under **DR 13(1)(f), DR 25 and DR 57**. Under the LOSC, the Secretary-General performs administrative functions. It will be necessary to define what "administrative" means, because in these draft Regulations, the tasks assigned often appear to be substantive and within the specific purview of the LTC.

DR 76(1) (former DR 74(1)): "Where the Secretary-General determines …" "…the Secretary-General **may**,…" "that the Secretary-General **considers reasonable in the circumstances**…"
DR 76(3) (former DR 74(3): "The Secretary-General **may**, …" and **after giving due consideration** …" "that the Secretary-General **considers ought to be**…" **[*Emphasis supplied.*]**

Problems with this DR 76 are legion. For example, it is not clear to us that:
a) the Secretary-General is legally empowered to undertake these tasks under the LOSC
b) even if such a power is found in the LOSC, these tasks can be undertaken entirely at the sole discretion of the Secretary-General (for example, what about the Finance Committee?)
c) the **bolded** terms are precise enough to facilitate predictability, implementation and enforcement

d) this does not incur the same transparency and uniform/non-discriminatory issues raised by the process as set out herein and discussed in, e.g., **DR 58(1).**

Furthermore, provision must also be made for the exemption of documents subject to attorney-client privilege.

DR 77 (former DR 75): General anti-avoidance rule
DR 78 (former DR 76): Arm's-length adjustments

The same comments made under, e.g., **DR 76** above re issues relating to *ultra vires*/substantive legal competence issues raised with regard to the functions and role of the Secretary-General in this context and the transparency and uniform/non-discriminatory issues raised by the process set out herein apply here as well.

DR 81 (former DR 79): Review of system of payments
DR 82 (former DR 80): Review of rates of payments

DR 81(1) and DR 82(1): "…taking into account the **level of maturity and development of Exploitation activities** in the Area." **[*Emphasis supplied.*]**

What does the **bolded** language mean? This language is not in the LOSC. Problems with it include: even if it can be defined, how is this going to be applied in practice? Will it be applied to all the different types of mineral resources for the whole Area?

DR 83 (former DR 81): Recording in Seabed Mining Register Noting that the LTC implemented our comments submitted in September 2018, we have no further comments on this DR.

PART IX

DR 89 (former DR 87): Confidentiality of information: DR 87(2): Provision must be made in the list for the exemption from disclosure of documents subject to attorney-client privilege - and/or their specific inclusion confirming their confidential status.

DR 89(2)(d): The same comments made under, e.g., **DR 76** above re issues relating to *ultra vires*/substantive legal competence issues raised with regard to the functions and role of the Secretary-General in this context and the transparency and uniform/non-discriminatory issues raised by the process set out herein apply here as well.

Noting that the LTC implemented our comments submitted in September 2018 on the use of "and" rather than "or" in DR 89(2)(d), we have no further comments on DR 89(2)(d).

DR 90 (former DR 88): Procedures to ensure confidentiality
Who is the Authority here? See also general comment re use of "the Authority" under **DR 76** above.

DR 91 (former DR 89): Information to be submitted upon expiration of an exploitation contract
DR 91(2): "…the Contractor and the Secretary-General shall consult together…"
See also comments made under, e.g., **DR 13(1)(f), DR 76** above re issues relating to *ultra vires*/substantive legal competence issues raised with regard to the functions and role of the Secretary-General in this context. See also comments made above under, e.g., **DR 58(1), DR 76** re the transparency and uniform/non-discriminatory issues raised by the process set out herein.

DR 92 (former DR 90): Seabed Mining Register
DR 92(1)(i): "The Secretary-General shall establish a Seabed Mining Register in which shall be published: … (i) Any other details which the Secretary-General considers appropriate (save Confidential Information)."
See also comments made under, e.g., **DR 13(1)(f), DR 76** above re issues relating to *ultra vires*/substantive legal competence issues raised with regard to the functions and role of the Secretary-General in this context. See also comments made above under, e.g., **DR 58(1), DR 76** re the transparency and uniform/non-discriminatory issues raised by the process set out herein.

PART X

DR 93 (former DR 91): Notice and general procedures
DR 93(5): "Delivery by hand is deemed to be effective when made."
More detail is needed here in terms of actual proof of delivery by hand. There must be some form of publicly available written or otherwise recorded registration by the Secretariat and preferably as well a recorded transmission to the sender by the Secretariat of a written acknowledgement of receipt.

DR 94 (former DR 92): Adoption of Standards
DR 94(3): "The Standards contemplated by paragraph 1 above may include both qualitative and quantitative standards and include the methods, process **or** technology required to implement the Standards." **[*Emphasis supplied.*]**
The word "must" is to be inserted between "and" and "include", otherwise, because of the use of the optional verb "may" after "above", setting out the methods, etc. also remains optional, which cannot be what was intended. As implementation of the Standards are highly likely to require more than one "process", this word is recommended to be changed to "processes". This is an inappropriate and confusing use of 'or'. In order to make clear that *all* methods, processes and technology required to implement the Standards are included in the Standards,
The sentence should read [**bolded** changes] as follows:
The Standards … and **must** include **all** the methods, processes **and** technology required to implement the Standards.

DR 95 (former DR 93): Issue of guidance documents
DR 95(1): "The Commission **or** the Secretary-General shall, from time to time, issue guidance documents (Guidelines) of a technical or administrative nature …. "
DR 95(3): "The Commission **or** the Secretary-General shall keep under review **such** Guidelines in the light of new knowledge or information." **[*Emphasis supplied.*]**

This is an inappropriate and confusing use of 'or'. The sentences should read [**bolded** changes] as follows:

Proposed revised DR 95(1): "The Commission **and** the Secretary-General, **respectively,** shall ... issue guidance documents (Guidelines) of a technical (the Commission) or administrative (the Secretary-General) nature …"

Proposed revised DR 95(3): "The Commission **and** the Secretary-General shall keep under review their respective Guidelines …"

PART XI
Noting that the LTC is awaiting further information on this Part, we reprise our comments on the previous version.

DR 96 (former DR 94) Inspections: general
Noting that the LTC implemented our comments submitted in September 2018 re DR 96(3), we have no further comments on DR **96(3).**

DR 96(4): Inspectors may inspect **any relevant documents** …" [***Emphasis supplied.***]
DR 96(5): The Contractor and **its agents and employees …" /*Emphasis supplied.*]**
Provision must be made for the exemption from disclosure of documents and communications subject to attorney-client privilege.

DR 98 (former DR 96): Inspectors' powers
Provision must be made for the exemption from disclosure of documents and communications subject to attorney-client privilege.

DR 101 (former DR 99): Complaints
DR 101(2): "The Secretary-General **may take such reasonable action as is necessary** in response to the complaint .." [***Emphasis supplied.***]
See comments made under **DR 13(1)(f)** above re issues relating to *ultra vires*/substantive legal competence issues raised with regard to the functions and role of the Secretary-General in this context. See comments made above under, e.g., **DR 58(1)** re the transparency and uniform/non-discriminatory issues raised by the process set out herein. The **bolded** language in **DR 101(2)** is also too vague.

DR 103 (former DR 101): Compliance notice and termination of exploitation contract
DR 103(4): "The Contractor shall be given a reasonable opportunity to make representations in writing to the Secretary-General concerning any aspect of the compliance notice. Having considered the representations, the **Secretary-General** may confirm, modify or withdraw the compliance notice." [***Emphasis supplied.***]
See comments made under **DR 13(1)(f)** above re issues relating to *ultra vires*/substantive legal competence issues raised with regard to the functions and role of the Secretary-General in this context. See comments made above under, e.g., **DR 58(1)** re the transparency and uniform/non-discriminatory issues raised by the process set out herein.

DR 104 (former DR 102): Power to take remedial action
Who is "the Authority" here? See also general comment re use of "the Authority" under **DR 76** above.

Comments on the Annexes

Annex IV - Environmental Impact Statement (EIS) Template

Our observations on this Annex are limited to its section 2: "Policy, Legal and Administrative Context" as set out in ISBA/24/LTC/WP.1/Add.1. This section presents three major issues, briefly summarized here and addressed in detail below.
1)The purpose and relevance of this section 2 are wholly unclear. Why is this section relevant to stating/ascertaining/assessing the **environmental consequences** of an activity, which is the purpose of an EIS/A?
2) Furthermore, this section 2 as currently structured and drafted is incompatible with the LOSC/IA and with their status in international law.
3) Finally, given that the purpose of a Regulator is to regulate, where in the LOSC/IA is it permitted for the Regulator to abdicate responsibility for specifying the applicable law and its requirements and leave this up to the entities it is legally obliged to regulate with regard to deep-sea mining?

Our reasons for these concerns are as follows.

First, the structure of section 2 reveals a profound and disturbing misunderstanding of the legal regime applicable to activities in the Area. The LOSC is not only placed in the third category of elements to be addressed (item 2.3), but it is there also incorrectly placed on a legal par with the other instruments listed, as well as being placed in a position of legal authority inferior to that of the instruments of less, if any, status in international law listed in items 2.1 and 2.2.

This is completely at variance and incompatible with the actual legal context in which activities in the Area **must in law** be conducted and evaluated. The LOSC is the governing international legally binding instrument for oceans in general and the Area in particular, and for the latter the IA is added.

The LOSC already addresses the types of and relationships with legally binding international treaties and conventions, including multilateral trade agreements, and rules of international law, in accordance with which, as relevant and appropriate, activities in the Area are to be carried out under the auspices of the International Seabed Authority.

Furthermore, the body of international law within which the LOSC operates, and the operation of the LOSC itself, are exceedingly complex. The nature and mechanisms of their application to the Area and to the activities of the Area, including with regard to the marine environment, cannot be considered as being so clear and settled that a request by the regulator for their description and analysis by an applicant to conduct an activity in the Area can reasonably be made. Nor is it at all clear what purpose such an analysis would serve in the context of an EIA/S. Indeed it is likely that such a request would be inconsistent with the requirements set out by the LOSC itself with regard to how the activities in the Area are to be organized, carried and controlled by the ISA, if only because there must be a level playing field among contractors, at least insofar as regulation by the ISA is concerned.

Other questions raised by this Section 2 include:

Why is this section relevant at all to a statement/assessment of environmental impacts?

Why is the applicant being required to describe the applicable legal regime? Does the regulator not consider itself to be cognizant of and familiar with the legal basis pursuant to which the assessment is being conducted? And if not, why not, and then if not, what is the purpose of the regulator?

But if for some reason (that totally escapes us) this is indeed the case, why is the applicant, clearly an interested party - which is not to be considered in any way as a negative attribute - the appropriate source for legal advice to the regulator on the applicable law? Where is the required level playing field here?

In the same vein, why is the applicant being required to assess its own compliance with the law? Is the regulator not capable of doing this? If not, why not, and then if not, what is the purpose of the regulator? Where is the required level playing field here?

With regard to "policies" (items 2.1 and 2.2), their establishment for activities in the Area is within the sole purview of the ISA, and specifically the Assembly (Art. 160(1)). Policies promulgated by other international bodies, especially if they are not legally binding, may or may not be taken into account by the ISA. Whether and if so how to do so is entirely at the ISA's discretion. Unless and until the Assembly

has formally done so, it is incompatible with the LOSC to require an applicant to take them into account. The same issues raised above re requiring the applicant to list them also apply here.

With regard to item 2.4, why is the applicant being required to describe non-legally-binding instruments? On what legal basis are these instruments considered to be relevant at all?

The only non-legally-binding guidelines, standards, principles, etc. (collectively referred to as "guidelines" in this comment), which any entity applying to conduct an activity in the Area **must** take into account, pursuant to the LOSC, are those formally issued or endorsed by the ISA.

For both policies and "guidelines," this sole formal source in this context is necessary, *inter alia*, to ensure that a level playing field of requirements for conducting activities in the Area is maintained among all contractors.

The examples of other "guidelines" set out in item 2.4 apparently considered to be potentially relevant by the drafters of this section have not been so endorsed by the ISA.

It must also be noted that these non-ISA examples have not been universally accepted or adopted by their own constituents either and remain subjects of debate. Even were this not the case, the legal basis against their consideration in this context remains unchanged.

This item 2.4 furthermore and again erroneously places the ISA's own guidelines on a legal par with these others, which is incompatible with the governance hierarchy of instruments applicable to activities in the Area set out in the LOSC. That hierarchy does not include guidelines from other sources that have not been formally endorsed by the ISA.

In any event, whether or not a given contractor has chosen to abide by any or all or none of these non-binding "guidelines" and non-ISA policies is irrelevant both in law and in fact, as that choice is not pertinent to stating/ascertaining the environmental consequences of the activity being examined, which is the objective of this document.

In conclusion: this entire item 2 as currently structured and drafted is incompatible with the LOSC/IA and with their status in international law, and it fails to satisfy the obligations of the regulator to set out and define the applicable law with which the Contractors must comply insofar as this is necessary for the evaluation of an EIA/S.

In our original submission, we recommended removal of this section 2 from the EIA template. Because of the inaccuracy in characterizing the legal status of all the instruments set out in this draft Section 2 and the inadequacy in the exercise of the legally required role of the regulator in this context - which role is to regulate; it is not to invite Contractors to submit essays opining on their assessment of applicable legally binding and non-binding instruments - here we urge a fundamental review of this Section 2 in light of the objections raised above. In particular we stress the legal requirement to place the full and unqualified and sole responsibility on the regulator to specify clearly which, if any, non-LOSC/IA binding and non-binding instruments it requires the Contractors to follow, and to specify clearly how the Contractors are to demonstrate that they are following these instruments in their EIA/S, and on the legal requirement that the Regulator must exercise this responsibility.

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Annex X: Standard clauses for exploitation contract

Section 3: Undertakings
Section 6: Use of subcontractors and third parties
Noting that the LTC implemented our comments submitted in September 2018, we have no further comments on these two sections.

Section 9: Renewal
Section 9.1(a): "The resource category is recoverable annually in **commercial and profitable quantities** from the Contract Area;" **[*Emphasis supplied.*]**
See our comment on the **bolded** text here as made under **DR 20(6)(a)** above**.**

Section 9.1(b): Noting that the LTC implemented our comments submitted in September 2018, we have no further comments on section 9.1(b).

Section 12: Suspension and termination of Contract and penalties
Section 13: Obligations on Suspension or following Expiration, Surrender or Termination of a Contract
Noting that the LTC implemented our comments submitted in September 2018, we have no further comments on these two sections.

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