Comments by

Republic of Korea on the Draft Regulations on

Exploitation of Mineral Resources in the Area (ISBA/25/C/WP.1)

15 October, 2019

1. General comments by issues

1.1. Financial terms

Korea is of the view that the important thing in determining the financial terms of an exploitation contract is the provision of a reasonable financial burden to the developer for commercialization of the deep-sea mineral resources. Given that the deep-sea mineral resource development is very risky compared to land mining, it would not be proper to overburden the risks to the developers.

One of the key variables in economic evaluation of deep sea mining is the price of minerals. Therefore, the highest concern in calculating the royalties of deep-sea mineral resources would be determining the criteria for setting the mineral prices so that the risks from price fluctuations can be avoided. The Republic of Korea believes that the criteria for setting of these three types of minerals should be established and considered somehow in royalty calculation.

We also think that not only the royalty imposed by the international seabed authority but also the charges imposed by the national laws of the individual countries (for instance, taxes) and fees for the exploitation regulations should all be taken into account appropriately.

Implementation agreement provides the following financial terms and conditions for the contract: First, the payments system should be fair to both contractors and the Authority, secondly, the payments rates should be set within the scope of the ratios widely applied to land-based mining of the same or similar mineral, the third payment system should not be complicated, not impose major administrative costs on the Authority or on a contractor, and finally, consideration should be given to the adoption of a royalty system or a combination of a royalty and profit-sharing system. With this in mind, the Republic of Korea believes that it is more appropriate to

impose an initial fixed cost first, and adopt the closing price system that is linked to the mineral resource market price after the contractors have made some profits. In addition, additional provisions for profit sharing will be required in the development of the payment system. We also recommend providing incentives for contractors to reduce environmental impact and to develop eco-friendly technologies.

1.2. Standards and guidelines

The role and legal status of standards and guidelines should be clarified. We believe that the legally binding rules should be adopted by the Council, and non-binding guidelines should be prepared in a separate document. It is our view that exploitation regulation should be completed by 2020 except for some critical issues that are still under debate such as financial systems including royalties. Then the standards and guidelines supplementing the exploitation regulation can be completed sequentially. The Council should continue to work towards getting a consensus on the fiscal system while at the same time establishing standards and guidelines by the Secretariat and LTC.

1.3. REMP

We acknowledge the importance of regional environmental management plans in terms of inclusion in the exploitation regulations of the REMP regulations. However, it is our view that first the modality of REMPs should be clarified and agreed before we discuss whether and how to put specific language on REMPs into the regulations. We also have to think about capabilities and gaps among contractors, for example, between pioneer investors and late comers in terms of their resources and investments. As of now, including REMPs in legally binding instruments may be challenging.

1.4. Sponsoring States and environment protection

If the contractor fails to fully compensate for damages caused by default, the problem may arise whether the sponsoring State is responsible for them. In its recommendation, the ITLOS in 2011 decided that if causally linked does not exist in

relation to the residual liability, the responsibility of the sponsoring State is not recognized and the ISA should respond by setting up trust funds. Currently, ISA is making great efforts to protect the marine environment by stipulating the Environmental Performance Guarantee, Insurance and Environmental Compensation Fund while establishing the exploitation regulations. However, issues have been raised regarding the compliance with the original purpose of the fund. In particular, whether the Environmental Compensation Fund can be viewed as the recommended trust fund and can be used for the training programme (DR Article 55(c)) have been questioned and should be addressed.

1.5. Independent review mechanism

ISBA/25/C/10 document para 1 states that the procedural mechanisms are necessary to ensure effective protection for the marine environment, and that independent review mechanisms by the Authority are required in connection with the environmental plans and performance assessments under the draft regulations on exploitation of mineral resources in the Area.

The establishment of independent review mechanism is supported by Article 163 para 13 and Article 165 para (e) of the United Nations Convention on the Law of the Sea, and draft regulations Article 12 para(5)(b), Article40 para(2)(h), article 50 para(5)(c) and article 50 para(6).

In particular, Annex 7 to the Draft Regulations, environmental management and monitoring plans must be verified and reported on by independent competent persons. The republic of Korea fully agrees with the secretariat note para 4 that independent reviews should be conducted or sought and the timing and frequency of such reviews will also require clarification. The independent review would require development of a roster of independent competent persons. When establishing the roster, in addition to respective experts in the field of fisheries, protection and preservation of the marine environment, and marine scientific research and navigation, including pollution from vessels and by dumping as stated in Article 2 Annex 8 of the Convention, the competent persons who have a background or experience in deep seabed mining should also be included in the roster such as ore

collecting, lifting, determining the amount of minable ore and carrying out deep sea activities on board.

The procedures for the inclusion and selection of experts on such roster should be made transparently by collecting opinions from member states, ISA and contractors. It is important to note that the use of relevant experts should be limited to supplementing and supporting the performance of the LTC and not to replace their functions and decisions.

2. Specific comments by provisions

2.1. Part I Introduction

- On Regulation 1, we believe that not only the rules of the Authority, but the United Nations Convention on the Law of the Sea and the 1994 Part XI Implementation Agreement need to be added to Regulation 1, Paragraph 1. This is to ensure that the regulations are in line with the Convention and the Agreement. Taking this into account, we′d like to make reference to ′Regulations on Prospecting and Exploration for Cobalt-rich Ferromanganese Crusts in the Area′, which states in Regulation 1, para 1 that ″Terms used in the Convention shall have the same meaning in these Regulations.″
- In Regulation 2, the language of Article 150 of the Convention is identically repeated in para 2 (b). To make it simple and concise, rather than repeating the whole language of Article 150 of the Convention, Regulation 2 para 2 (b) could state "give effect to article 150 of the Convention by ensuring that activities in the Area shall be carried out in accordance with the policies stated under article 150 of the Convention".

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

- The term ″effectively controlled″ used in in Regulations 5 and 6. In Regulation 6,

this term is used to define the State which will issue the certificate of sponsorship. Although the term ″effective control″ is commonly used under international law, the term seems rather unclear by itself. And it would be better if we can predict what it is going to be when this term is applied in the specific context. In order to enhance the predictability, conducting further studies such as comparative studies on domestic laws or stocktaking of practices related to this term could be useful.

- In Regulation 10, clarification is needed whether the Secretary-General, Council or the LTC holds the authority to determine the applicant′s preferences and priorities.
- In Regulation 16, the Council will consider and approve Plans of Work, but there is no mentioning of any procedure to appeal the Council′s decision, in case the Council disapproves the Plans of Work and if a dispute arises. Just like the exploration regulations, Korea believes that there is a need to set up a dispute settlement procedure by mentioning not only paragraph 11 but also paragraph 12 of section 3 of the annex to the Agreement.

2.3. Part III Rights and obligations of Contractors

- In Regulation 18 para. 7, the fees applied during the exploration phase are required at the exploitation phase. As a result, the contractors may have to make payment of both applicable fees under Regulation 18 para. 7 and annual reporting fee under Regulation 84. This could cause double burdens on the contractors, considering that exploration can continue even after they enter into the exploitation phase. Korea is of the view that we should avoid the overlap of payments and need further reviews on how to coordinate the multiple fees imposed by the regulations.
- Regulation 19 is about the joint arrangements with the Enterprise, but it is necessary to establish clear conditions for the joint arrangements by stating the

specific conditions for the joint arrangements with the Enterprise in the exploration regulations for polymetallic sulphides and cobalt-rich ferromanganese crusts.

- Regulation 21 states that termination of sponsorship takes effect no later than 12 months after the date of receipt of the notification. However, in accordance with the exploration regulation relating to the termination of sponsorship, we recommend the termination to take effect no later than 6 months after the receipt of the notification.
- Regulation 23 para 5 stipulates that monopolization shall not be allowed, but this can apply only to polymetallic nodules, since Annex 3, Article 6(3)(c) of the United Nations Convention on the Law of the Sea only mentions polymetallic nodules and not the polymetallic sulphides nor cobalt-rich ferromanganese crusts. Therefore, since the exploitation regulations cover all of them, namely, polymetallic nodules, polymetallic sulphides and cobalt-rich ferromanganese crusts, the exclusive criteria for polymetallic sulphides and cobalt-rich ferromanganese crusts needs to be added to this Regulation.

2.4. Part IV Protection and preservation of the Marine Environment

- In Regulation 47 para 1 (b), screening and scoping process is reintroduced. We would like to ask for clarification of LTC whether the environmental impact assessment at the exploration phase cannot be seen as the process under Regulation 47 para 1 (b), and whether these procedures regarding environmental impact assessment are compatible with each other.
- Regarding Draft regulation 50, the Republic of Korea is of the opinion that more scientific researches need to be carried out, before we proceed to making or revising regulations on mining discharges. In the present practice of deep seabed mining discharges of the Resources, polymetallic nodules and polymetallic sulphides should be treated differently. While polymetallic nodules cannot be dressed/processed, polymetallic sulphides tend to be

dressed/processed to increase the economic efficiency. Thus, only water and muds are discharged during polymetallic nodule processing, while the substances that are called ″mine tailings″ may be discharged in case of polymetallic sulphides processing. As far as we know, mining discharges from polymetallic sulphides have been processed on the ground and there are no cases of processing on the ship. Thus, we do not know the mine tailing effects on the marine environment yet. In this respect, we think it is necessary to consider characteristics of the Resources and their treatments when establishing the definition of mining discharges and standards of mining discharges. However, the draft regulation 48 does not allow the releasing of mining discharges to the ocean, except in exceptional circumstances such as to protect human life and does not reflect the difference of each Resource′s processing. In addition, we are of the opinion that to minimize mining discharges and marine environmental harm, it is necessary to carry out additional studies regarding discharge areas. We believe that through these studies, a clearer scientific basis for the regulation would be attained.

- In draft regulation 52 paragraph 5, stipulates consequences of the Contractor where the performance assessment undertaken by the Contractor is considered unsatisfactory or unacceptable by the Commission. Whereas in paragraph 6, it is stipulated that performance assessment to be carried out by the Contractor may be deemed as unsatisfactory by the Commission under reasonable grounds even before submission of the performance assessment by a Contractor. For the latter paragraph, we are of the view that it would be necessary to spell out the instances of reasonable grounds for presuming that the performance assessment of the Contractor would be unsatisfactory to avoid any misunderstanding between the Contractors and the Commission, and additionally, how to objectify those measures.

- Regulation 52, para 6 states that ″Where the Commission has reasonable grounds to believe that a performance assessment cannot be undertaken

satisfactorily by a Contractor in accordance with the Guidelines, the Commission may procure, at the cost of the Contractor, an independent competent person to conduct the performance assessment and to compile the report.″ In our view, paragraph 6 is not necessary in this regulation, and the purpose of this regulation can be sufficiently reached by the rest of the paragraphs (namely, para 1 to 5, 7 and 8). Rather, para 6 might cause dispute between the contractor and ISA by prejudging what has not actually occurred. Therefore, Korea is of the view that para 6 should be deleted.

- In Regulation 54, The Republic of Korea concur with the idea of establishing the Environmental Liability Trust Fund to prevent the environmental damage caused by activities in the Area. However, we think there are some points that need to be addressed for practical operation of this matter. First, it is questionable how much financial resources can be secured for the purpose of the fund from the listed subjects. In addition, the expenses necessary for education and training programs may be covered by Contractors fulfilling their training duties. Second, the draft regulation 56 (a), the funding scheme, imposes a certain amount of fees for the fund from the fees paid to the Authority and since this may be considered as deviating from the principle of polluter pays rule, we suggest a study dealing with this matter. At this point, if necessary, we believe that one way to secure funding to fulfill the purpose of the Environmental Liability Trust Fund is to find ways to utilize funds allotted for environmental protection from the United Nations.
- Lastly, although we support the idea of preventing and remedying environmental damage by establishing an environmental compensation fund as stated in Section 5 of Part 4, we are not confident whether the sufficient fund can be secured by the methods listed under the regulations. Furthermore, according to regulation 56 (a), a certain amount of fees paid to the Authority can be used as the fund, but we need more review to see whether this is inconsistent with ‘polluter pays principle’. /END/