Polish remarks regarding Draft regulations on exploitation of mineral resources in the Area

The following comments are without prejudice to the positions that Poland may adopt in the future.

General comment:

The draft regulations (DR) should be in accordance with UNCLOS. In particular, they should respect the balance of rights between different categories of states, the balance of interests between different stakeholders and, finally, should respect the mandates of the organs of the Authority. All regulations as well as any new proposals should be examined with this in mind.

Specific comments:

DR 1.1 PL prefers to refer to "the Convention" instead of "the Rules of the Authority" as the former option seems to provide more legal certainty. According to the definition in the Schedule 1 the Rules of the Authority consist of "the Convention, the Agreement, these Regulations and other rules, regulations and procedures of the Authority, as may be adopted from time to time". The said means that some of the Rules of the Authority may be adopted after the adoption of DR which in turn would imply that terms used in DR would need to have the same meaning as terms used in documents that do not exist at the time of the adoption of DR.

DR 2 In PL's opinion this regulation consists not only of principles but also of approaches and policies. Accordingly, we would prefer to add the word "approaches" in the chapeau of this regulation. As an argument in favor of not limiting ourselves to "principles" we could point out that the title of article 150 of UNCLOS (this article is inserted in reg. 2 (b)) reads "Policies relating to activities in the Area" hence, while referring to article 150 and its content we should not use the term "principles".

Alternatively, PL could support listing elements mentioned in this regulation without determining whether they are principles, policies or approaches.

DR 2 (b) Notwithstanding the above, PL does not see the need to repeat the content of article 150 of UNCLOS in DR. We are not sure about potential legal consequences of repeating one part of UNCLOS and omitting other relevant parts. Accordingly, we would like to propose to streamline this provision as follows "Give effect to article 150 of the Convention."

DR 2 (e) The chapeau of this provision refers to principles yet, some of the elements listed in this provision are not principles or are not presented as such. For example the second and third indents refer explicitly to approaches. This provision would merit from more consistency.

DR 2 (i) It seems that this letter should be a separate provision. Keeping it in this place may cause interpretive difficulties (it refers to “fundamental policies and principles” being – according to the chapeau - one of them).

DR 6 (1) (2) Clearly defining what “effective control” means is crucial to ensure that sponsoring states fulfil their obligations as party to the ISA. Clear understanding of the term could be useful also in determining whether there is a risk of monopolization of the conduct of activities in the Area. The definition of this term could be inserted in the Schedule 1.

DR 7 (2) (d) The current version of this provision may allow a situation where a contractor – when sponsored by more than one state - is obliged to comply with national legislations, regulations etc. which - even though in line with relevant articles of UNCLOS - is nevertheless incompatible with each other. Articles of UNCLOS referred to in this provision are fairly general but at the same time national laws may be (and probably will be) more specific – hence, the risk of differences in more detailed national rules. In order to avoid a situation where a contractor is obliged to comply with incompatible obligations PL would propose either adopting a standard that would deal with the problem of incompatible obligations or adding a special clause in Reg. 7 (2) (d).

DR 10 (1) This provision refers to article 10 of annex III to the Convention. The said article stipulates that preference or priority given to applicants previously engaged in exploration in a given area “may be withdrawn if the operator’s performance has not been satisfactory”. In PL’s view there is a need for more clarity on what basis the satisfactory element would be assessed. And whether an applicant whose preference or priority status has been withdrawn has any means to challenge such decision.

DR 24 (1) PL is not sure whether “a change of 50 per cent or more of the ownership” is the best way of defining “change in control”. In some cases a change of only 1 percent of the ownership may result in a change of control. PL believes that this provision requires further work.

DR 31 (1) PL is of the opinion that we should not use the term “due diligence” in DR as it is not referred to in UNCLOS. Moreover, it may be interpreted as a different legal concept related to sovereignty rather than to activities in the Area. We would prefer to use the term “reasonable regard”.

Reg. 33 (2) (a) PL believes that in order to remain consistent with the chapeau of this para. the 24 hours deadline should start at the moment of the contractor becomes aware of the incident rather than from the moment of the occurrence of the incident.

Reg. 33 (3) PL would like to add the word “promptly” before “report any Contractor (…)” We believe that it is essential that sponsoring states are informed as soon as possible.

Reg. 35 It would merit of further discussion on whether - in case of the Contractor being unable to continue its exploration or exploitation because of the finding of human remains and objects and sites of an archaeological or historical nature – there should be some kind of compensation offered to him (e.g. by a new area for further activities or a reduced fee)

Reg. 78 (2) The term “internationally accepted principles” needs further explanation as it is unclear what principles are referred to here. UNCLOS speaks of “generally accepted international rules and standards”.