Jamaican Foreign Service

Ref. No. 7/703/1[25]

The Ministry of Foreign Affairs and Foreign Trade presents its compliments to the Secretariat of the International Seabed Authority (ISA) and has the honour to enclose herewith comments on the Draft regulations on Exploitation of Mineral Resources in the Area as prepared by the Legal and Technical Commission.

The Ministry of Foreign Affairs and Foreign Trade avails itself of this opportunity to renew to the Secretariat of the International Seabed Authority (ISA), the assurances of its highest consideration.

MINISTRY OF FOREIGN AFFAIRS & FOREIGN TRADE * JAMAICA *

Secretariat
International Seabed Authority

KINGSTON

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FURTHER COMMENTS AND PROPOSED TEXTUAL SUGGESTIONS OF JAMAICA ON THE DRAFT REGULATIONS, ISBA/25/C/WP.1

Regulation 2 Fundamental ~~policies and~~ principles

In furtherance of and consistent with Part XI of the Convention and the Agreement, the fundamental policies and principles of these regulations are, inter alia, to:

(e) Provide, pursuant to article 145 of the Convention, for the effective protection of the Marine Environment from the harmful effects which may arise from Exploitation, in accordance with the Authority's environmental policy, including regional environmental management plans, based on the following principles: ...

(iv) The application of "the polluter pays" principle through regulatory mechanisms, including standards and guidelines, market-based instruments, ~~mechanisms~~ and other relevant measures;

RATIONALE:

DR 2(b) has been redrafted to more closely follow Article 150 of UNCLOS on *"Policies relating to activities in the Area"*. We interpret the change in the heading of DR 2 to include reference to "policies" as attributable to this. Nevertheless, we note the views expressed by other States Parties in Council and agree that the reference to "policies" in the title of DR 2 may serve to weaken the provision which addresses some of the fundamental principles governing the Area stated in Section 2 of Part XI of UNCLOS. In the alternative approach, we would suggest making DR 2(b) a distinct provision, i.e. DR 2bis.

With regard to paragraph (e)(iv), the text may be read as emphasizing market-based approaches over other measures. The polluter pays principle is mainly implemented by regulatory instruments (sometimes referred to as 'command-and-control' approaches) but can also be applied via market-based mechanisms, e.g. for the development and introduction of environmentally sound technologies and products. The proposed amendments are designed to present a more balanced approach in the application of the polluter pays principle.

Regulation 3 Duty to cooperate and exchange of information

In matters relating to these regulations:

(a) Members of the Authority and Contractors shall ~~use their best endeavours to~~ cooperate with the Authority to provide such data and information as is reasonably necessary for the Authority to discharge its duties and responsibilities under the Convention;

RATIONALE:

The obligation placed on Members and Contractors is simply to cooperate with the ISA in discharging their duties and responsibilities under UNCLOS. The obligation is minimal and there is no reason to further qualify this.

Regulation 4 Protection measures in respect of coastal States

5. If the Commission determines that the Serious Harm or threat of Serious Harm to the Marine Environment, which is likely to occur or has occurred, is attributable to a breach by the Contractor of the terms and conditions of its exploitation contract, the Secretary-General shall issue a compliance notice pursuant to regulation 103 or direct an inspection of the Contractor's activities pursuant to ~~article 165 (2) (m) of the Convention and Part XI of these~~ regulation~~s~~ 96.

RATIONALE:

UNCLOS article 165(2)(m) concerns LTC recommendations to Council on the direction and supervision of a staff of inspectors and does not of itself authorize action by the Secretary-General. DR 96(3) appears to confer such authority on the Secretary-General and would therefore seem to be the more appropriate reference.

Regulation 10 Preliminary review of application by the Secretary-General

1. The Secretary-General shall review an application for approval of a Plan of Work and determine whether an application is complete for further processing. Should there be more than one application for the same area and same Resource category, the Secretary-General shall determine whether the applicant has preference and priority in accordance with article 10 of annex III

to the Convention. Where the application concerns a reserved area, the Enterprise shall be given an opportunity to decide whether it intends to carry out activities in the area in accordance with article 9 of annex III to the Convention.

RATIONALE:

UNCLOS, annex III, article 9(3) provides that

> "3. The Authority may prescribe, in its rules, regulations and procedures, substantive and procedural requirements and conditions with respect to such contracts and joint ventures [with the Enterprise]."

The 1994 Agreement, annex, section 2, paragraph 2 requires that the initial deep seabed mining operations of the Enterprise shall be conducted through joint ventures. Additionally, paragraph 4 of section 2 requires that obligations applicable to contractors shall apply to the Enterprise. However, as regards reserved areas UNCLOS, annex III, article 9 gives the Enterprise the right of first refusal. This provision should be interpreted in context which includes article 10 of annex III on whether an applicant has preference and priority. Thus it is proposed that reference should be made to both provisions (articles 9 and 10 of annex III) in DR 10.

Section 3 Consideration of applications by the Commission

Regulation 12 General

3. The Commission shall, in considering a proposed Plan of Work, apply the Rules of the Authority in a uniformed and non-discriminatory manner, and shall have regard to the principles, policies and objectives relating to activities in the Area as provided for in Part XI of and annex III to the Convention, and in the Agreement, and in particular the manner in which the proposed Plan of Work contributes to realizing benefits for mankind as a whole as specified in the decisions of the Council and Assembly .

4. In considering the proposed Plan of Work, the Commission shall take into account: ...

> (b) Any advice or reports sought by the Commission or the Secretary-General from independent competent persons identified in the Commission's report to Council, in respect of the application to verify, clarify or substantiate the information provided, methodology used or conclusions drawn by an applicant;

RATIONALE:

As regards DR12(3), what should be treated as contributing to the benefits for mankind as a whole is a political determination and therefore one on which the LTC, as a purely technical body, requires guidance. It is incumbent on the Council and Assembly to provide the necessary guidance.

With respect to DR 12(4), UNCLOS article 163(13) provides that "[i]n the exercise of its functions, each Commission may, where appropriate, consult another commission, any competent organ of the United Nations or of its specialized agencies or any international organizations with competence in the subject-matter of such consultation." Article 163(13) of UNCLOS is essentially reproduced in rule 15 of the Operational Rules concerning the LTC/Rules of Procedure of the LTC. Thus the persons to be consulted are international entities that may be expected to reflect a plurality of views. Consultations with other persons (outside of the UN system), whether identified as "independent competent persons" or "recognized experts" (as in the context of DR 94) should only be pursued through transparent processes that ensure that the views obtained may be objectively characterized of a similar quality and generally internationally accepted nature as that which would have been provided by the UN or its specialized agencies.

We note that reference is made to "independent competent persons" in DR 12(4)(b) (above); 38(2)(h) (annual reports); 52(5)(c) & (6) (performance assessments of the EMMP); and annex VII(1)(b) (EMMP). The persons referred to in the afore-mentioned provisions, save for DR 12(4)(b) would necessarily be identified as having verified the report (in the instances of DR 38(2)(h) and annex VII(1)(b) or been contracted by the LTC at the cost of the Contractor to conduct the whole or part of a performance assessment. In light thereof, similar amendments have not been proposed in relation to DR 38, 52 and annex VII.

A distinction is made in the Draft Regulations between "independent competent persons" and "recognized experts"; the latter term is found in DR 94(1). Proposed amendments to DR 94 are advanced further below.

Regulation 15 Commission's recommendation for the approval of a Plan of Work

3. The Commission shall not recommend the approval of a proposed Plan of Work if it determines that:
(a) Such approval would permit a State party or entities sponsored by it to monopolize the conduct of activities in the Area with regard to the Resource category in the proposed Plan of Work as set out in the relevant Guidelines;

RATIONALE:

The discussions in Council and the reports of the LTC Chairs have consistently noted the need for further clarification and guidance on the concept of monopolization. However, the LTC has for a number of years continued to defer consideration of issues related to the monopolization of activities in the Area; see, for example, LTC Report, ISBA/20/C/20 (2014); ISBA/25/C/19/Add.1 (2019). In order to promote a consistent and fair application of DR 15 the criteria for determining monopolization should be established in guidelines or the rules.

Regulation 18 Rights and exclusivity under an exploitation contract
3. The Authority, in consultation with a Contractor, shall ensure that no other entity holding a contract with the Authority operates in the Contract Area for a different category of Resources in a manner which might interfere with the rights granted to the Contractor.

RATIONALE:

The term "entity" is not defined and potentially includes persons over which the Authority has no control. The phrase "entity holding a contract with the Authority" is suggested as it may be desirable to include entities with an exploration contract that have not received an exploitation contract.

Regulation 21 Termination of sponsorship
1. Each Contractor shall ensure that it is sponsored by a State or States, as the case may be, throughout the period of the exploitation contract in accordance with regulation 6~~, and to the extent necessary that it complies with regulations 6 (1) and (2)~~.
2. A State may terminate its sponsorship by providing to the Secretary-General a written notice describing the reasons for such termination. Termination of

sponsorship takes effect ~~no later than~~ 12 months after the date of receipt of the notification by the Secretary-General unless the notification specifies an earlier date, except for termination due to a Contractor's non-compliance under its terms of sponsorship, in which case termination takes effect no later than 6 months after the date of such notification.

4. A sponsoring State or States is not discharged from any obligations or deprived of any rights accrued while it was a sponsoring State by reason of the termination of its sponsorship~~, nor shall such termination affect any legal rights and obligations created during such sponsorship~~.

RATIONALE:

As regards DR 21(1), DR 6(1) and (2) use the word "shall" and, as such, where applicable they are not optional. The current phrasing of the draft text may, unnecessarily create ambiguity.

With respect to DR 21(2), the current wording does not require the sponsoring State to inform Council of the precise date on which sponsorship terminates. The proposed rewording, which draws on the previous version of the text, would provide a date certain.

With respect to DR 21(4), the reference to obligations in both the first and second parts of the paragraph raises questions as to whether distinct sets of obligations are contemplated or, alternatively, whether there may be unnecessary repetition. The proposed rephrasing presumes the latter.

Regulation 22 Use of exploitation contract as security

3. As a condition to giving consent under this regulation, the Authority shall request evidence that the beneficiary of any encumbrance referred to in paragraph 1 above shall agree either, upon foreclosure, to undertake Exploitation activities in accordance with the requirements of the exploitation contract and these regulations in which case the beneficiary must fulfil the requirements of paragraphs 4 and 5 of regulation 23, or that such beneficiary shall~~to~~ transfer the mortgaged property only to a transferee that fulfils the requirements of paragraphs 4 and 5 of regulation 23 as determined by the Commission.

RATIONALE:

The proposed amendments are for purposes of clarity based on the assumption that the provision was designed to convey that the beneficiary or transferee must objectively satisfy the requirements of the Draft Regulations as determined by the LTC.

Regulation 23 Transfer of rights and obligations under an exploitation contract

We propose the reinsertion of paragraph 10 of the former version of the text:

> "10. The terms and conditions of the transferee's exploitation contract shall be those set out in the standard exploitation contract annexed to these Regulations that is in effect on the date that the Secretary-General or a duly authorized representative executes the assignment and novation agreement."

RATIONALE:

DR 20(8) provides: "Any renewal of an exploitation contract shall be effected by the execution of an instrument in writing by the Secretary-General or duly authorized representative, and the designated representative or the authority designated by the Contractor. The terms of a renewed exploitation contract shall be those set out in the standard exploitation contract annexed to these regulations that is in effect on the date that the Council approves the renewal application." (added emphasis)

The balance currently reflected in the Draft Regulations allows for an adjustment of contractual terms at the time of renewal. Should there be a transfer of a contract this would also be an appropriate time to introduce any adjustments that may have been made to the standard terms and conditions.

Regulation 24 Change of control

1. For the purposes of this regulation, a "change in control" occurs where there is a change in ~~50 per cent or more of~~ the ownership of the Contractor, or of the membership of the joint venture, consortium or partnership, as the case may be,

that results in the holding of the beneficial ownership of 50% or more of the Contractor or the controlling interest in the Contractor by an entity that previously held a minority share or had no prior equity interest, or a change in 50 per cent or more of the ownership of the entity providing an Environmental Performance Guarantee.

2. Where there is a change of control of the Contractor, or there is a change of control in any entity providing an Environmental Performance Guarantee on behalf of a Contractor, the Contractor shall~~, where practicable,~~ notify the Secretary-General in advance of such change of control, and in the case of an entity providing an Environmental Performance Guarantee, no later than~~ but in any event~~ within 90 Days thereafter. The Contractor shall provide the Secretary-General with such details as he or she shall reasonably request of the change of control.

RATIONALE:

The definition of 'change in control' as provided in DR 24(1) is inadequate in that a change of much less than fifty per cent (50%) of the ownership of a Contractor may result in a change of effective control depending on the initial division of ownership interests. This may have implications for, *inter alia*, sponsorship. DR 6(2) provides that where an applicant has the nationality of one State but is effectively controlled by another State or its nationals, each State shall issue a certificate of sponsorship. Thus where there is a change in effective control additional States may be required to assume a sponsorship role.

Notification should be made of the proposed change of control of the Contractor prior to the event.

Regulation 26 Environmental Performance Guarantee

2. The required form and amount of the Environmental Performance Guarantee shall be determined according to the relevant [Standards] [rules]~~Guidelines~~, and shall reflect the likely costs required for:

(a) The premature closure of Exploitation activities;

(b) The decommissioning and final closure of Exploitation activities, including the removal of any Installations and equipment; and

(c) The post-closure monitoring and management of residual Environmental Effects.

3. The amount of an Environmental Performance Guarantee may be provided by way of instalments over a specified period according to the relevant Guidelines.
4. The amount of the Environmental Performance Guarantee shall be reviewed and updated~~, where~~:

(a) Where t~~T~~he Closure Plan is updated in accordance with these regulations; or

(b) As the result of:

(i) A performance assessment under regulation 52;

(ii) A modification of a Plan of Work under regulation 57; or

(iii) A review of activities under a Plan of Work under regulation 58; and

(c) At the time of review by the Commission of a final Closure Plan under regulation 60.

RATIONALE:

The form and amount and the possibility of payment by instalments of the Environmental Performance Guarantee are to be determined by the Guidelines. It would seem preferable that the principles for determining the amount of the Guarantee should be addressed in binding texts as opposed to non-binding Guidelines. This may be through Standards or other relevant rules as generally alluded to under the umbrella term "Rules of the Authority" which means "the Convention, the Agreement, these regulations and other rules, regulations and procedures of the Authority as may be adopted from time to time." (added emphasis)

As regards DR 26(4), the suggested amendment is purely editorial so as to read with the chapeau.

Old Draft Regulation 31

We note the deletion of old DR 31 and the LTC's explanation therefor. We look forward to seeing a revised definition of Good Industry Practice that encompasses good mining practices and waste minimization as well the Guidelines expanding on these elements.

Regulation 42 Restrictions on advertisements, prospectuses and other notices

No statement shall be made in any prospectus, notice, circular, advertisement, press release or similar document issued by the Contractor, or with~~to~~ the express or implied permission~~knowledge~~ of the Contractor, or in any other manner or through any other medium, claiming or suggesting, whether expressly or by implication, that the Authority has or has formed or expressed on opinion over the commercial viability of Exploitation in the Contract Area.

RATIONALE:

The phrase "to the knowledge of the Contractor" is very broad. Things may occur with one's knowledge but over which one has no control. DR 42 should be rephrased to capture an element of culpability as obtained with the former draft regulation 44, entitled "Disclaimer", which DR 42 replaces.

Regulation 45 Development of environmental Standards

DR 45 is described in the LTC Note, ISBA/25/C/18, as a "placeholder pending further discussion at the workshop to be held in Pretoria in May 2019." Jamaica looks forward to seeing the proposed text and will reserve its comments until such time.

Regulation 47 Environmental Impact Statement

DR 47 now includes reference to a scoping *process*. The LTC Note, ISBA/25/C/18, clarifies that requirements of the scoping stage should be detailed under the exploration regime. The exploration regulations (regulation 1(5)) refer to the adoption of supplemental rules, regulations and procedures especially with respect to the protection and preservation of the marine environment. We therefore understand that supplemental rules to the exploration regulations are contemplated and are being prepared.

Regulation 52 Performance assessments of the Environmental Management and Monitoring Plan

2. The frequency of a performance assessment shall be in accordance with the period specified in the approved Environmental Management and Monitoring Plan which shall be no less than 24 months;

3. A Contractor shall compile and submit a performance assessment report to the Secretary-General in accordance with, and in the format set out in, the relevant Guidelines.

5. Where the Commission considers the performance assessment undertaken by the Contractor to be unsatisfactory, taking account of the Guidelines or the conditions attaching to the Environmental Management and Monitoring Plan, the Commission may require the Contractor to:

(a) Repeat the whole or relevant parts of the performance assessment, and revise and resubmit the report;

(b) Submit any relevant supporting documentation or information requested by the Commission; or

(c) Appoint, at the cost of the Contractor, an independent competent person to conduct the whole or part of the performance assessment and to compile a report for submission to the Secretary-General and review by the Commission.

6. Where a Contractor has previously submitted two unsatisfactory reports and 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.

RATIONALE:

With regards to DR 52(2), Council has an interest in ensuring that assessments are undertaken regularly. Thus a maximum period should be stated in the Draft Regulations. We note that annual reports are required under DR 38(2)(g). To require a performance assessment to be undertaken at least every twenty-four (24) months would not appear to be unduly burdensome

With regards to DR 52(6), paragraph 3 of DR 52 imposes an obligation on a Contractor to compile and submit a performance assessment report. It is therefore presumed that all Contractors will be competent to do so and/or may choose to outsource this activity. Paragraph 6 refers to the LTC having "reasonable grounds to believe that a performance assessment cannot be

undertaken satisfactorily by a Contractor". The proposed amendment addresses the basis on which reasonable grounds could be argued should other aggravating circumstances also be present.

Regulation 54 Establishment of ~~an~~ Environmental ~~Compensation~~ Funds

1. The Authority hereby establishes the Environmental Compensation Fund ("the Fund") and the Environmental Research and Training Fund ("the ERTF").

2. The rules and procedures of the Fund and ERTF will be established by the Council on the recommendation of the Finance Committee.

3. The Secretary-General shall, within 90 Days of the end of a Calendar Year, prepare ~~an~~ audited statements of the income and expenditure of the Fund and the ERTF for circulation to the members of the Authority.

Regulation 55 Purpose of the Environmental Compensation Fund

The main purpose~~s~~ of the Fund is~~will include:~~

~~(a)~~ T~~t~~he funding of the implementation of any necessary measures designed to prevent, limit or remediate any damage to the Area arising from activities in the Area, the costs of which cannot be recovered from a Contractor or sponsoring State, as the case may be, including~~;~~

~~(b) The promotion of research into methods of marine mining engineering and practice by which environmental damage or impairment resulting from Exploitation activities in the Area may be reduced;~~

~~(c) Education and training programmes in relation to the protection of the Marine Environment;~~

~~(d) The funding of research into Best Available Techniques for the restoration and rehabilitation of the Area; and~~

~~(e)~~ T~~t~~he restoration and rehabilitation of the Area when technically and economically feasible and supported by Best Available Scientific Evidence.

Regulation 55 bis Purpose of the ERTF

The main purposes of the ERTF include:

(a~~b~~) The promotion of research into methods of marine mining engineering and practice by which environmental damage or impairment resulting from Exploitation activities in the Area may be reduced;

(b~~c~~) Education and training programmes in relation to the protection of the Marine Environment; and
(c~~d~~) The funding of research into Best Available Techniques for the restoration and rehabilitation of the Area.~~;~~

RATIONALE:

The purposes of the Fund as stated in the Draft Regulations appear to be overly broad. This would likely diminish the utility of the Fund in achieving the stated objectives. A Compensation Fund should address the possible gap in liability, as identified by the Seabed Disputes Chamber, which may occur where a Contractor has caused damage and is unable to meet its liability in full and the sponsoring State has taken all necessary and appropriate measures, or has failed to meet its obligations but that failure is not causally linked to the damage. This extends in our view to the possible restoration and rehabilitation of the environment in cases where the Contractor and sponsoring State may not be held liable.

It is proposed that a separate fund be created to deal with environmental research, training and education programmes. This would supplement the resources that may be available under the Endowment Fund for Marine Scientific Research in the Area and other ISA and Contractor capacity development and training programmes.

Regulation 89 Confidentiality of information

3. "Confidential Information" does not mean or include data and information that:

(f) Relate to the protection and preservation of the Marine Environment, provided that the Secretary-General may designate~~agree that~~ such information ~~is regarded~~ as Confidential Information for a reasonable period, subject to such conditions as may be appropriate, where the Commission agrees that there are bona fide academic reasons for delaying its release on the terms proposed by the Secretary-General and the decision including the reasons are reported to Council; or …

(i) The area to which the data and information relates is no longer covered by an exploitation contract; provided that following the expiration of a period of 10 years after it was passed to the Secretary-General, Confidential Information shall

no longer be deemed to be such unless otherwise agreed between the Contractor and the Secretary-General in accordance with the relevant Guidelines, and save any data and information relating to personnel matters under paragraph 2 (b) above

RATIONALE:

As regards DR 89(3)(f), in light of the academic qualifications and experience in diverse disciplines, the members of the LTC should be involved in the decision to treat information as confidential for academic reasons and may determine whether conditions should be imposed on delaying the release of the information.

In relation to DR 89(3)(i), the treatment of confidential information should be applied uniformly and this is promoted by establishing clear criteria that are applied objectively and in a transparent fashion.

Regulation 94 Adoption of Standards

1. The Commission shall, taking into account the views of recognized experts identified in accordance with annex X*, relevant Stakeholders and relevant existing internationally accepted standards, make recommendations to the Council on the adoption and revision of Standards relating to Exploitation activities in the Area, including standards relating to: ...

*Annex X would provide for the Secretary-General to establish a roster on a similar basis as UNCLOS annex VIII. This would include a list of experts drawn up by relevant UN Specialized Agencies and experts nominated by States Parties. The ISA is one of the sponsoring organizations of the Joint Group of Experts on the Scientific Aspects of Marine Environmental Protection. It is proposed that the annex would expressly include the Joint Group of Experts.
Annex X would also address the basic principles and procedures governing the use of the roster with a view to minimizing conflicts of interests, ensuring an appropriate geographical balance, etcetera.

2. The Council shall consider and approve, upon the recommendation of the Commission, the Standards, provided that such Standards are consistent with the intent and purpose of the Rules of the Authority [and] [including] the

decisions of the Council and the Assembly. If the Council does not approve such Standards, the Council shall return the Standards to the Commission for reconsideration in the light of the views expressed by the Council.

4. Standards adopted by the Council and approved by the Assembly shall be legally binding on Contractors and the Authority and shall~~may~~ be reviewed~~revised~~ at least every five years from the date of their adoption or revision, and in the light of improved knowledge or technology.

RATIONALE:

As relates to DR 94(1), in relation to DR 12(4)(b) it is noted that UNCLOS Article 163(13) is essentially reproduced in rule 15 of the Rules of Procedure of the LTC, and provides that in the exercise of its functions the LTC "may, where appropriate, consult another commission, any competent organ of the United Nations or of its specialized agencies or any international organizations with competence in the subject-matter of such consultation." As such, it is not the views of any recognized expert but only persons evidencing the culture and values of the UN system (as would be reflected in the views of an organ of the UN or its specialized agencies) whom the LTC may freely consult.

The LTC is a subsidiary organ of the Council. The LTC is obliged under UNCLOS article 165(2)(f) to formulate and submit to the Council the rules, regulations and procedures relating to, *inter alia,* exploitation in the Area, taking into account assessments of the environmental implications of activities in the Area. It is appropriate for the Council to establish appropriate procedures for any reference by the LTC to recognized experts (external to the ISA and UN system) for advice in developing rules including standards that will be recommended to the Council for adoption.

With regard to DR 94(2), the LTC report, ISBA/25/C/19/Add.1, recommends a phased outcome-based approach should be used in the development of standards and guidelines. This compromise approach will not enable a full appreciation of the extent to which the proposed regulatory regime for the exploitation of minerals adequately addresses the effective protection of the marine environment when the regulations are placed before the Council for adoption. Council may wish to provide guidance to the LTC on the development of the outstanding Standards and Guidelines when adopting the

regulations and/or subsequently in light of matters that may have arisen. The decisions of Council and those of the Assembly are not expressly included in the definition of "Rules of the Authority". The Schedule to the Draft Regulations provides that "'Rules of the Authority' means the Convention, the Agreement, these regulations and other rules, regulations and procedures of the Authority as may be adopted from time to time." It is useful in our view to expressly include reference to decisions of the Council an Assembly.

As regards DR 94(4), the report of the LTC, ISBA/25/C/19/Add.1, recommends (in paragraph 21) that DR 94 be amended to reflect that Standards should be approved by the Assembly. Jamaica supports this recommendation.

Regulation 95 Issue of Guidelines

1. The Commission or the Secretary-General shall, from time to time, prepare~~issue~~ Guidelines of a technical or administrative nature, taking into account the views of the Council and relevant Stakeholders. Guidelines will support the implementation of these regulations from an administrative and technical perspective.

2. The full text of such Guidelines shall be reported to the Council. Should the Council find that a Guideline is inconsistent with the intent and purpose of the Rules of the Authority, it may request that the guideline be modified or withdrawn. Where no such request is made the Council shall approve the Guidelines.

2bis. Where the Council approves the Guidelines, the Commission or the Secretary-General, as appropriate, shall issue the Guidelines.

3. The Commission or the Secretary-General shall keep under review such Guidelines in the light of improved knowledge or information.

RATIONALE:

Guidelines should be developed through transparent processes that provide States Parties and other stakeholders an opportunity to proffer expert views and the Council an opportunity to discuss the Guidelines and provide guidance on their further development, as necessary, before the Guidelines are officially issued. The Council's role should not be limited merely ex post factum in requiring the withdrawal or modification of a Guideline. A similarly transparent process should also apply to any revisions made to the Guidelines.

Regulation 100 Inspectors to report

3. The Secretary-General shall report acts of violence, intimidation or abuse against or the wilful obstruction or harassment of an Inspector by any person or the failure by a Contractor to comply with regulation 96 to the sponsoring State or States, ~~and~~ the flag State of any vessel or Installation concerned, and the State of nationality of any person, if known, for consideration of the institution of proceedings under national law.

RATIONALE:

We recommend that additional reference should be made in DR 100(3) to the State of nationality of any alleged offender. There are instances where the State of nationality is best placed to assert jurisdiction in personam. It may be noted, for example, that UNCLOS reserves to the flag State and the State of nationality penal jurisdiction in matters of collision and any other incident of navigation.

Also, as several States may have concurrent jurisdiction over an alleged offender it would seem useful to have process guidelines to facilitate cooperation between States and the Authority on the exercise of jurisdiction. The assumption of jurisdiction by one State may in certain instances impede prosecution in another State.

Section 2 Remote monitoring

Regulation 102 Electronic monitoring system

3. The Secretary-General shall issue a compliance notice under regulation 103, where there is reasonable evidence to suggest based on ~~he or she determines from~~ the data transmitted to the Authority that unapproved mining activities have occurred or are occurring.

RATIONALE:

The use of the word "determination" suggests that the Secretary-General has made a ruling on the facts and law. This would not appear to be appropriate, neither is it required for the Secretary-General to take action under DR 103.

Reference is made to the LTC Report, ISBA/25/C/18, where it is noted (at paragraph 36) that the secretariat will conduct a study on remote monitoring technology, including proposals on how the use of such technology will be reflected in the Draft Regulations and relevant guidelines. Jamaica looks forward to the circulation of this study which should assist Council in its deliberations on Section 2 of Part XI of the Draft Regulations.

Regulation 105 Sponsoring States

Without prejudice to regulations 6 and 21, and to the generality of their obligations under articles 139 (2) and 153 (4) of the Convention and article 4 (4) of annex III to the Convention, States sponsoring Contractors have the responsibility to ensure~~shall~~, in particular, that activities in the Area carried out~~take all necessary and appropriate measures to secure effective compliance~~ by Contractors whom they have sponsored are conducted in conformity~~in accordance~~ with Part XI of the Convention, the Agreement, the rules, regulations and procedures of the Authority and the terms and conditions of the exploitation contract.

RATIONALE:

DR 105 does not mirror the language of UNCLOS article 139(1) which was addressed in the advisory opinion of the International Tribunal of the Law of the Sea (ITLOS) (Advisory Opinion on "Responsibilities and Obligations of States Sponsoring Persons and Entities with respect to Activities in the Area"). ITLOS identified articles 139(1) and 153(4) of UNCLOS and article 4(4) of annex III of UNCLOS as the key provisions concerning the obligations of sponsoring States.[1] The revisions to the text of the Draft Regulations have generally attempted to remain as faithful as possible to the text of the UNCLOS. We believe that this is particularly advisable in this instance as the application for an Advisory Opinion was with a view to obtaining a desirable degree of clarity and certainty as regards the scope of the obligations and liability that may be imposed on sponsoring States. The Draft Regulations should build on and not in any way undermine the value of the Advisory Opinion requested by the Council.

[1] See ITLOS Advisory Opinion, para 99.

Regulation 106 Settlement of disputes

1. Disputes concerning the interpretation or application of these regulations and an exploitation contract shall be settled in accordance with section 5 of Part XI of the Convention and the rules of procedure adopted by the International Tribunal for the Law of the Sea for the conduct of expedited hearings concerning the Rules of the Authority.

2. [In accordance with article 21 (2) of annex III to the Convention,] any final decision rendered by a court or tribunal having jurisdiction under the [Convention] [Rules of the Authority] relating to the rights and obligations of the Authority and of the Contractor shall be enforceable in the territory of any State party to the Convention affected thereby.

RATIONALE:

Jamaica has previously outlined its concerns with regard to ensuring the timely resolution of disputes. In the absence of a consensus to provide for an optional alternative system of administrative review, Jamaica recommended that the ISA explore the possibility of ITLOS establishing special rules of procedure that would accommodate expedited hearings on a subset of disputes that may arise under the exploitation regulations similar to those applicable to the prompt release of vessels and crews.

Jamaica further recommended that discussions with ITLOS could be pursued with a view to accommodating enhanced transparency and possibly greater participation by third parties in certain dispute settlement proceedings under the Draft Regulations.

Jamaica addressed these matters at length in our previous submissions and therefore will not repeat the argumentation here.

As regards DR 106(2), it is noted that the judgment of a national court in relation to proceedings taken in context of DR 100(3) relating to acts of violence, intimidation or abuse against or the wilful obstruction or harassment of an Inspector, may require recognition and enforcement in other jurisdictions. The reference to "a court or tribunal having jurisdiction under the Convention relating to the rights and obligations of the Authority and of the Contractor" may be seen as limiting. It would cover the flag State and sponsoring State generally, though only the flag State and State of nationality where penal

jurisdiction is asserted in matters of collision and any other incident of navigation (UNCLOS, article 97). The Council may consider referring to jurisdiction under the Rules of the Authority, which includes the Convention, the Agreement, the regulations and other rules, regulations and procedures of the Authority as may be adopted from time to time. Were this approach to be adopted, as the reference to Rules of the Authority is broader than the Convention, the reference to annex III, article 21(2) would be deleted.

Regulation 107 Review of these regulations

2. If, in the light of improved knowledge or technology, it becomes apparent that these regulations are not adequate, any State party, the Commission or any Contractor through its sponsoring State may at any time request the Council to consider, at its next ordinary session, revisions to these regulations and the matter shall be included in the provisional agenda of the Council for that session.

RATIONALE:

The rules of the Council provide that the provisional agenda of a regular session shall include items proposed by the Assembly, Council, a member of the Council and the Secretary-General, and reports etcetera of the Enterprise, Economic Planning Commission, LTC and Finance Committee. A matter which is raised by a State Party which is not a member of the Council would not automatically be included as an item on the Council's agenda. The inserted text is designed to address this.