

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

Submitted by the Government of Japan

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1. GENERAL COMMENTS

The Government of Japan is of the view that the Regulations on Exploitation of Mineral Resources in the Area (hereinafter referred to as “the Regulations”) should establish a proper balance between the principle of Common Heritage of Mankind and Sound Commercial principles. Japan considers the realization of the exploitation of the resources in the Area, which mankind has been longing for, presupposes the entry of ample number of companies to the deep-sea mining industry in the Area. Therefore, Japan would like to stress that the discussion on the Regulations needs to be given full consideration regarding the provision of sufficient incentives for companies to engage in deep-sea exploitation in light of the technical and economic difficulties they face in exploiting mineral resources in the Area. Japan also would like to reaffirm its belief that it is essential to formulate reasonable Regulations, properly striking a balance between exploitation and environmental considerations, that are indispensable for the realization of deep-sea exploitation.

Japan fully agrees with many voices raised in the twenty-fifth session that it is important to proceed with the work towards the adoption of the Regulations on Exploitation in accordance with the predetermined time period whereas ensuring quality of the Regulations should be an overriding priority.

For the sake of efficiency and transparency any revision to be undertaken should be track-changed and likewise supplementary explanatory notes could also be made to provide justifiable rationale behind such revision that is made from the next round of the revision thereafter.

From these viewpoints, Japan would like to proactively engage itself fully with the formulation of pragmatic, balanced Regulations in collaboration with other member countries and stakeholders.

The following views are as of October 2019 and we reserve the right to make further oral or written comments in the course of further discussions.

## 2 PART I: INTRODUCTION

### Regulation 2 (Fundamental policies and principles)

Regulation 2(e)(iv) provides “the application of the polluter pays principle through market-based instrument, mechanisms and other relevant measures,” which could be being interpreted in many ways. In order to avoid such situation, Japan considers the text should refer to the principle 16 of the Rio Declaration, which reads “a State party should promote the internalization of environmental costs and the use of economic instruments taking into account the principle that the polluter should bear the cost of pollution without distorting international trade and investment.”

< Regulation 2 (e) (iv) >

- (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 **as reflected in principle 16 of the Rio Declaration on Environment and Development** through market-based instruments, mechanisms and other relevant measures;

### Regulation 3 (Duty to cooperate and exchange of information)

Regulation 3 (a) and (g) includes ambiguous provisions where what kind of data and information Contractors are required to provide is unclear, such as “provide such data and information as is reasonably necessary” and “provide or facilitate access to such information as is reasonably required by the Secretary.” Under such circumstance, Japan previously proposed to incorporate “use their best endeavours” into text for the sake of eliminating a possibility to unduly broaden obligations of Contractors.

Following the discussion at the meeting of part one of the twenty-fifth session, where some council members pointed out that the phrase “use their best endeavors” would obscure the obligation of Member states and Contractors and it therefore should be deleted, Japan suggests deleting the phrase “use their best endeavours ...” subject to the conditions that the request to members of the Authority and Contractors is made by the

Secretary-General in writing with an explanation that such data and information is necessary for the Authority and that this rule applies to all member of the Authority and Contractors in a uniform and non-discriminatory manner.

< Regulation 3(a) and (g) >

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 ~~upon the request by the Secretary-General in writing with an explanation that such data and information is as is reasonably~~ necessary for the Authority to discharge its duties and responsibilities under the Convention. ~~This provision shall be applied to all members of the Authority and Contractors in a uniform and non-discriminatory manner;~~
- (g) In order to assist the Authority in carrying out its policy and duties under section 7 of the annex to the Agreement, Contractors shall ~~use their best endeavours, upon the request of the Secretary-General, to~~ provide or facilitate access to such information ~~upon the request as is reasonably required~~ by the Secretary-General ~~in writing with an explanation that such information is necessary for the Authority.~~ to prepare studies of the potential impact of Exploitation in the Area on the economies of developing land-based producers of those Minerals which are likely to be most seriously affected. The content of any such studies shall take account of the relevant Guidelines. ~~This provision shall be applied to all Contractors in a uniform and non-discriminatory manner.~~

Regulation 4 (Protection measures in respect of coastal States)

Japan welcomes the revised text that newly defines an issuance of an emergency order, which is considered as the first and foremost measure to be taken, pursuant to paragraph (2)(w) of article 162 and paragraph (2)(k) of article 165, in a situation where “there are clear grounds for believing that Serious Harms to the Marine Environment is likely to occur,” and also appreciates text revision where the Commission and the Council will be involved in its decision-making process.

In the previous text, the whole responsibility for issuing a compliance notice, which may lead to serious consequence such as suspension and termination of an exploitation contract, was solely placed on the Secretary-General alone. Japan is pleased to see the revisions that a compliance notice is issued in case where Serious Harm or threat of

Serious Harm to the Marine Environment is attributable only to the breach by the Contractor of the terms and conditions of its exploitation contract, and that a decision-making process leading to the compliance notice is institutionalized by involving the Commission and the Council. We believe these modifications bring these provisions into conformity with the provisions of the Convention.

Japan supports developing the relevant Guidelines for the assessment of “Serious Harm to the Marine Environment.” Considering that the determination of the Serious Harm has a crucial importance in handling of serious situations, Japan suggest that common understanding on the interpretation of the terms be established by stakeholders and therefore the Guideline on Serious Harm be developed before the Regulations are adopted.

### 3 PART II: APPLICATION FOR APPROVAL OF PLANS OF WORK IN THE FORM OF CONTRACTS

Regulation 10: Preliminary review of application by the Secretary-General and

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

Japan welcomes the text addition that clearly differentiates an operator who has a preference and a priority for a Plan of Work covering exploitation of the same area and resources from other applicants. However, current provisions do not inhibit an operator who has no approved Plan of Work for exploration from applying for exploitation. We have concern that if such operators mentioned above (i.e., those who apply for exploration based on the result of marine scientific research or prospecting carried out from above the sea surface in some parts of the Area where exploration is yet to be carried out by any operators) is qualified for applying for exploitation, which would open the pathway for a Contractor to go for exploitation without exploration, which takes a huge investment in time and money.

There may be a case in which an operator, who has no preference and priority for exploitation, applies for exploitation prior to the submission of application by an operator who has a preference and a priority. In order to prevent such an application from being proceeded in vain it is crucial to confirm an intention of an operator, who has a preference and a priority, to apply for exploitation along with determination of whether the applicant has a preference and a priority in accordance with article 10 of annex II to the Convention, at the time of preliminary review by the Secretary-General.

< Regulation 10 >

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. **In case there is a potential applicant who has preference and priority in the same area and same Resource category under Exploration contract, the Secretary-General shall confirm the intention of such a potential applicant to apply.**
2. Where an application is not complete, the Secretary-General shall, within 45 Days of receipt of the application, notify the applicant, specifying the information which the applicant must submit in order to complete the application, together with a justification in writing as to why the information is necessary and a date by which the application must be completed. Further processing of an application will not begin until the Secretary-General determines that the application is complete, which includes payment of the administrative fee specified in appendix II. **An application will not be processed further if there is another operator who has a preference and priority and an intention to apply in accordance with regulation 10 (1).**

As a consequence of the above revision, regulation 10 duplicates by regulation 15 (2) (a), which should be deleted. The provision should be deleted also because even if the proposed Plan of Work for exploitation by some applicant is included in a Plan of Work for exploration approved by the Council for the same Resource category for a different qualified applicant, such proposed Plan of Work of the former could be approved in so far as the qualified applicant have no intention to apply.

<Regulation 15 (1) and (2)>

1. If the Commission determines that the applicant meets the criteria set out in regulations 12 (4) and 13, it shall recommend approval of the Plan of Work to the Council.
2. The Commission shall not recommend approval of a proposed Plan of Work if part or all of the area covered by the proposed Plan of Work is included in:
  - ~~(a) A Plan of Work for Exploration approved by the Council for the same Resource category for a different qualified applicant;~~
  - (ab)** A Plan of Work approved by the Council for Exploration or Exploitation of other Resources if the proposed Plan of Work would be likely to cause undue interference with activities under such approved Plan of Work for other Resources;

- (be) An area disapproved for Exploitation by the Council pursuant to article 162 (2) (x) of the Convention; or
- (cd) A Reserved Area or an area designated by the Council to be a Reserved Area, except in the case of eligible applications under these regulations made in respect of a Reserved Area.

#### Regulation 11: Publication and review of the Environmental Plans

As mentioned in paragraph 14 of the Note by the Legal and Technical Commission on draft regulations on exploitation of mineral resources in the Area (ISBA/25/C/18), the review of the Environmental Plans should be conducted by the Commission pursuant to article 152 (2) of the Convention. In case where such review is supplemented by external independent experts, the engagement of such experts should be discretionary and not mandatory. For the sake of transparency, necessity of engaging with the discretionary experts should be well clarified in advance and process of selecting and appointing the experts should be developed in the relevant Guidelines. Japan would like to know who will bear the cost of hiring the experts on a discretionary basis.

The applicant is required to revise the Environmental Plans or provide responses in reply to the comments in principle within a period of 30 Days. Japan is of the view that while maintaining that time period, upon a request the applicant the extension should be granted if the applicant needs additional time to revise the plans or respond to the comments depending on nature of the comments received.

< Regulation 11 (2) and (5)>

2. The Secretary-General shall, within 7 Days following the close of the comment period, provide the comments submitted by members of the Authority, Stakeholders, the Commission and any comments by the Secretary-General to the applicant for its consideration. The applicant shall consider the comments and may revise the Environmental Plans or provide responses in reply to the comments and shall submit any revised plans or responses within a period of 30 Days following the close of the comment period, **unless otherwise decided by the Secretary-General after considering a request by the applicant for the extension of the period. Such an extension of the period may be requested only when revision of plans or responses takes more than 30 Days and the request shall be made before the time period of 30 Days expires. The extension of the period shall be informed by posting on the Authority's website.**
5. The Commission shall prepare a report on the Environmental Plans. The report shall include details of the Commission's determination under regulation 13 (4) (e) as well as a summary of the comments or responses made under regulation 11 (2). The report shall also include any amendments or modifications to the Environmental Plans

recommended by the Commission under regulation 14. Such report on the Environmental Plans or revised plans shall be published on the Authority's website and shall be included as part of the reports and recommendations to the Council pursuant to regulation 15. **In preparing the report, the Commission may seek advice from recognized experts as necessary. In such case, the Commission shall clarify the necessity of advice from experts and seek prior approval of the Council. The experts shall be selected and appointed in accordance with the relevant Guidelines.**

**Regulation 13: Assessment of applicants and Regulation 31: Reasonable regard for other activities in the Marine Environment**

Regulation 31 (1) contains a provision that Contractor shall, "consistent with the relevant Guidelines," carry out Exploitation under an exploitation contract with reasonable regard for other activities in the Marine Environment. The Guidelines pertaining to reasonable regard are of great important and Japan supports their development. On the other hand, regulation 13 (4) (d) provides "the Commission shall determine if the proposed Plan of Work provides for Exploitation activities to be carried out with reasonable regard for other activities in the Marine Environment" without mentioning any reference to the relevant Guidelines, which Japan thinks should be taken into account in process of determination by the Commission.

In the previous text, regulation 31 (2) provided "other activities in the Marne Environment shall be conducted with reasonable regard for the activities of Contractors in the Area." Japan welcomes the revised text, which replaces the phrases above with "the Authority ... shall take measures to ensure that other activities in the Marine Environment shall be conducted with reasonable regard..." as in most cases identification of legal subject of "other activities in the Marnie Environment" is unknown and it is not possible the Regulations provide legally-biding measures for these other activities. In light of this, it is expected that the Authority plays a role as mediator and facilitates between Contractors and other activities in the Marine Environment through information sharing at least at initial stage.

< Regulation 13 (4) >

4. The Commission shall determine if the proposed Plan of Work:

(d) Provides for Exploitation activities to be carried out with reasonable regard for other activities in the Marine Environment, including, but not limited to, navigation, the laying of submarine cables and pipelines, fishing and marine scientific research, as referred to

in article 87 of the Convention **in accordance with the relevant Guidelines**; and

<Regulation 31>

1. Contractors shall, consistent with the relevant Guidelines, carry out Exploitation under an exploitation contract with reasonable regard for other activities in the Marine Environment in accordance with article 147 of the Convention and the approved Environmental Management and Monitoring Plan and Closure Plan and any applicable international rules and standards established by competent international organizations. In particular, each Contractor shall exercise due diligence to ensure that it does not cause damage to submarine cables or pipelines in the Contract Area.

2. The Authority, in conjunction with member States, shall take measures to ensure that other activities in the Marine Environment shall be conducted with reasonable regard for the activities of Contractors in the Area, **which includes but not limited to the Authority's facilitation of the coordination between two parties at early stages. For this reason, the Authority shall promote, inter alia, effective and early-stage consultations between the contractors and the proponents of the other activities in the Area.**

#### 4 PART III: RIGHTS AND OBLIGATIONS OF CONTRACTORS

##### Regulation 18 Rights and exclusivity under an exploitation contract

Japan welcomes the reference to “the relevant Guidelines” in application of Exploration Regulations to exploration activities in the Contract Area conducted under an exploitation contract in regulation 18 (7). The relevant Guidelines should be listed in guidelines to be developed in due course. It is expected that due consideration is given in the process of developing relevant Guidelines to whether regulations under Exploration Regulations, including those related to reporting of activities, are uniformly applied to exploration activities under an exploitation contract. Japan suggests deleting the reference to “the payment of applicable fees” as fees for exploration activities conducted under an exploitation contract should not be charged twice under the exploration and exploitation contracts.

<Regulation 18 (7)>

7. In relation to Exploration activities in the Contract Area conducted under an exploitation contract, the applicable Exploration Regulations shall continue to apply as set out in the relevant Guidelines. In particular, the Contractor shall be expected to continue to show due diligence in conducting Exploration activities in the Contract Area,



together with ~~the payment of applicable fees and~~ the reporting of such activities and its results to the Authority in accordance with the applicable Exploration Regulations, including under regulation 38(2)(k).

#### Regulation 20: Terms of exploitation contracts

As the Contractor invests considerable time and money in exploration activities, exploitation activities have to be undertaken over a period of time sufficiently long enough for the Contractor to recover the prior investment. In light of sound commercial principle, the initial term of an exploitation contract for 30 years along with renewal period for 10 years is quite reasonable.

Procedure needs to be identified for applying for an additional Mining Area within the existing Contract Area by the same contractor as a result of exploration activities under the exploitation contract under regulation 18 (7).

#### Regulation 25: Documents to be submitted prior to production

Japan supports for the revised text with reference to mutatis mutandis application of regulation 57(2) in case the proposed modification of the Environmental Plans prior to production. ~~Environmental Plans need to be modified from time to time in order to improve their effectiveness. If environmental plans with minor modifications are required to go through the same procedures which the original plans went through, this would significantly delay commencement of Commercial Production and may affect a project itself. To avoid such a procedural delay, Japan considered that it would be better if such process is limited to the case of “Material Change.” We welcome the revision.~~

#### Regulation 26: Environmental Performance Guarantee

There is no description which organ of the Authority decides the amount of the Environmental Performance Guarantee. As the amount of the Guarantee is of critical importance, it is the Council that should decide its amount in relevant Standard, taking into account the recommendations of the Commission and Finance Committee.

#### <Regulation 26>

1. A Contractor shall lodge an Environmental Performance Guarantee in favour of the Authority and no later than the commencement date of production in the Mining Area.
2. The required form and amount of the Environmental Performance Guarantee shall be determined according to the 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 Council shall decide the amount of an Environmental Performance Guarantee in Standard, taking into account the recommendation of the Commission and Finance Committee.** The amount of an Environmental Performance Guarantee may be provided by way of instalments over a specified period according to the relevant Guidelines.

**Regulation 28: Maintaining Commercial Production and Regulation 4: Protection measures in respect of coastal States**

Regulation 28 (3) places the Contractor under an obligation to temporarily reduce or suspend production whenever such behavior is required to protect the Marine Environment from Serious Harm or a threat of Serious Harm or to protect human health and safety. With the understanding that this provision is applied to both the temporary reduction or suspension upon an emergency order under regulation 4 (4) and the temporary reduction or suspension on a voluntary basis by Contractor based on its own judgement that there is Serious Harm or a threat of Serious Harm if it maintains Commercial Production.

<Regulation 28>

1. The Contractor shall maintain Commercial Production in accordance with the exploitation contract and the Plan of Work annexed thereto and these regulations. A Contractor shall, consistent with Good Industry Practice, manage the recovery of the Minerals removed from the Mining Area at rates contemplated in the Feasibility Study.
2. The Contractor shall notify the Secretary-General if it:
  - (a) Fails to comply with the Plan of Work; or
  - (b) Determines that it will not be able to adhere to the Plan of Work in future.
3. Notwithstanding paragraph 1 above, the Contractor shall temporarily reduce or suspend production whenever such reduction or suspension is required to protect the Marine Environment from Serious Harm or a threat of Serious Harm or to protect human health and safety **upon the receipt of emergency order pursuant to regulation 4(4) or on the Contractor's own decision that maintaining the level of production would result in Serious Harm or a threat of Serious Harm.** A Contractor shall notify the Secretary-General of such a reduction or suspension of production as soon as is practicable and

no later than 72 hours after production is reduced or suspended.

<Regulation 4 (4)>

4. If the Commission determines, taking account of the relevant Guidelines, that there are clear grounds for believing that Serious Harm to the Marine Environment is likely to occur, it shall recommend that the Council issue an emergency order pursuant to article 165 (2) (k) of the Convention. **Upon the receipt of the emergency order, the Contractor shall take necessary measures in accordance with regulation 28 (3).**

**Regulation 29: Reduction or suspension in production due to market condition**

Timing of the notification to the Secretary-General by a Contractor on temporary reduction and suspension of production in Regulation 29 should be clarified.

<Regulation 29 (1)>

1. Notwithstanding regulation 28, a Contractor may temporarily reduce or suspend production due to market conditions but shall notify the Secretary-General thereof **no later than one month from the date of the reduction or suspension as soon as practicable thereafter**. Such reduction or suspension may be for a period of up to 12 months.

**Regulation 33: Preventing and responding to Incidents and Regulation 34: Notifiable events**

Regulation 33 (2)(e) requires the Contractor to record notifiable events under regulation 34 in the Incidents Register whereas no such provision appears under regulation 34 itself. In light of consistency, the same provision should be spelled out in regulation 34.

< Regulation 34 (2) >

2. The Contractor shall, as soon as reasonably practicable, but no later than 24 hours after the Contractor becomes aware of any such event;
  - (a) Provide written notification to the Secretary-General of the event, including a description of the event, the immediate response action taken (including, if appropriate, a statement regarding the implementation of an Emergency Response and Contingency Plan) and any planned action to be taken- ; and
  - (b) **Record the notifiable events in the Incidents Register, which is a register to be maintained by the Contractor on board a mining vessel or Installation to record any Incidents or notifiable events under this regulation.**

#### Regulation 36: Insurance

The relevant Guidelines on insurance have not been included in a list of guidelines to be in place before the adoption of the Regulations as a result of the consideration by the Commission. As regulation 36 (3) provides “the obligation under an exploitation contract to maintain insurance is a fundamental term of the contract,” it is vital to ensure terms and conditions of insurance to be made clear before start of administration of the Regulations. In light of this, Japan is of the view that the Guideline on insurance needs to be completed before the adoption of the Regulations.

Regulation 36 (2) provides “contractors shall include the Authority as an additional assured” and “the underwriters *have to* waive any rights of recourse, including *subrogation rights against the Authority* in relation to Exploitation,” whereas article 22, annex III to the Convention, reads “the Authority shall have responsibility or liability for any damage arising out of wrongful acts in the exercise of its powers and functions.” Japan had made an inquiry if such responsibility or liability the Authority assumes is designed to be covered by the insurance of the Contractors and if such practice of mining industry exists. Given these inquiries remain unanswered, Japan would suggest deleting the whole regulation 36 (2).

#### <Regulation 36>

1. A Contractor shall obtain and thereafter at all times maintain, and cause its subcontractors to obtain and maintain, in full force and effect, insurance with financially sound insurers satisfactory to the Authority, of such types, on such terms and in such amounts in accordance with applicable international maritime practice, consistent with Good Industry Practice and as specified in the relevant Guidelines.
- ~~2. Contractors shall include the Authority as an additional assured. A Contractor shall use its best endeavours to ensure that all insurances required under this regulation shall be endorsed to provide that the underwriters waive any rights of recourse, including subrogation rights against the Authority in relation to Exploitation.~~
3. The obligation under an exploitation contract to maintain insurance as specified in the Guidelines is a fundamental term of the contract. Should a Contractor fail to maintain the insurance required under these Regulations, the Secretary-General shall issue a compliance order under regulation 103. The Secretary-General shall notify the Council at its next available meeting of such failure, and the corrective measures taken by the Contractor.

Regulation 38: Annual report

Usage of terms provided in regulation 38 such as “any criteria”, technical standards and indicators pursuant to the Environmental Management and Monitoring Plan” should be consistent with that of regulation 48(1).

< Regulation 36 (2)(g)>

2. Such annual reports shall include:

(g)The actual results obtained from environmental monitoring programmes, including observations, measurements, evaluations and the analysis of environmental parameters, reported against, where applicable, any ~~environmental objectives and standards criteria, technical standards and indicators~~ pursuant to the Environmental Management and Monitoring Plan, together with details of any response actions implemented under the plan and the actual costs of compliance with the plan;

Regulation 39: Books, records and samples

Japan welcomes that the revised text refers to the relevant Guidelines, which include a practical and realistic option for the Contractor to maintain samples by itself or have such maintenance performed on its behalf by other agencies under regulation 39 (3).

5 PART IV: PROTECTION AND PRESERVATION OF THE MARINE ENVIRONMENT

Regulation 44: General obligations and Regulation: Assessment of applicants

There may be different understandings among many stakeholders with regard to the terms used under regulations 44 and 13 such as “Best Available Techniques,” “Best Environmental Practice,” “Best Available Scientific Evidence” and “Good Industry Practices.” It is essential to identify the common understanding on those techniques, required specifications of equipment and practices in the relevant Guidelines, which should be developed taking into account the views of relevant stakeholders.

Regulation 2: Fundamental policies and principles, Regulation 45: Development of Environmental Standards, Regulation 46: Environmental Management System: Regulation 47: Environmental Impact Statement, and Regulation 48: Environmental Management and Monitoring Plan

With regard to Environmental Standards, Environmental Management System, Environmental Impact Statement and Environmental Management and Monitoring Plan

under regulations from 45 through 48, relationship between each respective issues is not clear at the present moment. Therefore, an entire picture including likely contents, outputs, workflow and primary implementing entity should be made clear before entering into a discussion of the respective Guidelines.

Fundamental policies and principles (regulation 2) Environmental Impact Statement (regulation 47), Environmental Management and Monitoring Plan (regulation 48), and Closure Plan (Annex VIII) are respectively to be developed in accordance with regional environmental management plans (REMPs). As is important and useful for ensuring protection of the marine environment under article 145 of the Convention, Japan supports the development of REMPs. With regard to the nature of the document, as the note by the Secretariat (ISBA/25/C/4) explains, REMPs themselves are not legal instruments but rather instruments of environmental policy, which should be clearly reflected in the Regulations.

#### <Regulation 2>

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 instruments, including regional environmental management plans, based on the following principles:

#### Regulation 47: Environmental Impact Statement

The note by the Commission (ISBA/25/C/18) mentions "the detailed requirements for the scoping stage, including the associated processes, should be detailed under the exploration regime." The process of concrete steps for laying out the detail under Exploration Regulations should be identified. In general, activities relating to delivering the Environmental Impact Statement (EIS) are undertaken under Exploration Contract, a screening and scoping process referred to under Regulation 47(1)(b) should be appropriately reflected in Exploration Regulations.

In case the adequacy of holding public consultation as requirement for preparing the EIS is reviewed in the assessment of the Environmental Plans, a modality of public consultation should be identified in advance. Therefore, the relevant Guidelines on EIS should include a modality of the public consultation along with measures taken by

applicants.

<Regulation 47>

1. The purpose of the Environmental Impact Statement is to document and report the results of the environmental impact assessment. The environmental impact assessment:
  - (a) Identifies, predicts, evaluates and mitigates the biophysical, other relevant effects of the proposed mining operation;
  - (b) Includes at the outset a screening and scoping process, which identifies and prioritizes the main activities and impacts associated with the potential mining operation, in order to focus the Environmental Impact Statement on the key environmental issues. The environmental impact assessment should include an environmental risk assessment;
  - (c) Includes an impact analysis to describe and predict the nature and extent of the Environmental Effects of the mining operation; and
  - (d) Identifies measures to manage such effects within acceptable levels, including through the development and preparation of an Environmental Management and Monitoring Plan.
2. An applicant or Contractor, as the case may be, shall prepare an Environmental Impact Statement in accordance with this regulation.
3. The Environmental Impact Statement shall be in the form prescribed by the Authority in annex IV to these regulations and shall be:
  - (a) Inclusive of a prior environmental risk assessment;
  - (b) Based on the results of the environmental impact assessment;
  - (c) In accordance with the objectives and measures of the relevant regional environmental management plan; and
  - (d) Prepared in accordance with the applicable **Regulations on Prospecting and Exploration and** Guidelines, Good Industry Practice, Best Available Scientific Evidence, Best Environmental Practices and Best Available Techniques, **based on the results of the consultation conducted in accordance with the relevant Guidelines.**

**Regulation 48: Environmental Management and Monitoring Plan**

According to regulations 49 and 50, a Contractor is required to take necessary measures in accordance with the Environmental Management and Monitoring Plan (EMMP), regulation 48 also needs to make reference likewise to pollution control and restriction on Mining Discharges under regulations 49 and 50.

<Regulation 48>

1. The purpose of an Environmental Monitoring and Management Plan is to manage and confirm that Environmental Effects meet the environmental quality objectives and standards for the mining operation. The plan will set out commitments and procedures on how the mitigation measures, **including pollution control and mining discharge in regulations 49 and 50**, will be implemented, how the effectiveness of such measures will be monitored, what the management responses will be to the monitoring results and what reporting systems will be adopted and followed.
2. An applicant or Contractor, as the case may be, shall prepare an Environmental Management and Monitoring Plan in accordance with this regulation.
3. The Environmental Management and Monitoring Plan shall cover the main aspects prescribed by the Authority in annex VII to these regulations and shall be:
  - (a) Based on the environmental impact assessment and the Environmental Impact Statement;
  - (b) In accordance with the relevant regional environmental management plan; and
  - (c) Prepared in accordance with the applicable Guidelines, Good Industry Practice, Best Available Scientific Evidence and Best Available Techniques, and consistent with other plans in these regulations, including the Closure Plan and the Emergency Response and Contingency Plan.

Regulation 50: Restriction on Mining Discharges

“Unauthorized mining discharge” is one of the notifiable events in Appendix I (9) of the Regulations and is applicable to most cases taken up in regulation 50 (2). It should be clearly stated in regulation 50 (2) that necessary measures should be taken as appropriate in accordance with regulation 34 (2) in occurrence of incidents.

<Regulation 50>

1. A Contractor shall not dispose, dump or discharge into the Marine Environment any Mining Discharge, except where such disposal, dumping or discharge is permitted in accordance with:
  - (a) The assessment framework for Mining Discharges as set out in the Guidelines; and
  - (b) The Environmental Management and Monitoring Plan.
2. Paragraph 1 above shall not apply if such disposal, dumping or discharge into the Marine Environment is carried out for the safety of the vessel or Installation or the safety of human life, provided that all reasonable measures are taken to minimize the likelihood of Serious Harm to the Marine Environment, and such disposal, dumping or



discharge shall be reported forthwith to the Authority. In case of such mining discharge occurred, the Contractor shall take necessary measures in accordance with regulation 34(2).

#### Regulation 55: Purpose of the Fund

Given a primary purpose of the Environmental Compensation Fund is to fund for the implementation of any necessary measures designed to prevent, limit or remediate any damage to the Area arising from activities in the Area as described in regulation 55(2), it is important not to broaden the scope of the Fund. In elaborating the mechanism for environmental compensation fund, practice of mining industry if any may be referenced.

<Regulation 55>

The main purposes of the Fund will be include:

~~(a) The 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.;~~

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

## 6 PART VI: CLOSURE PLANS

#### Regulation 59: Closure Plan

Closure Plan is such a critical document as it addresses issues including any deliberate disposal at sea of wastes or other matters from vessels and Installations to be regulated by Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter (London Convention) and 1996 Protocol to the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, 1972 (London Protocol). The priority of the relevant Guideline on Closure Plan should be regarded as Phase 2, or "Guidelines to be developed prior to the receipt of the first application for a plan of work

for exploitation. “

7 PART VII: FINANCIAL TERMS OF AN EXPLOITATION CONTRACT AND  
APPENDIX IV : DETERMINATION OF A ROYALTY LIABILITY

Regulation 62: Equality of treatment, Regulation 63: Incentives, Regulation 64:  
Contractor shall pay royalty, Regulation 81: Review of system of payments, Regulation  
82: Review of rates of payments and Appendix IV : Determination of a Royalty Liability

Paragraph 1(a), Section 8 of annex to the 1994 Agreement provides the principle that the system of payments to the Authority shall be fair both to the contractor and to the Authority. In light of this principle, Japan is of the view that a proper balance should be struck between the principles of the Common Heritage of Mankind and sound commercial principles.

Regarding the issue of royalty, in respect of sound commercial principles provided in the paragraph 1(a), Section 6 of annex to the Agreement, it is important that the financial regime should reflect the total costs of Contractors such as their investments for explorations which is essential for a long-term, commercially viable and safe deep-sea exploitations. Considering that commercial mining of deep seabed is unexplored area, the risks the pioneer investors of exploitation would face should be taken into consideration.

In setting up the financial regime, the all relevant elements such as the financial incentives provided in article 13 of annex III to the Convention, various fees and payments listed in the Appendix II to the Regulations, insurances that Contractors must purchase, and Environmental Compensation Fund, should be considered. As a method of the financial incentives, reduction or exemption of payment of royalty and annual fees for the First Period of Commercial Production, as defined in Appendix IV, would be effective.

An economic model developed by the Massachusetts Institute of Technology (MIT) is based on the assumptions including metal prices significantly increase in future. We should keep in mind that the consequences of using such model totally depends on the assumptions and it is not easy task to predict costs involved in the deep sea exploitation. The rates of payments under an existing system of payments should be reviewed in close

consultation with Contractors, in terms of the entire financial regime including financial incentives, various fees and payments, insurance, Environmental Compensation Fund and so forth, with due consideration of an annual fixed fee provided in the paragraph 1(d), Section 8 of annex to the Agreement.

The starting point of the proposal submitted from African Group is that the rates of payment under the Authority payment regime should be similar to rates of payment to the government that has the jurisdiction over the area where land-based mining occurs. However, it should be remembered that activities undertaken by the Contractor in the Area involves technical difficulty and huge risks. If proposed progressive ad valorem system is to be introduced, in light of the principle provided in Section 8 (1)(a) of the annex to the Agreement (the system of payments to the Authority shall be fair both to the contractor and to the Authority), necessary measures to mitigate burden of the Contractors in case metal prices decrease should be similarly introduced as a single package.

Considering deep sea exploitation is a long-term project over thirty years and a scale of investment is so large, it is necessary to avoid the situation where the system of payments including the rates of payments change as a result of review, which would greatly ruin the economic viability of the project. Due consideration should be given to commercial viability in reviewing system of payments.

Provisions in Part VII (Financial terms of an exploitation contract) is financial matters where the Finance Committee must be involved in the process of consideration.

<Regulation 62>

The Council shall, based on the recommendations of the Commission and the Finance Committee, apply the provisions of this Part in a uniform and non-discriminatory manner, and shall ensure equality of financial treatment and comparable financial obligations for Contractors.

<Regulation 63>

1. The Council may, taking into account the recommendations of the Commission and the Finance Committee, provide for incentives, including financial incentives, on a uniform and non discriminatory basis, to Contractors to further the objectives set out in article 13 (1) of annex III to the Convention based on the principles provided in paragraph

1(a) of section 6 and paragraph 1(a) of section 8 of the annex to the Agreement.

2. Furthermore, the Council may provide incentives, including financial incentives, to those Contractors entering into joint arrangements with the Enterprise under article 11 of annex III to the Convention, and developing States or their nationals, to stimulate the transfer of technology thereto and to train the personnel of the Authority and of developing States.

3. The Council shall ensure that, as a result of the incentives provided to Contractors under paragraphs 1 and 2 above, Contractors are not subsidized so as to be given an artificial competitive advantage with respect to land-based miners.

<Regulation 64>

A Contractor, from the date of commencement of Commercial Production, shall pay a royalty in respect of the mineral-bearing ore sold or removed without sale from the Contract Area as determined in appendix IV to these regulations pursuant to Paragraph 1 of section 8 of the annex to the Agreement.

<Regulation 81 (2)>

2. The Council, based on the recommendations of the Commission, and in consultation with Contractors, may revise the system of payments in the light of changing circumstances and following any review under paragraph 1 above, taking into account of the economic viability of the project save that any revision shall only apply to existing exploitation contracts by agreement between the Authority and the Contractor.

<Regulation 82 (2)>

2. The Council, based on the recommendations of the Commission and in consultation with Contractors, may adjust the rates of payments in the light of such recommendations and consultation, taking into account of the economic viability of the project save that any adjustment to the rates of payments may only apply to existing exploitation contracts from the end of the Second Period of Commercial Production reflected in appendix IV to these regulations.

#### Regulation 78: Arm's-length adjustments

Regulation 76 (2) provides the Secretary-General with a responsibility to adjust the value of such costs, prices, and revenues to reflect an arm's-length value in accordance with internationally accepted principles. As such responsibility is considered as important, the involvement of the Council, the Commission, and Finance Committee should be ensured

in the decision-making process. Given regulation 73(3) provides “the Secretary-General shall provide the Contractor with written notice of any “proposed adjustment” under paragraph 2 above” and “the Contractor may make written representation to the Secretary-General,” the Secretary-General have limited authority to coordinate with the Contractor. In light of this, in order to ensure consistency a phrase “may adjust the value ...” under regulation 73(2) can be modified as “may propose to adjust the value.” Finally, procedures to be followed after submission of representations by the Contractor should be developed.

<Regulation 78>

1. For the purposes of this regulation:

(a) “Arm’s length”, in relation to contracts and transactions, means contracts and transactions that are entered into freely and independently by parties that are not related parties; and

(b) “Arm’s-length value”, in relation to costs, prices and revenues, means the value that a willing buyer and willing seller, who are not related parties, would agree is fair under the circumstances.

2. Where, for the purposes of calculating any amounts due under this Part VII, any costs, prices and revenues have not been charged or determined on an arm’s -length basis, pursuant to a contract or transaction between a Contractor and a related party, ~~the Council~~ ~~the Secretary-General~~ may propose to adjust the value of such costs, prices and revenues to reflect an arm’s-length value , taking into account the recommendations of the Commission and Finance Committee, in accordance with internationally accepted principles.

3. The Secretary-General shall provide the Contractor with written notice of any proposed adjustment under paragraph 2 above. The Contractor may make written representations to the Secretary-General within 60 Days of the date of such written notice.

4. The Commission and Finance Committee shall consider any such representations made by the Contractor at their respective next available meetings provided that the representations have been circulated at least 30 Days in advance of the respective meetings. The Commission shall then prepare its report and recommendations to the Council based on consultation with Finance Committee. The Council shall decide the value of relevant costs, prices and revenues based on the recommendation. The Contractor may take necessary measures in accordance with regulation 106 in case it is not satisfied with the decision of the Council.

Regulation 79: Interest on unpaid royalty

It is appropriate to shift the provisions relating to interest rate on the amount outstanding to Appendix IV, where a royalty rate is prescribed.

< Regulation 79 >

Where any royalty or other amount levied under this Part remains unpaid after the date it becomes due and payable, a Contractor shall, in addition to the amount due and payable, pay interest on the amount outstanding, beginning on the date the amount became due and payable, at an annual rate calculated ~~in accordance with Appendix IV by adding 5 per cent to the special drawing rights interest rate prevailing on the date the amount became due and payable.~~ **in accordance with Appendix IV**

Regulation 80: Monetary penalties

Article 18 (2) of annex III of the Convention provides “in the case of any violation of the contract not covered by paragraph 1(a), or in lieu of suspension or termination under paragraph 1(a), the Authority may impose upon the contractor monetary penalties...” In order to ensure consistency with the provision above, “in respect of a violation under this Part” can be modified as “in respect of a violation of the contract.”

<Regulation 80>

Subject to regulation 103 (6), the Council may impose a monetary penalty in respect of a violation ~~of the contract under this Part.~~

## 8 PART VIII: ANNUAL, ADMINISTRATIVE AND OTHER APPLICABLE FEES

Regulation 85: Annual fixed fee

An issue relating to the annual fixed fee is being considered by the Commission according to the note by the Commission on draft regulations on exploitation of mineral resources in the Area (ISBA/25/C/18). It is appropriate to clarify purpose and use of each annual and administrative fee listed in Appendix II after consideration by the Commission.

## 9 PART X: GENERAL PROCEDURES, STANDARDS AND GUIDELINES

Regulation 94: Adoption of Standards and 95: Issue of Guidelines

As stated in the note by the Commission on draft regulations on exploitation of mineral resources in the Area (ISBA/25/C/18), standards approved by the Council are mandatory

whereas guidelines provide clarification and should be recommendatory in nature. Japan welcomes proposed revised text in regulations 94 and 95 to take on differentiated processes based on the nature of each document and to apply process uniformly to each category of documents. Japan expects that standards and guidelines will be developed with the guidance of the Commission.

Active participation of relevant stakeholders including Contractors is key to making these standards and guidelines really practical and effective and in this respect Japan welcomes incorporation of this element into the revised text.

Japan is of the view that the Guideline on restriction on mining discharges needs to be completed before the adoption of the Regulations as it is extremely important in terms of environment and implementation of the project. Relevant Guidelines on Environmental Performance Guarantee and Closure Plan, both of which are necessary for Contractors in developing application for a Plan of Work for exploitation, should be developed prior to the receipt of the first application for a Plan of Work.

With regard to regulation 94 (1) (b), the scope of standards should be both “conservation” and “exploitation” of the Resources. The former term, which is deleted in the revised text, should be revived.

<Regulation 94 (1)>

1. The Commission shall, taking into account the views of recognized experts, 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 but not limited to standards relating to:

- (a) Operational safety;
- (b) The conservation and exploitation of the Resources; and
- (c) The protection of the Marine Environment, including standards or requirements relating to the Environmental Effects of Exploitation activities, and referred to in regulation 45.

## 10 PART XI: INSPECTION, COMPLIANCE AND ENFORCEMENT

Regulation 96: Inspections: general and Regulation 97: Inspectors: general

Provisions under regulations 96 and 97 needs to be consistent with regulation 4 (5), which

provides the Secretary-General shall direct an inspection in case where the Commission considers there are clear grounds for believing that Serious Harm to the Marine Environment is likely to occur or has occurred, and it is attributable to the breach of the Contractor of the terms and conditions of the exploitation contract.

Japan suggests creating lists of professionals, from various fields such as marine geology, marine minerals, mining, environment, marine biology, accounting, legal affairs, marine environment and so forth, who are considered by the Secretariat to be qualified. When inspection is required, the Secretariat, sponsoring states and other state parties concerned select an inspector out of the lists through consultation. As article 165 of the Convention assumes members of the Commission carry out the function of supervision and inspection, members of the Commission may be registered on the list likewise.

<Regulation 96 (3)>

3. The Secretary-General shall give reasonable notice to the Contractor of the projected time and duration of inspections, the names of the Inspectors and any activities that the Inspectors are to perform that are likely to require the availability of special equipment or special assistance from the personnel of the Contractor, save in situations where the Secretary-General may without prior notification direct an inspection of the Contractor's activities in accordance with regulation 4(5) ~~where the Secretary-General has reasonable grounds to consider the matter to be so urgent that notice cannot be given, in which case the Secretary-General may, where practicable, exercise the right to conduct an inspection without prior notification.~~

<Regulation 97>

1. The Council, based on the recommendations of the Commission, shall determine the relevant qualifications and experience appropriate to the areas of duty of an Inspector under this Part ~~save in situations where the Secretary-General shall direct an inspection of the Contractor's activities in accordance with regulation 4(5).~~ Based on the specified qualifications and experiences, a roster of candidates for Inspectors, including the members of the Commission as provided in article 165 (3) of the Convention, shall be made by the Secretariat
2. The Commission shall make recommendations to the Council on the appointment, supervision and direction of Inspectors, including an inspection programme and schedule, under the inspection mechanism established by the Council in regulation 96(1).
3. The Secretary-General shall manage and administer such inspection programme,



including the terms and conditions of the appointment of Inspectors, at the direction of the Council.

**Regulation 103: Compliance notice and termination of exploitation contract**

Japan welcomes the revised text, which reflects a case for suspending or terminating a contractor's rights provided under article 18 (1) (a) of annex III of the Convention, has become consistent with the Convention as the provision relating to suspension and termination of the contract is so critical.

**11 PART XIII: REVIEW OF THESE REGULATIONS**

**Regulation 107: Review of these regulations**

Considering deep sea exploitation is a long-term project over thirty years and a scale of investment is so large, it is necessary to avoid the change of rules in the middle of implementing the project otherwise it may ruin the economic viability of the project. In light of this, in principle, any amendments to the Regulations, especially those which have significant negative impact on the viability, shall not be applied retroactively to the detriment of the Contractors that have already signed an exploitation contract with the Authority.

<Regulation 107 (4)>

**4. Any amendments to these Regulations adopted by the Council and the Assembly, shall not be applied retroactively to the detriment of the Contractors that have already signed an exploitation contract with the Authority.**