Comments from UK Seabed Resources regarding ISBA/24/LTC/WP.1/Rev.1:
Draft Regulations on Exploitation of Mineral Resources in the Area

UK Seabed Resources Ltd. ("UKSR") commends the International Seabed Authority for establishing an opportunity for all stakeholders to provide comments on the current integrated draft of the Exploitation Code ("Code"). As a commercial contractor, UKSR remains committed to working with all stakeholders toward a Code that is both commercially viable and environmentally sound. This draft continues to demonstrate progress towards meeting both of those goals, and we applaud the efforts to date by the Legal & Technical Commission. We remain hopeful that the ISA and the State Parties will be able to meet the target of adoption of the Code at the second 2019 Council meeting.

To provide context for our comments, we note that the Code is intended to be the set of regulatory requirements applicable to contractors, clearly articulating roles and responsibilities of both regulator and contractor and ensuring that those requirements are both able to be, and are in fact, met. Towards that end, it is critical that there be clarity for all stakeholders as to those requirements. Clarity is perhaps uniquely critical for the contractors, charged with complying with the regulatory provisions, and investors, who need to understand the regulatory risks to determine whether the Code will in fact permit commercially viable undertakings before making material investments.

Therefore, at this point in the process, our comments are heavily focused on the need for greater i) regulatory certainty and predictability, particularly in definitions and consistency of terms used and the regulatory roles and responsibilities, and ii) economic clarity, to create and maintain a level playing field both among ISA contractors, regardless of ownership models, and between the mature terrestrial based mining industry and the nascent deep seabed mining industry. We have sought to provide a non-exhaustive list of examples in the draft Code for each of the topics below in order to highlight areas for further work or of concern.

Regulatory Certainty.

- Definitions. We urge the ISA to ensure that concepts in the Code – which form the basis of a contract between the ISA and the contractors and thus the basis for contractor performance, evaluation, and compliance – are appropriately and adequately defined, in addition to being used consistently throughout the Code. Doing so will avoid downstream conflicts in interpretation between the ISA and contractors, or potentially different interpretations being implemented among contractors. Some illustrative examples are below.

    - We would encourage the ISA to revisit the term "marine environment" to ensure that the definition is within the purview of the ISA under UNCLOS. For example, we would question the inclusion of genetic resources in any definition in the Code.
    - We would also urge the ISA to consider carefully the definition or standard for determining what is a "material" change.
    - We also observe that the term "Commercial Production" would benefit from additional clarity in an updated definition.
    - Additional review of Draft Regulations (DR) 34, 38, 47, 68, 72, 76. 87, and Appendix IX for clarity of terms (including using additional defined terms where appropriate) would be beneficial.

- Regulatory Roles & Responsibilities. It is critically important that the regulated industry as well as other stakeholders have a clear understanding of the regulatory roles and responsibilities of each body referenced in the Code. This will be important to the contractor as well as investors – whether from a compliance, dispute settlement, liability, or accountability perspective.

    - An important element in determining the appropriate roles and responsibilities for the exploitation phase should be the need for the regulator to be able to respond in real time, not at 6 month or yearly intervals, to regulatory developments, questions, and issues, arising either from the contractor(s) or other stakeholders. Clarity in those roles also enables greater accountability of the regulator by its stakeholders. Another important factor, critical to commercial undertakings, is that the regulatory oversight and associated decision-making be immune to any potential conflict of interest, whether due to direct financial, management or other special interests. We urge the ISA to consider how best to insulate its regulatory responsibilities and oversight functions carried out through any of the bodies – LTC, Council or Secretariat – or individual contractors from actual or perceived conflicts of interest. One important step would be to incorporate published, reasoned decision-making requirements into the Code's regulatory processes.

- Predictability. A hallmark of commercial viability is for commercial contractors to understand fully what their regulatory obligations and responsibilities are, with the expectation that those obligations will be stable and predictable over a reasonable period of time; and, proposed changes to general terms and conditions of the Code or associated guidelines will be done through a public notice and comment process, the results of which will be uniformly applied to all contractors, presumptively on a prospective basis. We believe, and expect that investors will expect, that the regulator needs to have the ability to propose and consider updates responsive to changing environments within the context of the fundamental need to create and administer a stable regulatory environment that attracts investment and enables responsible commercial operations.

    - While there are numerous examples, a particularly clear one is in DR 55 (4), which permits the Secretary General to unilaterally propose, make and enforce non-material changes to individual contractors. This does not breed a stable regulatory environment and is of questionable utility (since by definition the change would be non-material).

Economic Clarity

- Level Playing Field. We urge the ISA to recognise in the execution of its responsibilities that it must ensure that the Code does not favour one deep seabed mining business model or contractor structure over another. For example, the ISA must ensure that financial provisions are impact-neutral among the various potential contractor approaches to exploitation (including state-owned enterprise, privately-held or publicly-traded entity, or a partnership with the Enterprise), whether due to inherent differences in cost of capital, calculation of profit (or profit motive), enforcement oversight and so on. This is not only critical for the contractors themselves, but also for the investor community, which is a

stakeholder group for commercial exploitation and will look for the greatest regulatory certainty to mitigate investment risks in a nascent commercial industry that has existing well-understood alternatives.

  - One example includes DR 2(d) as it relates to "expansion" of opportunities, which may contrast to contractors' modelling based on a predictable regime.
  - Another area of clarification is DR 24 as it pertains to transfer of rights and obligations: it needs to be clear that it applies to all under the Code, whether the entities are in partnerships with the Enterprise or stand-alone contractors.
  - The proposed Environmental Performance Guarantee is another area for further practical consideration given the funding approach appears to be an upfront financial commitment or performance bond for the total amount of the closure plan, versus an annual contribution.
  - Finally, in DR 61, any discussion of incentives needs to ensure that they are equally available to all contractors, and not benefit only those who choose one model over another, including joint arrangements with the Enterprise.

- Commercial Principles. To ensure that this nascent industry has the opportunity to help fulfil one of UNCLOS' foundational principles by increasing the world supply of minerals, the ISA must ground the Code in sound commercial practices as a general matter. The ISA and the State Parties must ensure that the Code reflects an understanding of commercial principles and practices - whether environmental, business, financing, insurance or other elements of the Code.

  - For example, the Code should rely upon sound commercial practices to determine what the rate of commercial production should be. Commercial production should not be reduced or suspended for non-commercial reasons, except for an environmental effect that significantly exceeds that expected in the Plan of Work, or to protect human health and safety.
  - UKSR encourages the Secretariat to reach out to the insurance industry to better understand the capacity to support the contractors and their ability to comply with Draft Regulation 38.

- Financial Obligations. UKSR is very supportive of the ongoing dialogue concerning numerous potential uses of the contractors' financial payments to be received by the ISA, particularly in the context of being part of contribution that deep seabed mining will bring to the benefit of humankind. As those discussions continue, it is important that an overall "total cost" approach be applied to that financial stream; otherwise, it is possible that the numerous obligations placed on a contractor would undermine the ISA's ability to adhere to the UNCLOS principle that contractors in this emerging, nascent industry are not to be disadvantaged vis-à-vis the very mature, national land-based mining industry. UKSR welcomes the ongoing work by the Commission, supported by the Massachusetts Institute of Technology, in modelling the overall commercial viability of deep seabed mining, including the impact of regulatory costs.

- The draft Code creates a number of uncertainties pertaining to rights of lenders, equity investors, and major suppliers, and may disadvantage small developing countries over others.
- The draft Code also seems to create ambiguities and adverse impacts on first movers particularly in terms of cash flow burden.
- We would encourage a closer and integrated review of DR 23, 52, 78, 101.

Finally, we would note that as the Code is further revised, and to the extent that the ISA believes the Code is the appropriate place to restate foundational principles of UNCLOS, we would encourage the ISA to incorporate a broader representation of those foundational principles, such as those that also reflect UNCLOS' positive commitment to exploitation.

UKSR looks forward to the continued progress and finalisation of the Code so that the many benefits of deep seabed minerals can begin to be shared broadly across the world economy.

UK Seabed Resources,
30 September 2018