UK Seabed Resources Submission in Response to the International Seabed Authority's Report on Developing a Regulatory Framework for Mineral Exploitation in the Area

Working Draft – Exploitation Regulations (ISBA/Cons/2016/1)

UK Seabed Resources (UKSR) appreciates and welcomes the opportunity to provide these comments on the working draft of exploitation regulations. UKSR also commends the ISA for its continuing commitment to consultation and transparency in the development of these regulations. Consistent with the principle of transparency, UKSR submits these comments with the expectation that the ISA will treat them as non-confidential. Please use Jennifer Warren, Director of Regulatory Affairs, UK Seabed Resources as the contact point for publication reference or for any questions.

The expeditious development of the final regulations is a critical milestone for this new emerging industry to understand whether it will be commercially feasible to exploit polymetallic nodules in a sustainable fashion. UKSR urges the ISA to complete a first draft for Council in 2017, with the target of 2018 for final regulations.

UKSR has provided comments on all sections, save Part V. UKSR is actively participating in the financial workshops, and anticipates that there will be important contributions from the multiple workshops to provide significant guidance for the further development of Part V of these regulations. We also encourage the ISA to plan on incorporating the environmental regulations into these exploitation regulations to ensure that the result is a single integrated code. With this first working draft, UKSR is not providing line by line edits, but instead providing comments on the general provisions and objectives within each part. UKSR may not provide comment on every draft regulatory provision.

In addition to predictability, stability and transparency, timeliness of regulatory actions is a key element in a successful regulatory framework; therefore, UKSR will throughout identify where timelines needs to be more responsive or better aligned to commercial business rhythms. Another general comment is the need to consider what appears to be an interchangeability among ISA institutions – Secretariat, Commission, and Council. UKSR urges the regulations to preserve as much flexibility for the future inspectorate in the actual regulation of the contractors' exploitation operations, and day-to-day regulatory matters. In addition, there is also an interdependency among provisions of the regulations, which will affect both the viability of the framework itself and the commercial viability of exploitation of polymetallic nodules.

Part I

We agree generally, but would encourage the ISA to note that duly authorised operations pursuant to these regulations should not be interfered with, and other uses should seek to avoid any potential interference to such duly authorised operations.

Part II

The regulations should make it clear that the entity holding an exploration contract has priority for filing an exploitation application for the same area under the exploration contract. Moreover, the exploration contract holder should have a clear right of first refusal should another entity file an application prior to the exploration contract holder.

Draft Regulation 3, reference to a partnership should be modified by "unincorporated".

Draft Regulation 4,

- Subsection 3, it should be clear that R&D tax credits, tax incentives or other such widely available grants are not intended to be precluded to an applicant;
- It is essential that all reports be sufficiently defined so that applicants can objectively understand what is envisioned as being required to satisfy each report. At a minimum, example outlines would be helpful in an annex.
- Given the commerciality of the operations, it is unclear what type of training plan in envisioned.
- Subsection 5, it is unclear what the status would be of an application submitted without the referenced Plans.
- Subsection 6 should also require the report referenced in 4(e); however, both reports in 4(b) and (e) will be dependent upon the distances of those non-contiguous sites.

Draft Regulation 5, UKSR proposes that the application fee should be $1M, with one half paid immediately to the ISA, and the other half held in escrow by the applicant until final action on the application by the ISA.

Draft Regulation 6, UKSR urges the ISA to adopt tighter timelines for basic acknowledgements of receipt of submissions – instead of 30 days, UKSR suggests 7 days to acknowledge receipt to the applicant, and to notify the LTC. Moreover, the date of receipt by the Secretary General should determine submissions' eligibility for consideration at the next LTC meeting, rather than the timing of the internal workings of the ISA, which are beyond the control and scrutiny of the applicant.

Draft Regulation 8, Subsection 3(d), UKSR would encourage the ISA to speak with Lloyds of London or another insurer to understand the availability of, and to anticipate the capacity for provision of, the type of insurance for this emerging industry. In Subsection 4(a), UKSR urges the ISA to focus instead on the contractor meeting defined performance objectives only. In Subsection 4(c), we would delete all text in [ ]. In subsection 4 (e), there should be a recognition that the principle of "mutual regard" should apply among activities, not simply having the deep seabed activity bear the unique responsibility. In Subsection 5(c), the policies referenced should be clearly those in place prior to the Secretary General's receipt of the application.

Draft Regulation 9 should reflect specific and reasonable timelines for the LTC actions, not only timelines for the applicant's response.

Draft Regulation 10, there is a financial impact on a commercial applicant to the type and amount of guaranty. The provision needs to be developed in such as a way as to be non-discriminatory given the range of government entities, state-owned entities, and commercial entities that will likely be eligible to apply for exploitation. It is unclear how the principles of non-discrimination and transparency can be adhered to if, per footnote 14, the terms and conditions are unique to a contract.

Part III

UKSR emphasises the importance of ensuring an appropriate scope of confidentiality with respect to the commercially sensitive or business aspects of the application.

Draft Regulation 14 should reflect a 30 year license term, or a shorter term, if so proposed by the contractor. 30 years is the minimum necessary to account for the ramp up time necessary for a contractor after receiving approval of its contract. Moreover, the duration period of the contract will directly affect the rate of recovery and business plans. It needs to be clear that the only obligations on contractors at the time of the extensions are regulatory obligations developed

through the normal regulatory processes in place at the ISA. It is unclear what reference to "then-existing and foreseeable conditions" is intended to cover – but it should be clearly limited to those provisions promulgated according to regulatory processes in place.

Draft Regulation 16 offers contractors a wider range of options for purposes of funding.

Draft Regulation 17 (4)(f) should clarify both the construction of this clause, and more particularly the actual standard that will be used to determine whether the transfer allows for any entity to 'monopolize'. UKSR would recommend a competition standard, for example "dominant abuse".

Part IV

It is important that the regulations clearly identify who's responsible for what actions pertinent to the contractor. Using Draft Regulation 19 as an example, UKSR would urge the ISA to consider what should be reserved specifically to the Secretary General, and thus any designee, such as the future regulatory inspectorate.

Part VI

Draft Regulation 46 is critical to get right for commercial operators. At the start, UKSR supports that environmental data submitted should be made public. UKSR also urges the ISA to replace the loose concept of 'contracts being amended from time to time' to a specific timeframe of 5 years – investors will require periods of stability and predictability in a contractor's routine operations. In subsection 2(a), UKSR respectfully urges the ISA to eliminate the modifying terms of "significantly", "legitimate". Subsection 2(b), should refer to the exploration contract, not the regulations. Subsection 2(d) should use the same standard as the modified 2(a) above. Subsection 2(e) should be restated to focus on the national law of the sponsoring state.

There should be a provision that allows a contractor to withdraw information if the ISA would otherwise refuse to treat it as confidential, and is not otherwise required data under the terms of the regulations.

Section 4 needs to clarify that 4(a) is not the result of inadvertent release of data by the ISA or any of its supporting consultants/contractors. Moreover, the regulations should require that the ISA needs to demonstrate that the provisions of Section 4 are applicable.

UKSR urges deletion of subsection 4(e), as it is covered by the very broad (f) that follows.

UKSR urges deletion of 4(i) as that should be covered in the provisions of termination.

UKSR believes the commercial sensitivity extends to 10 years, and thus urges a 10 year period after the expiration of the exploitation contract.

Section 5 needs to be clear that the confidential information referred to therein is that provided by contractor, and should simply end after the phrase 'without the express prior written consent'. It is important to clarify the scope of 5(a) – the Commission acting as a body is one concept, while reference to members' use is broader, and suggests the potential for use outside of the deliberations of the Commission. UKSR would urge the former.

In Section 6 there should be a reasonableness standard, a cure period of 30 days, and a right to withdraw introduced.

In Section 7, publication of aggregate payments received should be solely the obligation of the ISA. These details should be published with a 12 month delay to allow commercial sensitivities to lapse.

Draft Regulation 47 requires an Annex outlining the Authority's Data Security Plan.

Draft Regulation 48 should be expanded, from the title onwards, to focus on the information to be exchanged, not just that to be submitted, and should be the same for both termination and expiration. Moreover, the scope needs to be better defined as indicated in the [note]. We would propose that timelines be clearly articulated, so that any contractor has an obligation to submit data required through date of the contract within 180 days of either expiration or termination. The authority should within 120 days of receipt of such data issue a certificate of satisfactory closure of the contract.

Part VII

Draft Regulation 50(2) should extend the same standard of "shall" to the second sentence, so that where there is an inconsistency, the Council shall take that action.

Draft Regulation 53 should be retitled to reflect that the provision focuses exclusively on the application filing fee. UKSR urges that ½ of the application fee be placed in escrow until the ISA acts on the application.

Part VIII

UKSR is very supportive of the creation of an Inspectorate, anticipating a regulatory structure within the Secretariat, which will have the overall responsibility for day to day regulatory oversight of the contractors in operation. While Draft Regulation provides details on procedures, UKSR encourages a higher level description of what its role is, leaving the details of how it will implement its delegated responsibilities to implementing guidelines. For example, those guidelines may need to be updated to reflect developments in remote monitoring capabilities, sensor technologies, and other options. UKSR believes that current technology and trends in remote monitoring and sensor technologies will avoid the need for permanent observers, and allow for more efficient use of resources to achieve the goals of the regulations. Spot inspections may of course prove worthwhile where there are indicia of concern.

Part IX

Draft Regulation 55 should incorporate a reasonableness standard, a 'material' breach standard, and clarify roles and responsibilities. The compliance notice process should specify reasonable timeliness, except in a perceived emergency situation.

Part X

Draft Regulation 57 needs to clarify what would qualify as standing for a contractor to so engage. Moreover, it may be appropriate it to extend this right to decisions that go against the Authority as well.

Draft Regulation 58 would seem to extend to contractual disputes as written.

Part XI

Draft Regulation 59 would benefit from specifying the frequency of review. There is a great deal of uncertainty injected into the stability of the framework throughout these provisions. Having clear periods of stability in the regulations absent particular justifications or changes in circumstances, would be consistent with the regulatory principles of predictability and certainty.

Annexures

Annex I

Section II would seem more appropriately to be a determination by the Commission, rather than the Council. The Applicant should be able to use an internationally accepted equivalent to a pro forma balance sheet. 17(c)(ii) should be satisfied by an IFRS statement that the applicant is expected to have the financial resources to carry out the POW.

Section III is unclear in 20(d) as to what is unfair economic practices, and per prior comments about tax incentives, tax credits, grants, and such.

Annex II

The feasibility study is application specific, and not for other ISA purposes. More details for satisfaction of certain elements is required, while others need to be narrowed or eliminated. Some specific comments follow. The terms 'reserves' and 'resources' should be carefully employed as they imply validation by independent experts according to recognised standards. Suggest 1.(e) A.c. be called "Project Overview" instead of "Mineral Resources" with subsection I. called "Resource and Reserve Assessment" instead of "Proven and Probable Reserves". In addition, with respect to section H., UKSR does not see the need for the ISA to establish its own reporting standard for assessment of resources and reserves when several tested terrestrial standards already exist. In fact, per prior consultations, UKSR emphasises that the ISA should seek to avoid duplication of existing standards that can be readily applied to this activity. Moreover these standards have already been applied by contractors to seabed minerals.

Several aspects of the study content presume a certain amount of vertical integration which will likely vary among contractors. The downstream processing information requested in (N)(b) is very sensitive commercial, proprietary data, and the need for that in a feasibility study needs to be more clearly demonstrated. Also, content sections (O) and (T) seem redundant, but if not further distinctions are required to clarify intent to applicants. (P) needs to be limited to key personnel only. (U) requires clarification. (V) should be modified to clarify differences between its various subsection provisions, such as (i) and (j). With respect to (V) (u), it is unclear who will determine and at what point whether the estimates are within a 15% accuracy scale. Neither (V)(l) nor CC, DD, GG are appropriately within a feasibility study as we understand the purpose of such a study. BB requires further clarification to distinguish between Host Country and Sponsoring State.

Annex III

With respect to the mining plan, UKSR believes further discussions are required to appropriately address the provision 7, and would delete provisions 9, 10 (assumes vertical integration) and 15.

Schedule of Definitions

UKSR urges that the Appropriately Qualified Expert definition needs to clearly address the requirement that the AQE be bound by a co-extensive duty of confidentiality to, and a requirement to be free of any conflicts of interest (organizational, business, legal, or ethical) with, the applicant/contractor. It further urges that environmental information includes explicit reference to what it doesn't include, such as mineral content, geolocation. The provision on financial guarantee or security should eliminate reference to "state guarantee". UKSR believes that Good Industry Practice should be more broadly defined, and not limited to the marine mining industry.