

Developing a Regulatory Framework for Mineral Exploitation in the Area

Stakeholder Engagement

This stakeholder survey is the first stage of a consultative process and communications strategy being developed by the International Seabed Authority. It is aimed at a broad stakeholder base and seeks initial input into the development of further rules, regulations and procedures to be drawn up by the International Seabed Authority.



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Published February 2014 by:

International Seabed Authority
14-20 Port Royal Street
Kingston
Jamaica

Acronyms and Glossary

Exploration Regulations	Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area
ISA	International Seabed Authority
LTC	Legal and Technical Commission
“the Agreement”	Agreement relating to the implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982, New York, 28 July 1994
“the Area”	The deep seabed in areas beyond national jurisdiction
“the Convention”	United Nations Convention on the Law of the Sea, Montego Bay, 10 December 1982

I. Introduction

The International Seabed Authority (ISA) wishes to engage with current and future stakeholders as it commences the development of a regulatory framework for the future recovery of mineral resources from the Area.

Accordingly, you are invited to participate in this survey. The ISA would also encourage you to forward this document to other persons who you consider may wish to participate. This is important as the ISA wishes to identify possible new and future stakeholders and to encourage widest possible engagement. This survey is the first in a series of stakeholder engagements anticipated by the ISA.

The objectives of this survey are as follows:

- to identify a broad stakeholder base through submissions received;
- to begin a process of stakeholder engagement and consultation for activities in the Area;
- to benefit from the early views and expert opinions from the stakeholder base.

These objectives, and a commitment to the principles of fairness and transparency, will allow the ISA to begin development of a regulatory framework which incorporates contemporary best practice.

Going forward the ISA intends to foster and progress a “learning” environment and adaptive approach through stakeholder engagement. It is hoped that this will unlock new ideas and sustainable solutions contributing to both a robust regulatory framework for the exploitation of seabed mineral resources and at the same time contribute to overall ocean governance and management.

The development of the Area and its minerals resources is unique. The development of a universally acceptable exploitation framework is a challenge. However, this challenge presents an opportunity – an opportunity to get it right. An opportunity to incorporate “what we know” and to build a flexible and adaptive mechanism that accommodates future learnings and experience.

II. Background

The Convention and the 1994 Agreement sit atop the ISA's rules, regulations and procedures. Together they regulate the prospecting, exploration and ultimately exploitation of the mineral resources of the deep seabed beyond the limits of national jurisdiction ("the Area").

The Convention provides that the Area and its resources are the Common Heritage of Mankind and that activities in the Area are carried out for the benefit of mankind as a whole. This will be achieved through the equitable sharing of the benefits realized from activities in the Area. The Common Heritage of Mankind principle also embodies the protection of the marine environment and the conducting of scientific research for the benefit of the international community.

The ISA is managed and administered through three organs: the Assembly (165 States and the European Union as States parties to the Convention are members of the Assembly), the Council and the Secretariat. The Council is supported by a Legal and Technical Commission (LTC) which has the primary responsibility for drawing up draft rules, regulations and procedures relating to exploration and exploitation.

All activities in the Area are subject to an approved written plan of work, drawn up in accordance with Annex III of the Convention, the principles in the Agreement and the ISA's rules, regulations and procedures. One of the key features of the ISA regime is a requirement that contractors undertaking activities in the Area are sponsored by an ISA member State – a Sponsoring State.

To date, the ISA has implemented three sets of regulations relating to exploration activities in the Area.¹ Additionally, the ISA has issued a number of recommendations for the guidance of contractors, including on the assessment of environmental impacts.

So far the ISA has concluded 15 contracts for exploration, with four contracts awaiting signature.² There are a further seven applications for approval of plans of work for exploration being processed.

Exploration contracts are granted for a period of 15 years. The first group of polymetallic nodule exploration contracts will expire in 2016.

The ISA must now progress its Mining Code to encompass comprehensive rules, regulations and procedures connected with the exploitation of mineral resources in the Area in accordance with the legal framework of the Convention and the Agreement.

Also Sponsoring States have and will continue to progress complementary domestic regulations in respect of Sponsored Contractors.³

¹ Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area; Regulations on prospecting and exploration for polymetallic sulphides in the Area and Regulations on Prospecting and Exploration for Cobalt-rich Ferromanganese Crusts in the Area. See <http://www.isa.org.jm/en/mcode>.

² See <http://www.isa.org.jm/en/scientific/exploration/contractors>.

³ The ISA is building a database of applicable domestic rules and regulations: see <http://www.isa.org.jm/en/mcode/NatLeg>

III. Who is a stakeholder?

For the purposes of this initial survey, the definition of a *stakeholder* is to be considered in its broadest sense. The activities in the Area will occur outside of areas of national jurisdiction. The list of potential stakeholders who have an interest or stake in deep sea mineral exploitation activities will be wide and varied. This survey is intended to be inclusive of all potential stakeholders to cover all potential interests.

Naturally, specific groups of stakeholders will have different interests and concerns. In the interests of efficiency, future surveys and consultation may be targeted toward specific stakeholder groups as the engagement process unfolds.

IV. The Survey

In its preliminary work, the ISA has identified the following focus areas in which it seeks your initial input and comment. There is clearly no necessity to respond to all parts and all questions. However, each core area does have overlapping obligations.

- Part A – Financial terms and obligations;
- Part B – Environmental management terms and obligations;
- Part C - Health and safety and maritime security; and
- Part D – General considerations – stakeholder communication and transparency.

There are likely to be other focus areas that emerge during regulatory development.

You are also invited to comment on any issue connected with the development of the regulatory framework under Part D.

Part A: Financial terms and obligations

In responding to this Part A, please consider the questions presented below and in a bullet point form highlight the main issues you believe should be addressed or considered in developing a regulatory framework. Feel free to provide additional information in narrative form.

The payment mechanism

The Agreement requires that a system of payments is to be implemented which will compensate mankind for the exploitation of the resources in the Area.

The Agreement calls for there to be a fair system and that the payment system should neither be complicated nor incur major administration costs for either the ISA or a Contractor. The Agreement states that a royalty or combined royalty and profit-share mechanism is to be considered, although alternative system(s) are also possible.

In a land-based environment, it is generally accepted that a progressive system is fairer and that any payments increase in line with project profitability, subject to a minimum revenue flow through a royalty-based mechanism. However, there is an administrative trade-off in that royalties are generally simpler to administer than profit-based mechanisms, which can be technically challenging. Currently, the ISA does not have an accounting infrastructure to support a complex profit-based system.

Other qualities of a financial system include stability, flexibility and responsiveness to changing market conditions.

The ISA Secretariat has undertaken a preliminary study into comparable land-based mechanisms. However, to advance this further your comments on the following would be appreciated.

In connection with a proposed payment mechanism and system:

1. In delivering a best revenue opportunity for the ISA and an overall fair and equitable system, which payment mechanism would you consider preferable for the ISA and Contractors and why?
2. If a royalty mechanism is adopted for reasons of administrative convenience, how can a royalty mechanism capture, for example, economic rents over the life of an exploitation contract?
3. Are you aware of any alternative payment mechanisms that would merit consideration by the ISA?
4. In your view, how frequently should any payment mechanism be reviewed from a regulatory viewpoint?
5. The point(s) of valuation for any payment obligations under the regulatory framework needs to be identified. In land-based regimes and oil and gas regimes, theory determines that the valuation point is as close as possible to the point of extraction of the resource. In land-based regimes an approximation for this is usually the first arm's length sale in the downstream process. Often a free on board export price or a net back system is adopted for royalty calculation purposes.

For activities in the Area, there may be a number of possible valuation points for the minerals and metals to be exploited. Please would you consider and advise which valuation point(s) the ISA should consider in determining an arm's-length value for the purposes of calculating the fair value of the mineral and metal resources. From an administrative viewpoint, which valuation point would be the simplest to determine?

6. In connection with any late or overdue payments / returns by Contractors, in your opinion, what penalty or fine mechanisms should be adopted by the ISA?

Other considerations impacting financial terms and obligations

7. The current Exploration Regulations state that an applicant must be “financially and technically capable” of carrying out a plan of work for exploration. This is considered of relevance to future exploitation regulations as well.
 - a. In your view what key elements should be considered in respect of “technical” capability?; and
 - b. Similarly, in your view what key elements should be considered in respect of “financial” capability?
8. In your view, how can the regulatory framework be structured to encourage optimum extraction of low grade mineral resources?
9. Do you have any suggestions for incentive mechanisms that would encourage investment in the Area and / or support best environmental operating practices?
10. For what term (in years) should an exploitation contract be granted? What do you consider best practice in terms of renewal periods for the same contract?
11. In your view, what criteria should Contractors / the ISA consider in connection with the optimum size of exploitation areas within a contract area?
12. It would seem appropriate, in line with existing extractive industry regimes, that financial penalties are considered as part of the regulatory framework. The Agreement provides, subject to judicial remedies, that in the case of violations of non-fundamental contract terms (or in place of any suspension or termination of a contract), monetary penalties may be imposed on Contractors. Contractors may also be subject to other penalty regimes beyond that of the ISA (for example, by sponsoring States under the terms of domestic licences or permits).
 - a. In your view, what penalty mechanisms should be adopted in the regulatory framework and imposed specifically by the ISA? For example this could be fixed penalties in connection with the breach of procedural obligations, including environmental procedural obligations;
 - b. In addition, do you have any recommendations as to the classification (seriousness of the violation, duration etc) of violations and a range of penalty amounts?
 - c. Finally, your recommendations on the use of any penalty amounts collected by the ISA? For example, should these amounts be directed toward an inspection regime only?
13. The Exploration Regulations require Contractors to maintain appropriate insurance policies that are in accordance with generally accepted maritime practice. Do you have any

recommendations as to any specific insurance products that should be reflected in the exploitation regulatory framework?

Specific environmental considerations

14. It is common practice in land-based regimes to require an environmental guarantee or bond. In some regimes, a cash amount is paid under a trust arrangement or to a special bank account. What are your recommendations for including such a guarantee or cash contribution in the exploitation regulatory framework? Please advise on the nature of any guarantee, the quantum of the guarantee (its calculation methodology), its use and rationale (for example, for restorative obligations, agreed penalty amounts) and the suggested duration before release / return.

15. The Seabed Disputes Chamber⁴ recommended that consideration be given to establishing a trust fund in the event an environmental liability gap arises. Western Australia, for example, has implemented a Mining Rehabilitation Fund to cover situations where an operator fails to rehabilitate the environment. However, the concept of a trust fund may have wider appeal.

Your comments would be welcome therefore on the setting up of a general environmental trust fund under the exploitation regulatory regime on the basis of the “polluter pays” principle. Please also provide your comments on how any contribution to the fund should be calculated and suggested, specific uses of trust monies.

Part B: Environmental management terms and obligations

There exist a number of general obligations to protect the marine environment in the Convention. In addition the Exploration Regulations identify specific obligations including application of the precautionary approach and best environmental practices. These fundamental principles will be carried through to the exploitation regulations.

Similar to Part A, in responding to this Part B, please consider the questions below connected with environmental assessment and environmental management and in bullet point form highlight the main points for consideration in the development of the regulatory framework for exploitation. Again, please provide additional information in narrative form.

16. Please describe any general recommendations that the ISA should consider in developing rules, regulations and procedures on the prevention of damage to the marine environment from activities in the Area;

⁴ International Tribunal for the Law of the Sea: Case No. 17: *Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area (Request for Advisory Opinion submitted to the Seabed Disputes Chamber)*.

17. The Exploration Regulations do not reflect any restorative or rehabilitative obligations in the marine environment. In your view, under an exploitation framework, what general restorative or rehabilitative obligations should be incorporated?
18. As part of the approval process for exploitation, Environmental Assessments and Environmental Management Plans will be required.⁵ What procedural steps should be incorporated into the regulatory framework to evaluate Environmental Assessments and Environmental Management Plans? What independent verification procedures should be adopted by the LTC in reviewing Environmental Assessments and Environmental Management Plans?
19. As to any damage to the marine environment following the removal of a substrate (e.g. polymetallic nodules) what do you consider the most appropriate advance response strategies to conservation, restoration and natural remediation of biological diversity and ecosystem functioning? Is remediation best achieved by the development of Areas of Particular Environmental Interest⁶ and Preservation Reference Zones⁷ envisaged by the Exploration Regulations?
20. In connection with question 19 above, what ecosystem functions are critical to restore and / or what levels of biological diversity should be conserved at regional levels, local scales and over what time periods?
21. The Exploration Regulations (and the Convention) envisage an emergency response (known as “emergency orders”) where an incident has caused, is causing or poses a threat of serious harm to the marine environment. Please describe any recommendations you have in the light of best practices on the measures and procedures that should be adopted in connection with an emergency response.
22. A number of international and domestic legal instruments, including the Exploration Regulations, incorporate terms such as “serious harm” or “vulnerable marine ecosystems” in connection with the protection of the marine environment. How do you think these terms should be better defined and interpreted in the exploitation regulatory framework?
23. How can the ISA most usefully promote and encourage the use of best practice (including technology advances and scientific research) to better protect the environment during exploitation operations?
24. Are there any other fees or levies that the ISA should consider to promote environmental compliance?

⁵ See also *Content of the Environmental Impact Statement in ISA Environmental Management Needs for Exploration and Exploitation of Deep Sea Minerals* Technical Study: No. 10 at 17.

⁶ See *ISA Environmental Management Plan for the Clarion-Clipperton Zone*, ISBA/17/LTC/7, available at <http://www.isa.org.jm/en/mcode>

⁷ Under the exploration regulations, Preservation Reference Zones are areas in which no mining is to occur to ensure representative and stable biota of the seabed.

25. For the monitoring of activities in the Area, the Exploration Regulations provide for an inspection regime. Additionally, Sponsoring States may also undertake monitoring of Sponsored Contractor activities in the Area through inspection.
- a. In your view what monitoring obligations should be placed on Contractors operating in the Area and included in the exploitation regulatory framework?
 - b. Please list the key measures and characteristics of what should be considered in establishing a supervision programme to verify compliance of Contractors with the rules, regulations and procedures, particularly compliance with their monitoring obligations above. In your view, how should such an ISA regime be structured and implemented, including the frequency of inspection, by whom and how should an inspection regime be funded?
26. What specific procedural obligations should be adopted under the precautionary approach best environmental practices and adaptive management? Are there any best practice risk management approaches (for example in an oil and gas or fisheries context) that could usefully be adapted to deep seabed mineral exploitation activities?
27. In considering environmental procedures above, what internationally-accepted environmental management standards should be reflected in the exploitation regulatory framework?

Part C: Health, safety and maritime security

The Exploration Regulations require Contractors to comply with generally accepted international rules and standards relating to safety at sea and any related rules, regulations and procedures adopted by the ISA. Equally, the Exploration Regulations similarly require Contractors to comply with any rules, regulations and procedures relating to employment practices including health and safety matters.

28. In considering health, safety, labour and maritime security, can you suggest the general and / or specific duties and obligations that should be placed on Contractors under the exploitation regulations? Please also consider any further specific obligations toward other users of the marine environment.

Part D: General considerations – stakeholder communication and transparency

In connection with environmental decision-making procedures, the ISA will facilitate public participation in accordance with the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, 1998, and its own rules, regulations and procedures.

This stakeholder survey will naturally identify a broad list of stakeholders with an equally broad variety of interests. However, proper and effective stakeholder engagement demands an investment in time and resources.

The ISA seeks your suggestions and comments on the following:

29. How can the ISA best develop a communications and consultation strategy which both secures transparency, efficiency and provides for the needs of a broad stakeholder base? It would be helpful to include specific examples of successful communication and consultation approaches.
30. What forms of engagement best enable you to make contributions and receive appropriate feedback? Please provide comments on any specific initiatives, including digital initiatives, that would be productive together with any observations on the structure and content of the current ISA website (www.isa.org.jm).

Transparency is now an integral part of extractive industries. Transparency spans from financial transparency in terms of revenue management (promoted by the criteria set by the Extractive Industries Transparency Initiative (EITI)) through to transparency of other information which promotes public awareness, facilitates cross-border co-operation, sharing of best practices and lessons-learned.

31. What information on activities in the Area do you consider most important to make available available publicly? How should this information be shared?
32. What aspects of the EITI do you think should be reflected in the exploitation regulatory framework?

Your input on this Part D will allow the ISA to suggest a meaningful engagement plan, communication process and information flow and encourages your feedback on the above points.

Other considerations

33. Are there any further comments you wish to make on the issues raised in this survey that you have not commented on elsewhere?
34. What other areas or topics relevant to the exploitation regulatory framework do you think would benefit from future surveys and consultation, including processes and procedures?

V. The review process

Submissions made in connection with this survey will be taken into account by the ISA in the preparation of a preliminary outline of an exploitation regulatory framework for the recovery of mineral resources in the Area.

The bodies of the ISA are due to convene at their twentieth annual session in July 2014. At that time, the outcomes and findings of this survey will be considered by the LTC. Subsequent to that annual session work will continue on the regulatory framework. The ISA anticipates further consultative processes in due course.

The ISA will also identify appropriate stakeholder interest groupings for future engagement and consultation.

VI. Making a submission

Structure of submission

It would be extremely helpful if you would kindly structure your submission as follows:

- An opening paragraph introducing you and / or your organization and your direct and / or indirect interest in activities in the Area;
- Your comments referenced to the relevant parts and questions;
- Any other general and / or specific comments you wish to make;
- A list of any supporting documents accompanying your submission, together with website links where applicable;
- Your express consent (see below) to make your personal details and submission publicly available;
- Your interest in future contact by the ISA and / or being part of a stakeholder group;
- Your contact details clearly identified.

Closing date

The closing date for submissions is **Friday, 16th May 2014 at 1800hr (EST)**.

Submission details

Submissions should be sent by post or electronically as follows:

Stakeholder Survey (ISBA/Cons/2014/1)
International Seabed Authority
14-20 Port Royal Street
Kingston
Jamaica

Email: consultation@isa.org.jm (format: PDF or Microsoft Word document).

Online submission publication & confidentiality

In the interests of transparency and to promote and encourage further discussion, the ISA intends to publish all submissions on a dedicated area of its website at <http://www.isa.org.jm/en/home>. Additionally, the ISA will prepare and publish a summary document and analysis of key findings arising from submissions received.

However, the ISA requires your express consent and approval to make submissions publicly available (i) including your name and organization as appropriate or (ii) to make your comments without disclosing any of your personal details. **Please include such express consent in your submission** where applicable. The default position is that your comments and personal details will be kept confidential without attribution.

Future engagement & privacy

The ISA will retain your personal contact details securely and in-confidence (except for any disclosure consented to above) with a view to contacting you solely in respect of future surveys, consultations and engagement.

Should you no longer wish the ISA to store your personal details, please advise us by sending a request to remove your contact details to the email address above.

Anonymous submissions

Please note any submissions made anonymously will be disregarded for the purposes of this stakeholder survey.

Your contribution to this survey is very much appreciated and the ISA wishes to thank you in advance for your time and efforts in preparing a submission.

Other information and useful website links

The ISA publishes a wealth of information on its website. This includes current rules, regulations and procedures, papers and decisions from its annual sessions and workshops together with technical and other studies. You are encouraged to browse this material prior to your submission. In particular the ISA would draw your attention to the following publications for further background:

ISA *Towards the Development of a Regulatory Framework for Polymetallic Nodule Exploitation in the Area* Technical Study: No. 11, available at <http://www.isa.org.jm/files/documents/EN/Pubs/TStudy11.pdf>;

ISA *Environmental Management Needs for Exploration and Exploitation of Deep Sea Minerals* Technical Study: No. 10, available at <http://www.isa.org.jm/files/documents/EN/Pubs/TS10/index.html>;

ISA *Recommendations for the guidance of contractors for the assessment of the possible environmental impacts arising from exploration for marine minerals in the Area*, ISBA/19/LTC/8, available at <http://www.isa.org.jm/en/mcode> (text available in six languages: Arabic, Chinese, English, French, Russian and Spanish); and

ISA *Environmental Management Plan for the Clarion-Clipperton Zone*, ISBA/17/LTC/7, available at <http://www.isa.org.jm/en/mcode> (text available in six languages: Arabic, Chinese, English, French, Russian and Spanish).

Please refer to the following hyperlinks for additional content on the ISA's and other relevant websites:

The Mining Code: existing regulations and recommendations: <http://www.isa.org.jm/en/mcode>

Publications: including the ISA's Technical Study series available for download: <http://www.isa.org.jm/en/documents/publications>

Annual session documents: documents connected with the ISA's annual sessions between 1995 and 2013: <http://www.isa.org.jm/en/sessions>

United Nations Convention on the Law of the Sea of 10 December 1982: http://www.un.org/Depts/los/convention_agreements/convention_overview_convention.htm (text available in six languages: Arabic, Chinese, English, French, Russian and Spanish).

Agreement relating to the implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982: http://www.un.org/Depts/los/convention_agreements/convention_overview_part_xi.htm (text available in six languages: Arabic, Chinese, English, French, Russian and Spanish).

International Tribunal for the Law of the Sea: Case No. 17: Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area (Request for Advisory Opinion submitted to the Seabed Disputes Chamber) <http://www.itlos.org/index.php?id=109&L=1%27>

