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International Seabed Authority
14-20 Port Royal Street
Kingston
Jamaica

Gland, 15.05.2015

To whom it may concern:

Express consent – Our submission to ISA call for comments on the Report to Members and all stakeholders on developing a Regulatory Framework for Mineral Exploitation in the Area, sent on 15 May 2015

Dear Madam/Sir,

IUCN would like to give its express consent and approval to make our submission publicly available including the name of our organization.

Yours faithfully,

A handwritten signature in black ink, appearing to read 'F. Simard', is written over a light grey rectangular background.

Mr. François Simard
Deputy Director
Global Marine & Polar Programme



Comments on the Report to Members of the Authority and
all stakeholders on developing a Regulatory Framework
for Mineral Exploitation in the Area

15 May 2015

Contact person:

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Note:

This response includes an introductory paragraph about the International Union for Conservation of Nature (IUCN) and IUCN comments on the draft framework provided by the ISA Secretariat in the Report to the Members of the Authority and all stakeholders.

Please note that comments on the high level issues (Section 4 of the Report above mentioned) are presented first, followed by comments on the draft framework for regulation of exploitation activities (Section 2 of the Report above mentioned).

IUCN would like to reiterate, here, its great interest in future contact by the ISA and being part of a stakeholder group. Finally, IUCN would like to sincerely thank again the Secretariat of the Authority for the opportunity given to take part in this process through comments provided on the draft framework.



IUCN (International Union for Conservation of Nature)

IUCN helps the world find pragmatic solutions to our most pressing environment and development challenges. IUCN’s work focuses on valuing and conserving nature, ensuring effective and equitable governance of its use, and deploying nature-based solutions to global challenges in climate, food and development. IUCN supports scientific research, manages field projects all over the world, and brings governments, NGOs, the UN and companies together to develop policy, laws and best practice. IUCN is the world’s oldest and largest global environmental organization, with more than 1,200 government and NGO Members and almost 11,000 volunteer experts in some 160 countries. IUCN’s work is supported by over 1,000 staff in 45 offices and hundreds of partners in public, NGO and private sectors around the world.

www.iucn.org

IUCN is supported by a network of scientific researchers, policy and legal experts, and manages field projects all over the world. It is active in policy debates as well as in standard setting for biodiversity conservation and sustainable use of living resources and ecosystems.

Through the work of its programmes*, its commissions** and specialist groups***, IUCN has been actively working on marine issues, including in areas beyond national jurisdiction and deep seas, for many years.

* notably: Global Marine and Polar Programme; Species Programme; Environmental Law Centre (ELC)

** notably: World Commission on Protected Areas (WCPA); World Commission on Environmental Law (WCEL); Commission on Ecosystem Management (CEM)

*** notably: WCEL Oceans Specialist Group; WCPA High Seas MPA Task Force; WCEL/WCPA Joint Specialist Group on Protected Areas

IUCN also has specific experience on deep-sea ecosystems in areas beyond national jurisdiction of the Indian Ocean through an earlier UNDP supported GEF financed project – “Applying an ecosystem approach to fisheries management in the high seas: focus on seamounts of the Southern Indian Ocean”.

A current project, funded by the French Global Environment Facility (FFEM), focuses on the conservation and sustainable exploitation of seamount and hydrothermal vent ecosystems of the South West Indian Ocean in areas beyond national jurisdiction, notably in the context of future mineral exploitation.

The IUCN Species Programme, working with the IUCN Species Survival Commission (SSC), has been assessing the conservation status of species on a global scale (“The Red List”). As of 2012, the status over 11,500 marine species has now been assessed for their risk of extinction.

**Developing a Regulatory Framework for Mineral Exploitation in the Area:
Comments on the Report to Members of the Authority and all stakeholders**

“As we know, there are known knowns; there are things we know we know. We also know there are known unknowns; that is to say we know there are some things we do not know. But there are also unknown unknowns -- the ones we don't know we don't know. And if one looks throughout the history of our country and other free countries, it is the latter category that tend to be the difficult ones.”

United States Secretary of Defense Donald Rumsfeld, 2002

Page	Specific topic	Comment
Page 40	High level issues considered as missing from the list	<ul style="list-style-type: none"> • Provisions and mechanisms for developing an environmental management strategy for the ISA, including strategic environmental assessments (SEAs) and regional environmental management plans (REMPs); these are an urgent priority before any areas are allocated for exploitation • As pointed out in Jaeckel¹, “Particularly in light of the increase in the number of exploration contracts being granted, it is necessary to protect the marine environment from cumulative environmental impacts from mining activities and to set aside protected zones before minable areas are divided up between contractors” (Jaeckel at 3) • “”More importantly” continues Jaeckel “however, measures for the protection of the marine environment are, at present decided on an <i>ad hoc</i> basis, making them vulnerable especially if commercial pressure to promptly commence the exploitation phase increases. A detailed strategic vision to implement the ISA’s environmental obligations during the exploration and the exploitation stages would be instrumental to ensure that appropriate and systematic environmental protection measures are adopted and implemented, in order to conserve the diversity of deep ocean biota and ecosystem functions whilst providing for rational use of mineral resources” (Jaeckel at 4) • Provisions for effective public participation in the taking of decisions. As outlined in the Public Participation Directive (EC Directive 2003/35/EC) <i>“Effective public participation in the taking of decisions enables the public to express, and the decision-maker to take account of, opinions and concerns which may be relevant to those decisions, thereby increasing</i>

¹ Jaeckel, A. 2015. An Environmental Management Strategy for the International Seabed Authority? The Legal Basis, The International Journal of Marine and Coastal Law 30, 1-27

		<p><i>the accountability and transparency of the decision-making process and contributing to public awareness of environmental issues and support for the decisions taken”.</i></p> <ul style="list-style-type: none"> • Explicit recognition of the importance and implications of the “Common heritage of mankind principle” eg. The International Seabed Authority to take decisions on behalf of all humankind, including present and future generations. This may also need to include a mechanism for access to justice or right to call for review of ISA decisions made that may potentially be inconsistent with that principle and the associated environmental and other obligations under UNCLOS, the Part XI Agreement and general international environmental law. A proposal for an Ombudsman to represent the interests of the public as well as future generations could be considered here (see specific comment about page 18 below). The role of the Seabed Disputes Chamber might also be expanded to include public access. • Suggestion for ISA to publish a report at least every four years on the State of the Deep Sea environment, with information on the quality of, and pressures on, the environment. This could be done in conjunction with the World Ocean Assessment to include information and pressures from other deep sea activities and global level impacts. • Provisions for incorporating the concept of “ecologically or biologically significant area” as defined by the Parties to the Convention on Biological Diversity, and mechanisms for incorporating or taking account of the information provided by the CBD facilitated regional workshops, and plans for participating and contributing to future such workshops.
Page 41	High level issue - 1. Information and data	<ul style="list-style-type: none"> • Agree that a data management strategy for resource and environmental data is a matter of priority. • Contractors who are not contributing data in an effective and timely way should not be eligible for renewing their exploration contracts, or eligible to submit applications for exploitation contracts • Gaps in knowledge and data will need to be addressed – and data, information and uncertainties should be made transparent and accessible • Data and information sharing should be consistent with the Aarhus Convention on access to information, public participation in decision-making and access to justice in

		<p>environmental matters. Indeed all elements of the regulatory framework as well as ISA procedures should be brought into alignment with the Aarhus Convention.</p>
Page 41	<p>High level issue - 2. Interim framework</p>	<ul style="list-style-type: none"> • Concerned about what is meant about the regulatory framework being an interim “work-in progress” until knowledge gaps can be filled. • Many of these knowledge gaps are fundamental to preventing and minimizing harm to the marine environment. Hence mining should not proceed until these knowledge gaps are addressed. Small scale test mining might be a method to address these gaps. • IUCN does not believe an interim framework is a useful idea as it could remove pressure to fill in the knowledge gaps
Page 41	<p>High level issue - 5. The transition between exploration and exploitation phases</p>	<ul style="list-style-type: none"> • A strategic vision, strategic environmental impact assessments and regional environmental management plans need to be in place ideally before further exploration contracts are granted but at any rate before any contracts for exploitation contracts are granted. These are necessary to ensure a systematic approach to protection of the marine environment from harmful effects and effective allocation of mineral resources for the benefit of present and future generations. • Prior to launching into exploitation, there should be an assessment of risks and long term impacts and benefits including comparison of alternatives, distribution of effects and cumulative effects
Page 42	<p>High level issue - 8. Confidentiality</p>	<ul style="list-style-type: none"> • Commentary is appropriate and well framed. Would suggest that it is the confidentiality provisions in the Exploration Regulations that are the problem, as they provide an overgenerous assumption of confidentiality. These should be amended and new regulations should fully incorporate provisions for transparency. • In other words, there should be a ‘presumption in favour of disclosure’. Disclosure of information should be the default – in other words, information should be kept private only when there is a good reason and the Regulations allow it (needs to be tightly defined) • Information should be routinely published, in an easily accessible format, using electronic means whenever possible.

Page 43	High level issue - 9 . Effective protection for the marine environmental from harmful effects	<ul style="list-style-type: none"> • The commentary is appropriate but should go further. • Existing criteria and guidance may need to be updated to reflect fact that the Area is the common heritage of mankind and hence needs to be preserved and protected for the benefit of present and future generations. • The development of a precautionary risk management framework is indeed fundamental • Need to ensure that the full range of marine habitats, biodiversity and ecosystem functions are adequately protected
Page 43	High level issue - 10. Internationally recognized standards	<ul style="list-style-type: none"> • Existing standards for oil and gas and other existing sectors are useful but will need to be modified and upgraded to reflect the status of the Area as the common heritage of mankind. • Standards will need to be much higher to “ensure effective protection for the marine environment from harmful effects” (UNCLOS article 145) for the benefit of present and future generations. • Disagree with statement that “standard development should, primarily, be an industry-driven initiative.” Standards will certainly need to be informed by industry, but these need to be driven by internationally established goals of “ensur[ing] effective protection for the marine environment from harmful effects”. In short, new tools and technologies may be needed. Reliance on existing standards or what is considered to be “economically achievable” at present may be insufficient.
Page 12	Environmental impact statements (EIS)	<p>EIS should:</p> <ul style="list-style-type: none"> • Be based also on the precautionary principle and best environmental practices in addition to “sound engineering and economic principles” • Be verified by two consulting firms • Be made available for public comment and review • Assess cumulative impacts by looking at past and present activities, potential future activities as well as environmental changes both natural and those associated with climate change and ocean acidification • Agree that the concept of an <i>Environmental Impact Area</i> may need to be developed to cover horizontal and vertical areas

		<p>that may be influenced by the mining activities. It may be too early to try to limit the review to only areas where “significant impacts may occur” as don’t know what SAIs are at this point in time.</p> <ul style="list-style-type: none"> • Will also need to include monitoring requirements
Page 13	Environmental management plan	<ul style="list-style-type: none"> • Should be based also on the precautionary principle and best environmental practices in addition to “sound engineering and economic principles” • verified by two consulting firms • And made available for public comment and review • Section v. measures/plans for monitoring etc should be based on a specific hierarchy of goals—which start with the need to avoid and prevent harm, rather than minimise or mitigate. • UNCLOS article 145 requires measures to ensure effective protection for the marine environment from harmful effects which may arise from such activities. To this end the Authority shall adopt appropriate rules, regulations and procedures for <i>inter alia</i>: <ul style="list-style-type: none"> (a) the prevention, reduction and control of pollution and other hazards to the marine environment, including the coastline, and of interference with the ecological balance of the marine environment, particular attention being paid to the need for protection from harmful effects of such activities as drilling, dredging, excavation, disposal of waste, construction and operation or maintenance of installations, pipelines and other devices related to such activities; (b) the protection and conservation of the natural resources of the Area and the prevention of damage to the flora and fauna of the marine environment. • IUCN supports the statement on bottom of page 13 about the need for cooperation and harmonization of the EMP with the Strategic Environmental Management Plan, and underscores the need to provide more elaborate provisions for an Environmental Management Strategy, as well as for a strategic environmental impact assessment (is this meant to be the same as a Strategic Environmental Assessment?) and regional environmental management plans
Page 14	Social impact assessment and action plan	<ul style="list-style-type: none"> • SIA needs to include as well the interests of all of humankind, not just those directly affected • This needs to include the interests of present and future generations • Social Action plan should of course include contributions to

		<p>marine research and training programs, but should also include other non-monetary benefits to compensate humankind for the loss of the marine habitat and associated values in the area to be mined</p>
Pages 14-15	Closure plan	<ul style="list-style-type: none"> • Need a general decommissioning plan • Regulations should include rearticulation of decommissioning plan in light of realities at time of decommissioning (every five years include upgrade of decommissioning plan) • General restorative obligations should include: removal of all material and equipment, including lost material • Should include an ecological assessment to determine what necessary to allow nature to recover • Hazardous materials should be stabilized and neutralized • Source of disturbance stopped • Concept of restoration needs fuller discussion—suggest commissioning an expert paper and consultation to get input from scientists and civil society on feasibility of restoration and potential alternative forms of compensation for loss of the habitat and other values associated with the impacted area.
Pages 15-17	Size and location of exploitation	<ul style="list-style-type: none"> • In addition to including the relevant physical characteristics, should also include the relevant biological characteristics of the area • Environmental considerations also need to consider the timing/TEMPO of mining in the specific area as well as the surrounding area • In addition to EEZs, also need to consider proximity to coastal States extended continental shelves. • Another factor for size and location is the proximity of the “<i>environmental impact area</i>” of the exploitation area to marine protected areas and other significant or vulnerable areas. Any overlap should be prevented.
Page 18	Public review	<ul style="list-style-type: none"> • Strongly support the contents of this section. This is a vitally important way for the ISA to manifest it is acting for the “benefit of mankind” • Mankind as a whole does indeed have a “vested interest” • May wish to consider designating an "ombudsman for future generations", as is has been done in Hungary in 2007, on the

		<p>model of the more common "ombudsman for human rights". The "Ombudsman for future generations" can receive any complain or request about a project from the public, and has a power of investigation. He could make recommendations to the Authority and even stop a project if it is considered to have irreversible impact on the environment (and more generally on future generations). This would be a way of improving public participation, transparency, and the realization of the common heritage principle.</p>
Page 18	Consideration by the LTC	<ul style="list-style-type: none"> • Strongly agree on the need for evaluation criteria on which the Commission is to base their recommendations to Council • Strongly support the need to ensure that the necessary review and public participation procedures have been followed and account taken of the submissions received by the Commission from interested parties, including civil society
Page 19, column 4	Consideration by the LTC, actions for operationalization	<ul style="list-style-type: none"> • The technical working paper needs to develop criteria to assess whether there is sufficient information available to make a determination of <i>substantial evidence of risk of serious harm</i>—and the consequences of lack of sufficient information. • <i>Substantial evidence of risk of serious harm</i> should not be the only reason for disapproval of an application based on environmental grounds. There may need to be wider discussion of other thresholds that more explicitly take the precautionary principle/approach into account. • An additional standard for disapproval could be based, for example, on the absence of evidence that the activity will not cause serious harm. Better to ensure that the potential contractor bears the burden of demonstrating there is no risk of serious harm • Also need to consider mechanisms to ensure the rational allocation of areas for exploitation as to prevent domination—not just monopolization, by any one country—and to ensure that areas remain open for both conservation as part of a system of no-mining areas, and areas are set aside for exploitation by future generations
Page 19	Consideration by the Council	<ul style="list-style-type: none"> • Would support the need for additional governance steps for the Council to satisfy itself that proper procedures have been complied with. This is an important part of the check and

		balance process.
Page 19	Independent technical expert Working Group/subcommittee	<ul style="list-style-type: none"> • Would support the establishment of additional expert working groups and also the establishment of a sub-committee that includes participation of all stakeholders including civil society to help draft the exploitation regulations.
Page 24	Conservation of the natural resources of the Area	<ul style="list-style-type: none"> • Second column—needs to also include a reference to preserve the natural resources of the Area for the benefit and use of future generations • Strongly support the need for conservation measures to promote the conservation of the natural resources for future generations.
Page 27	Protection and preservation of the marine environment	<ul style="list-style-type: none"> • There is indeed a vast amount of work to be performed. However IUCN strongly believes that such work is essential to the development of effective exploitation regulations and that no contracts for exploitation should be granted before such work has been accomplished. <p>Dumping issue:</p> <ul style="list-style-type: none"> • The ISA will need to develop, in collaboration with the London Convention/London Protocol, rules to specially address the disposal of sediments and other wastes from ships connected with seabed mining activities. Such rules should reflect at minimum the standards and procedures of the London Protocol. • Regulations will also be needed to reflect specific waste assessment frameworks, monitoring and reporting obligations. • The operation of ships and the impact of disposal of wastes connected with seabed mining activities, should also be considered as part of the EIA and environmental management plan
Page 28	Environmental management	<ul style="list-style-type: none"> • IUCN strongly supports the suggested content in this section, in particular the need for contractors to make available a public annual statement of its environmental targets and its performance delivery.
Page 29	Strategic Environmental	<ul style="list-style-type: none"> • Strongly support need for regional strategic environmental management plans

	Management Plan (SEMP)	<ul style="list-style-type: none"> Such plans should be in place prior to the grant of contracts for exploitation to ensure that effective systems of ecologically representative and well connected no-mining areas can be established across the region.
Page 30	Rights of coastal State	<ul style="list-style-type: none"> Reference to any likely impacts on coastal States should be addressed in the EIS where considered significant. In this regard, not only size and location of area of exploitation but also the size and location of the <i>environmental impact area</i> should be considered.
Page 31	Adaptive management	<ul style="list-style-type: none"> The purpose of adaptive management is to ensure that environmental protection and preservation is maintained during the mining operation and beyond, not to ensure the commercial viability of operations. The principle of sustainable development deals not only with commercial viability but also with environmental sustainability.
Page 32	Seabed Sustainability Fund	<ul style="list-style-type: none"> IUCN strongly supports the concept of a “Seabed Sustainability Fund” but thinks it should be more ambitious than conceived of in the ISA Report. IUCN agrees that such a fund should be financed through a level on contractors as one way to compensate for the damage done to the “common heritage of mankind” that is the seabed Area and its biodiversity, ecosystems and living resources. The fund should be used to support the management, monitoring and research of Areas of Particular Environmental Interest
Page 32	Environmental Liability trust fund	<ul style="list-style-type: none"> The fund above would not replace the need for an Environmental Liability Trust Fund as the purposes and the proposed revenue stream should be different.
Page 33	Confidentiality of data	<ul style="list-style-type: none"> All data should be public, unless the need to keep it confidential is clearly justified for propriety purposes. The presumption should be in favour of open and free access – and review, of reports, EIS to enable full and effective public review and participation. ISA procedures may need to be amended to ensure that meetings of subsidiary bodies such as the Legal and Technical Commission are open—as are the meetings of Committees and sub-committees of the International Maritime Organisation.

		<ul style="list-style-type: none"> • Appropriate procedures are needed to enable effective participation by observers
Page 34	Recommendations for the guidance of contractors	<ul style="list-style-type: none"> • IUCN supports the fact that the process of issuing recommendations by the Commission needs review and expert input.
Page 34	Duty to cooperate	<ul style="list-style-type: none"> • IUCN emphasizes that the duty to cooperate and exchange information is essential
Page 34	Inspection	<ul style="list-style-type: none"> • IUCN believes that inspection process should be driven or a minima reviewed by an independent panel of experts. • Parameters for the qualifications of inspectors, their mandates, must be agreed on and should include a code of Good Practice on integrity, professionalism and transparency.
Page 36	Review	<ul style="list-style-type: none"> • In accordance with an adaptive management approach regarding the marine environment protection and preservation (see also part IV), IUCN supports the fact that the exploitation regulations should be reviewed frequently, not only at the early stages of development, but as long as exploitation activities are taking place. Enhancement of scientific knowledge and better understanding of the ecosystems and of the potential impacts of mining activities on the environment may require the Authority to amend the exploitation regulations.
Page 38	Contract for exploitation	<ul style="list-style-type: none"> • Contracts for exploitation should include clauses for suspension, termination and penalties in case of significant harm caused to the environment.