SUBMISSION OF THE UNITED KINGDOM GOVERNMENT IN RESPONSE TO THE ISA MARCH 2015 REPORT ON DEVELOPING A REGULATORY FRAMEWORK FOR MINERAL EXPLOITATION IN THE AREA

The UK would like to commend the Secretariat and the LTC on the Report on *'Developing a Regulatory Framework for Mineral Exploitation in the Area'*, which we welcome as a significant starting point in the development of a regulatory regime.

We are pleased to set out our response to the Report below. We have provided some general comments, followed by more detailed comments on some of the issues raised in the different parts of the Report.

General comments

The ISA is entering a critical phase in the realisation of mineral exploitation of the Area. There is a significant amount of work to come, but we are pleased to see that the ISA has identified the issues which need to be considered. The UK is keen that the ISA develops a regulatory regime promptly, to provide the necessary certainty and readiness to enable the move from exploration to exploitation sooner rather than later.

The 'Actions for organization of draft regulation' column in the table in Section 2 of the Report provides a useful steer on what actions are required. We note that a number of those actions propose the preparation of technical working papers or guidelines by experts. Undoubtedly we need the involvement of such experts and groups, but we should need to ensure that we are judicious and economical in our use of them. It is important to collate and utilise experience from other regimes and fora to ensure that we are not unnecessarily 'reinventing the wheel'. Other regimes have had to grapple with some similar issues, including the offshore oil and gas sector, fisheries and shallow water mining. Although the deep sea bed is unique in a number of ways, we should consider what we can gain from the experiences of others and the international, regional and national standards in those regimes and fora. It will therefore be crucial to involve experts with experience of other regulatory regimes in the marine environment. Where new standards need to be developed or existing standards adapted, we should seek to use experts and working groups efficiently by grouping together similar actions and issues, particularly where they overlap or effect one another. We would ask the Secretariat and the LTC to review how the various work streams can be implemented and when and how experts and working groups should be instructed. It will be necessary to clearly define important terminology to avoid ambiguity.

As set out below, we take the view that it is important to try to set target timescales for the various pieces of work being conducted and the ultimate delivery of exploitation regulations. The targets will need to be flexible and adaptable to issues which arise along the way, but targets will help to maintain momentum and ensure that we do not stagnate. The Secretariat and the LTC should prioritise this work and drive it forward.

Comments on Section 2: Draft framework for the Exploitation Regulations

The 'suggested structure for Exploitation Regulations' identifies the numerous issues which the regulatory framework will need to cover. Drawing on our experience of the marine aggregate dredging and disposal of wastes at sea licensing regime under the UK Marine and Coastal Access Act 2009 (MCAA), there are some additional issues which will need to be considered, including: (1) notification of vessels used in connection with the activities; (2) requirements for the construction, equipment and operation of vessels; (3) electronic monitoring systems; (4) force majeure requirements; (5) precautions to prevent the loss of debris; (6) discharges of material or wastes; (7) notices to mariners; (8) specifications of reporting requirements.

More specifically, it would be useful to clarify exactly where the specific conditions applied to the mining operations to protect the marine environment fit into this structure – they could be in the Plan of Works, the Contract or the Environmental Management Plan or some combination of them.

More generally, we believe that it will be very important to develop an adaptive management approach for the regulatory framework in order for the framework to be able to evolve as experience with deep sea mining develops over time.

Form of applications (p. 8)

The drafting of guidelines for the preparation of a plan of work for exploitation is an important piece of work which will draw together a number of important issues. We note the commentary that the wording for a plan of Works in the Exploration Regulations remains relevant. However, section IV of Annex II of the Exploration Regulations: 'The Plan of Work for Exploration', is fairly brief and only requires a description of:

- The proposed exploration programme
- The programme of oceanographic and environmental baseline studies
- The preliminary assessment of the possible impacts of the proposed exploration activities
- The proposed measures for the prevention, reduction and control of pollution and other hazards, as well as possible impacts

It seems clear that at a stage of applying for an exploitation licence, these issues would need to have been developed into detailed proposals that would form the basis for conditions in any subsequent contracts/licences specifying the operator's obligations.

We note the reference to the development of an online application management system under 'Actions for operationalization of draft regulations', which could modernise the application process. The UK's Marine Management Organisation (MMO) would be happy to share with the ISA its experience of developing and operating such a system. The MMO is a public body, sponsored by the Department for Environment, Food & Rural Affairs (Defra), which licenses, regulates and plans marine activities in the seas around England and Wales to ensure that they are carried out in a sustainable way.

Financial and Technical Capabilities, p. 9

We agree that the preparation of 'Guidelines for the Preparation and Evaluation of Information relating to Financial and Technical Capability' can draw on the wording in the Exploration Regulations. However, most of the relevant section of the Exploration Regulations (Section III of Annex II) deals with financial matters. The paragraph dealing with technical capability only requires a general description of:

- The applicant previous experience, knowledge, skills, technical qualifications and expertise relevant to the proposed plan of work.
- The equipment and methods expected to be used in carrying out the plan of works
- The applicant's financial and technical capability to respond to any incident or activity which causes serious harm to the marine environment.

It seems clear that at a stage of applying for an exploitation licence, these issues would need to have been developed into detailed proposals that would form the basis for conditions in any subsequent contracts/licences specifying the operator's obligations. We agree that a greater level of detail will be required to evaluate financial and technical capability to ensure that the agreed plan of work can be delivered in compliance with contractual requirements.

Undertakings, p. 10

It is suggested that undertakings could be used to deal with unfair economic practices, as anticipated by Annex, Section 6(1)(b) of the Implementation Agreement to UNCLOS. This provides that the provisions of the General Agreement on Tariffs and Trade shall apply. We would suggest that considering how other regimes have applied the General Agreement would be useful.

Feasibility Study, p. 11

We note the suggestion to prepare 'Guidelines for the Preparation and Evaluation of a Feasibility Study'. The feasibility study as described here is focused on commercial viability but it is unclear what that covers. Section 4 of the ISA Technical Study No. 11 'Towards the Development of a Regulatory Framework for Polymetallic Nodule Exploitation in the Area' considers the use of feasibility studies in the regulation of polymetallic nodule exploitation and includes a wide range of issues beyond just economic ones. Will Section 4 of this Technical Study form the basis for developing the Guidelines and will they therefore include more than just economic issues?

Environmental Impact Statement (EIS), p. 12

The recommended format for an EIS set out in ISA Technical Study No. 10 *'Environmental Management Needs for Exploration and Exploitation of Deep Sea Minerals'* is a good starting point for the development of a template EIS. We would also expect to see an additional section proposing draft licence conditions covering environmental impacts, mitigation and management measures. However, what is missing is a requirement for an applicant to prepare a Scoping Report that outlines the issues they plan to address in an EIS. Scoping Reports are a standard approach in Environmental Impact Assessments (EIA). The Scoping Report would be submitted to the regulator for their consideration and approval before an applicant

commenced significant work on an EIS. It would likely be necessary for such reports to be assessed by an expert group.

It will be important to involve experts with experience of EIA in other regulatory regimes in the marine environment in the development of guidelines for EIS.

We support the suggestion that a number of standards and resources for EIA/EIS highlighted by the Stakeholder Survey should be taken account of in preparation of a model EIS. In general, the ISA should look to standards that already exist to assess what can be taken or adapted, before developing a new solution.

It will be important for the rating system to be simple and easily measurable against clear criteria.

The commentary refers to an EIS being verified by an independent environmental consulting firm. It is not clear if the *'independent environmental consulting firm'* is to be the organisation carrying out the EIS/EIA or is to be a completely independent from the organisation carrying out the EIA. This will need to be clarified. We anticipate that a number of contractors will use independent consultants to produce their EIA and EMP, but an independent reviewer that is answerable to the regulator is something quite different.

Environmental Management Plan, p. 13
The EMP as described appears to be focused on monitoring and does not appear to include conditions applied to the mining operations to protect the marine environment.

The EMP will need to include a definition of the limitations of what constitutes acceptable "remediation, restoration/rehabilitation" and over what period of time. This is a point which equally applies to *Social impact assessment and action plan (SIA) (p. 14)* and *Closure plan (p. 14)*, which will need to include a definition of limitation to liability in time and space.

Public review of EIS and EMP, p. 18
We support this transparency initiative, which is something that will assist with full stakeholder participation; including the public at large (it should not be limited to "experts" in the field). The mechanism needs to be simple, workable, timely and cost-effective.

Consideration and approval of plans of work for exploitation by the Council, p. 19
The procedures and criteria to be adopted by the Council would mirror those applied by the LTC and the Council would seek to rely on the LTC's report. The practical consideration of plans of work for exploitation by the Council is an issue that can be considered once the exploitation regulations have been finalised.

Independent technical expert working group/sub-committees, p. 19
We strongly support the consideration of the ISA structure and its readiness for the dealing with the increased workload the move to exploitation will bring. Further information on how the ISA sees such group/committees being constituted, their

working arrangements and remits would be useful to enable more definitive comments to be provided.

However, the question posed in the Actions section is whether this should be formalised under the regulatory framework. In order to keep the issues to be dealt with in the exploitation regulations at a manageable level, we recommend that this matter is not formalised under the regulations, but dealt with in parallel or shortly after the finalising of the exploitations regulations.

Function of this group should also be considered. These might include defining Best Environment Practices (and updating them as new information comes through); review of licence applications, including the EIA and EMP and draft licence conditions; reviewing outputs from monitoring of licences; and reviewing the evidence base and advising on evidence gaps/research needs.

Legal title to minerals, p. 20
The concept raised in the commentary of restrictions being placed on the transfer of title where a contractor is, for example in breach of contractual obligations, is something that we would welcome further consideration of. To act as an effective and robust regulator, the ISA will need to be armed with sufficient 'teeth' by which to ensure contractor compliance with contractual obligations.

Performance requirements, p. 22
Production obligations will need to be specified under a plan of work. A cut-off point will be necessary to ensure greater opportunity for any valuable resources to be extracted where there is commercial inactivity. The level and terms of any cut-off point will need to be pitched at the right level for this new industry. The US Deep Seabed Hard Minerals Act is quoted as an example. This provides a cut-off point of 10 years, unless a contractor can show "just cause". It may be necessary to build in an exception to any cut-off point, but we would suggest that phrases such as "just cause" should be avoided, as they are open to a number of interpretations and could cause uncertainty and much debate further down the line. We would advocate firmer criteria being established for any exception to the cut-off point.

Performance requirements will form the crux of the day-to-day running of the exploitation activities. The ISA should be in a position to deal with contractors that are failing to meet agreed requirements. However, we agree that there should be some flexibility to make changes to the programme of work. Minor changes could be permitted to be made by contractors upon simple notice to the ISA, but major changes should require prior approval by the ISA. It will be imperative to clarify what is minor/major and the border between the two.

Preservation and Protection of the Marine Environment, p. 27-28
The commentary acknowledges that a vast amount of work needs to be done in this important area. Licence conditions will need to be developed to ensure compliance with the general principles and obligations.

The Centre for Environment, Fisheries and Aquaculture Science (Cefas), an agency sponsored by Defra, and the MMO in the UK have had recent experience in

developing standard licence conditions under the UK Marine and Coastal Access Act 2009 (MCAA) for both dredging/disposal and marine aggregate dredging licences. We would be happy to share our experiences and approaches with the ISA to assist with the development of standard licence conditions for deep sea mining.

The commentary refers to the disposal, or storage of, waste arising from activities in the Area that will need to be regulated by the ISA. The London Convention/London Protocol experience with developing guidelines for the disposal of wastes in the marine environment should be of great benefit to the ISA and specifically the Waste Assessment Guidelines for 'Inert, inorganic geological material' and 'Dredged material' will be relevant. In addition, the LC/LP guidance on dealing with emergency and force majeure situations will also be relevant to the ISA.

We agree that this area requires broad stakeholder engagement, including relevant international organisations whose expertise and experience can be utilised. The suggestion of targeted expert working groups seems sensible, although more detailed proposals would be helpful. This is something that should be prioritised.

Environmental Management, p. 28
We agree that OSPAR Guidelines for Monitoring the Environmental Impact of Offshore Oil and Gas Activities will indeed be useful. However, other guidelines covering seabed mining or waste disposal activities may also be useful to draw upon e.g. ICES guidelines for marine aggregate extraction.

The proposal that contractors should have reporting obligations to publish annual statements of environmental targets and performance delivery against environmental indicators is welcomed and would go a long way to ensuring full stakeholder engagement with the process of exploitation.

We note that two yearly audits for the EMP and EMS are proposed. We would comment that this is rather frequent for the environmental aspects at least. Although we appreciate that more frequent audits may be considered prudent in the early years of operations, with a move towards less frequency as the industry develops.

Strategic Environmental Management Plan (SEMP), p. 29
Under 'Specific Elements' there is a reference to SEIAs i.e. Strategic Environmental Impact Assessments. We assume that this is equivalent to a Strategic Environmental Assessment (SEA). If so, it would be preferable to refer to SEA rather than SEIA as the latter is not a term in general use. If, however, SEIAs are different to an SEA, then some explanation needs to be provided of what they are and what they are intended to cover.

Restoration and rehabilitation of the marine environment, p. 31
The feasibility and practicality of restoration and rehabilitation is something that should be determined as soon as possible. As if it is not feasible, or the scope would be very limited, then the alternatives will need to be fully considered. This will need to be recognised in the exploitation regulations.

The possibility of offsetting also needs further careful consideration, including what offsetting could include. The proposed seabed sustainability fund will also be relevant here.

The closure of sites will need to be considered – what will this entail, how will it differ to the closure of land sites?

Seabed sustainability fund, p. 32
We support the idea of a seabed sustainability fund – which could take advice from an expert group in defining its programme of work, and ensuring transparency of data and research findings. The UK's Marine Aggregate Levy Sustainability Fund provides a good model.

Annex II Contract for exploitation, p. 37
On a more general note, it would be useful to know how these five suggested provisions have been selected for action and/or consideration. We would suggest that draft contractual clauses should be dealt with in line with the action plan to be agreed. Terms used should be clearly defined.

Comments on Section 4: Summary of high level issues

We strongly agree with High level issue 1 'Information and data' being included. This is an area of key importance, as very little is still known about the deep sea environment.

High level issue 3: we agree that the initial focus should be on developing a regulatory framework for polymetallic nodules. There may be different requirements, e.g. environmental, depending on the mineral and, therefore, it will be necessary to consider each set of regulations separately (as was done for the exploration regulations).

High level issue 5 'The transition between exploration and exploitation phases': the commentary states "...for reasons of commerciality, it is recommended that the concept of a provisional mining licence, while having some merit, is forgone and that a substantive review period against pre-determined performance indicators is undertaken within a 5-year period from the commencement date of a contract for exploitation". It would be useful to explain the reasons for this proposed change in approach, as provisional mining licences were recommended in ISA Technical Study No 11. In addition, it is not clear what effect the 'substantive review against pre-determined performance indicators' could have on the mining licence. One assumes it could potentially lead to changes in working practices, licence conditions etc. However, could it lead to termination of the licence if that were considered necessary? Clarification of what effect this substantive review could have is needed. We presume that the reason for this proposal is that the licence holder would have to invest such large sums of money to build the vessels, mining equipment etc, that it might not be considered commercially viable to do this for just a provisional mining licence.

High level issue 8 'Confidentiality': as noted above, the provision and sharing of data is very important for the advancement of knowledge of the deep sea bed. We appreciate that there are difficulties where data is commercially sensitive. However, the starting point should be that data should be disclosed and only withheld where there are genuine commercial sensitivities. The calls for greater public access to data and information are only going to increase as we move towards the exploitation stage. Therefore, we would advocate contractors proactively taking a transparent approach.

High level issue 10 'Internationally recognised standards and their significance in exploitation activities': the UK is pleased that this issue has been recognised as a high level issue. Although deep sea mining is a new industry, it does not mean that we have to start from scratch in developing a regulatory framework. The ISA can draw upon existing practice and industry standards in other fora. Some existing standards may be capable of specific application, while others may provide a useful starting point from which industry-specific standards can be developed. Utilising what already existing in other industries and the international community can only assist with the prompt development a regulatory regime.

Comments on Section 5: Draft action plan

It is crucial that an action plan is agreed by the Council during the Annual Session in July 2015 to ensure that a clear and timely way towards the development of a regulatory framework for exploitation is established.

We support the identification of priorities and the criteria which has been applied by the LTC, namely prioritising according to when actions need to be initiated. However, in our view action in relation to protection and preservation of the marine environment should be a key priority and advanced with the first tranche of issues. We appreciate that further information is required in order to develop specific criteria and guidance for effective protection, but we should be considering the issue as a priority to identify what further information is required and how it can be obtained.

The current draft action plan only covers the period to February 2016. We would like to see a more developed action plan and timetable covering the entire period up to delivery of the exploitation regulations. We suggest that the prioritisation of the items in section 5 should be reviewed to ensure that some items currently with a low priority do not hold up items with a higher priority, i.e. utilise a project management approach such as the Critical Path Method that identifies the dependencies between the listed items.

We note the comment in the Executive summary that it is premature to consider that actions will be completed at this stage. There is clearly much work to be completed and some actions will take longer than others. However, our view is that it is important to set deadlines or key stages of the process, to allow us to measure delivery of the ultimate product. We accept that any deadlines will need to be flexible and the action plan adapted over time.

To this end we suggest that a target date for the submission of final draft regulations to the Council should be set. Again, this date may need to change as work progresses, but we are of the view that a target date will provide a necessary focus for all stakeholders involved in the process, rather than work being conducted with to an open-ended timescale.

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