# SUBMISSION

STRATERRA™
NATURAL RESOURCES OF NEW ZEALAND

**Submission to INTERNATIONAL SEABED AUTHORITY on**

## "DEVELOPING A REGULATORY FRAMEWORK FOR MINERAL EXPLOITATION IN THE AREA" (NOVEMBER 2016)

## INTRODUCTION

1. Straterra[1] welcomes the opportunity to submit on the International Seabed Authority document entitled "Developing a regulatory framework for mineral exploitation in the Area". We do so in the interests of achieving benefits for the minerals sector, and for the global economy and society as a whole, in recognition of the status of the Area as the "common heritage of mankind". The submission deadline of 6pm, 4 November, EST, is noted.

2. Our comments are necessarily brief, and focused on detail, having been appraised of this opportunity within the last week.

3. In preparing this submission, Straterra has consulted with our membership, which includes seabed mining exploration companies, marine scientific research providers, and marine environmental management consultants.

4. Straterra welcomes further engagement with the ISA, as the regulatory programme develops. This is an important body of work, with major implications for the future of seabed mineral resources, and their extraction.

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[1] Straterra represents the New Zealand minerals exploration and production industry, and associated research, services, and support, on land and in the oceans http://www.straterra.co.nz/about/

## EXECUTIVE SUMMARY / GENERAL COMMENT

5. The proposal for a regulatory framework is supported. The draft provided focuses on the seabed mining part of any application for an operation in the Area, i.e., financial and technical capability for mining, good industry practice, and capability to develop systems for health & safety, and environmental management. We provide comments below on the detail of the text.

6. As to the proposed environmental regulation, it is noted that this is to be developed separately. In New Zealand, for comparison, the applicable legislation is the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012, and accompanying regulations.

7. Following two unsuccessful applications for "marine consents" to mine the seabed - one for an ironsands project, the other for rock phosphate - Straterra prepared three papers[2] discussing how the EEZ Act marine consenting regime could be improved. Our advice focused on issues for decision-makers when considering uncertainty, risk and consequence, and adaptive management.

8. The Government has proposed reform of the EEZ Act, as part of the Resource Legislation Amendment Bill. View Straterra's submission to the relevant Parliamentary select committee, from page 18, on http://www.straterra.co.nz/assets/Straterrra-submission-to-LGE-on-Resource-Management-Legislation-Amendment-Bill-Feb-2016.pdf

## RECOMMENDATIONS

9. Straterra recommends the International Seabed Authority to:

   a) Note Straterra's general support for the document: "Developing a regulatory framework for mineral exploitation in the Area";

   b) Note Straterra's comments on the detail of the document, below; and

   c) Note the Straterra policy advocacy referred to in the executive summary, on New Zealand's Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012 regime.

## DISCUSSION / COMMENT ON SPECIFIC PROVISIONS

10. The following comments concern matters of detail in the text.

**Pages 4-5, para. 7**

11. A statement is needed about the strategic importance of mineral resources for the global economy and society.

12. The list of items for consideration for regulation looks reasonable and appropriate.

[2] http://www.straterra.co.nz/news-and-issues/policies/oceans-and-the-eez/

**Page 6, para. 9**

13. Three sets of regulations covering different matters are proposed. The alternative would be to produce a single set of comprehensive regulations, on the principle stated in para. 12 (page 6): "*nothing is agreed until everything is agreed*".

**Page 6, para. 10**

14. More information is needed on a "*practical application of the precautionary approach*", to understand what this means. It is our experience in New Zealand that this term has been interpreted in different ways, and not always as originally intended.

15. A definition of the precautionary approach and its practical application is recommended, to be inserted into the section on definitions (page 83).

**Page 8**

16. A note that the deadline for submissions is 6pm, EST, 4 November, not 2 November - i.e., 11am, 3 November, NZ time.

**Page 13, preamble**

17. This preamble is short. We suggest adding a statement as to the strategic importance of mineral resources for the global economy and society (refer also to comments on para. 7, above).

**Page 14, reg. 2**

18. A definition of Enterprise is needed, to be inserted into the definitions section at the end of the document.

**Pages 14-15, reg. 3**

19. This section does not adequately cover off multi-national mining companies or consortia, in terms of State sponsorship of applicants to mine in the Area. More wording is needed for completeness and clarity.

20. These considerations have implications for reg. 15 (page 23).

**Page 16, reg. 4**

21. Item 6: if an application is for non-contiguous mining areas, however, spans the same geology, resource or mineral deposit, then it would make more sense to deal with this as a single application (refer also to the comment below on the footnote, page 16).

**Page 16, reg. 5**

22. Will the setting of application fees be subject to specified criteria? If so, as we would expect, these should be set out.

**Page 16, footnote 12**

23. We support the proposal for criteria to be developed for considering applications to mine in non-contiguous areas as a single application.

**Page 18, reg. 8**

24. Item 4 (b): The concept of "*commercial viability*" needs to include reference to the business or financial model followed. This can be complex. For example, a seabed mining company would often not have all the capital it needs upfront to construct equipment for mining. It would need an Exploitation Licence to be able to raise the funds to develop the mining operation. See comment on reg. 16 below.

25. Item 4 (c): As previously commented, what is meant by "*application of … a precautionary approach*"? If we get this wrong, seabed mining activity risks being stymied.

**Page 24, reg. 16**

26. We agree that it is essential for the Contractor to be able to use an Exploitation Contract to raise finances for operations. This is for financial risk management. The point is that mining companies / consortia will not have all of the development capital they need upfront. At issue is the scale of investment required which would ordinarily exceed $500 million or $1 billion.

27. Joint ventures and farm-in agreements and the like would be a common feature of Contractors in the Area.

28. Item 4: in terms of setting a maximum ratio of a Contractor's debt to equity, this will depend, among other things, on the Contractor's strategies for pooling capital and spreading financial risk. There will need to be criteria developed.

**Pages 24-25, reg. 17**

29. A timeframe is needed for the approval of a "*transfer of rights and obligations*", say, no more than 60 days. Otherwise, the provision may not be workable for the Contractor.

**Pages 28-29, reg. 21**

30. It will important to be able to review the policy for setting administration fee levels, and to specify criteria for the setting of fee levels. These should include a requirement for the administrators of the regime to operate in a demonstrably efficient and effective way.

**Page 29, reg. 23**

31. This and subsequent regulations concern royalties.

32. An implication of this regulatory regime is that some States will have responsibilities in domestic law. Will a portion of royalty payments to the ISA, or a subsidiary body of the ISA, be diverted, or reimbursed to these States so they can recover costs that cannot be recovered from Contractors?

**Page 29, reg. 24**

33. We look forward to indications on how royalty levels are going to be calculated, i.e., methodologies, criteria, and benchmarking with State royalty regimes, to ensure international competitiveness.

34. Clarity is also needed on what happens to royalties collected and retained by the ISA, and any policy on disbursement of royalties, e.g., to sponsoring States.

**Page 44, reg. 54**

35. Yes, offences should be prosecuted by States under domestic law. It should be made clear that sponsoring States are required to establish an appropriate legislative regime and carry out monitoring, and, if required, enforcement action against sponsored Contractors where offences have been committed.

36. We assume that the ISA will pay for any costs incurred by States in this area, e.g., out of royalty payments and licence or contract fees.

37. A comparison could be made with CITES, the UN Convention on International Trade in Endangered Species of Wild Flora and Fauna, and the use of domestic law by States to enact CITES.

**Page 46, reg. 58**

38. Straterra agrees with the proposal that decisions against a Contractor by a court or tribunal under UNCLOS should be enforceable in sponsoring States. Again, we would expect that the State's costs, where not recoverable from the Contractor, would be met by the ISA.

**Page 48, Annex 1, section 1**

39. We query the need to provide a fax number.

**Page 48, Annex 1, section 2**

40. The requirement for the applicant to show that is has the "*necessary financial resources*" is problematic, as discussed elsewhere in this submission. Yes, the applicant must have the capability to raise capital, however, it will first need the Exploitation Licence or contract to be able to do that (see also comment on reg. 16 (page 24)).

41. To clarify, no company or Enterprise will have all of the capital its needs upfront to develop a mining operation because of the capital required. Such will only be able to raise mining development capital once all regulatory approvals have been obtained. Naturally, the ISA would want to avoid the situation where the holder of an Exploitation Licence sits on that right for an unreasonable length of time before starting development. This issue can be managed through provisions in regulation concerning the removal of Licences from Contractors.

**Page 56, annex 4**

42. Item (d): As stated elsewhere in this submission, the raising of finance for capital-intensive seabed mining projects presents a challenge. It is fair and reasonable to ask the applicant what mechanisms they would use, e.g., joint ventures, IPO, farm-in agreements.

**Page 73, section 32**

43. The proposals concerning actions the ISA may take to remove the installations of contractors who have had their licence revoked or suspended look workable, providing the Contractor had already paid to the ISA an adequate "*financial guarantee and security*".

**Page 75, section 40**

44. In this section on national law, what mechanisms are envisaged to ensure that relevant States enact and enforce domestic legislation to enable the international seabed mining regime?

45. One method could be to specify that a sponsoring State is only eligible to sponsor an applicant for an Exploitation Licence if it has the necessary domestic policy, and related implementation mechanisms in place.

**Page 79, definitions**

46. In addition to comments made elsewhere in this submission, the definition of the term "*affiliate*" is appropriate, however, leaves gaps. Further definitions are required to cover off all of the possible arrangements that multiple companies and States may enter into.