

**TEMPLATE FOR SUBMISSION OF TEXTUAL PROPOSALS DURING THE 28<sup>TH</sup> SESSION:  
COUNCIL - PART I**

Please fill out one form for each textual proposal which your delegation(s) wish(es) to amend, add or delete and send to [council@isa.org.jm](mailto:council@isa.org.jm).

**1. Name of Working Group:**

IWG of the Whole.

**2. Name(s) of Delegation(s) making the proposal:**

Submitted by Nauru Ocean Resources Inc., Tonga Offshore Mining Ltd and Blue Minerals Jamaica Ltd.

**3. Please indicate the relevant provision to which the textual proposal refers.**

Draft Reg 18(bis).

**4. Kindly provide the proposed amendments to the regulation or standard or guideline in the text box below, using the “track changes” function in Microsoft Word. Please only reproduce the parts of the text that are being amended or deleted.**

**~~{Regulation 18 bis~~**

**~~Obligations of the Contractors.~~**

~~1. Contractor shall comply with these Regulations and the Rules of the Authority in a manner consistent with the Convention and the Agreement.~~

~~2. Contractors, their holding, subsidiaries, affiliated and Ultimate Parent companies, agencies, partnerships, and suppliers shall be held liable for the compliance of the Contract. Particularly, they shall be jointly and severally liable for the obligation of compensating damages arising from Exploitation Activities.~~

~~3. Whether Contractors fail to comply with their payment obligations under these Regulations, holdings and Ultimate Parent Companies shall be held responsible to effect such payments to the Authority on behalf of Contractors.~~

~~4. Sponsor States shall take all legislative and administrative measures to assure that Contractors have all material, operative, and financial means to comply with the Contract and these Regulations and that no corporate limitation shall prevent Contractors, holding and Ultimate Parent Companies to compensate damages and make the payment required by the Contractors under the Contract and these Regulations.]~~

**5. Please indicate the rationale for the proposal. [150-word limit]**

- We oppose the inclusion of Draft Regulation 18(bis) and support retaining the existing Draft Regulation 18.

- We consider that Draft Regulation 18(bis) is inconsistent with both: (i) the Authority's previous decisions and subsequent practice; and (ii) the Convention.
- First, Draft Regulation 18(bis) misinterprets the Authority's position and test on "*effective control*". The Secretariat published a legal note (ISBA/20/LTC/10) interpreting the meaning of "*effective control*". Draft Regulation 18(bis) assumes the ability for the Authority to lift a Contractor's corporate veil. As provided for in ISBA/20/LTC/10, "*it is apparent that the standards for lifting the corporate veil in relation to jurisdiction and liability differ significantly from State to State*". The Secretariat advised and the Commission agreed that the test for "*effective control*" is based on place of incorporation and any ultimate parent companies of Contractors are not captured by the "*effective control*" test and do not fall within the ambit of the Mining Code.
- Secondly, it appears to us that Draft Regulation 18(bis) seeks to fill a potential gap in payment liability, which may occur if a Contractor cannot meet any payment liability in full. The potential for a gap in payment liability was discussed by the Chamber of the International Tribunal for the Law of the Sea in the Advisory Opinion, "*Responsibilities and obligations of States with respect to activities in the Area, Advisory Opinion, 1 February 2011, ITLOS Reports 2011, p. 10*" (**Advisory Opinion**). To address the issue, the Chamber proposed that the Authority may wish to consider the establishment of a trust fund to compensate for the damage not covered. Further, this issue has been the subject of ISA Technical Study No. 27 titled "*Study on an Environmental Compensation Fund for activities in the Area*" and further discussed in ISA Policy Brief 02/2022 "*The Environmental Compensation Fund*". We consider that the creation of an Environmental Compensation Fund would be more appropriate and effective than attempting to recover from affiliates of the Contractor.
- Thirdly, Draft Regulation 18(bis) goes beyond the requirements of Article 4 (*Qualifications of applicants*) of Annex III of the Convention, which provides that:
 

*The **sponsoring State** or States shall, pursuant to article 139, have the responsibility to **ensure, within their legal systems**, that a contractor so sponsored shall **carry out activities in the Area in conformity with the terms of its contract and its obligations under this Convention**. A sponsoring State shall not, however, be liable for damage caused by any failure of a contractor sponsored by it to comply with its obligations if that State Party **has adopted laws and regulations and taken administrative measures which are, within the framework of its legal system, reasonably appropriate for securing compliance by persons under its jurisdiction**.* (emphasis added)

- Further, at paragraph 218 of the Advisory Opinion the Chamber commented on the scope and extent to which a Sponsoring State is required to make laws. In particular, the Chamber opined:

*"Annex III, article 4, paragraph 4, of the Convention requires the sponsoring State to adopt laws and regulations and to take administrative measures. Thus, there is here a stipulation that the adoption of laws and regulations and the taking of administrative measures are necessary. **The scope and extent of the laws and regulations and administrative measures required depend upon the legal system of the sponsoring State.**" (emphasis added)*

- We therefore consider that the content of Draft Regulation 18(bis) is not consistent with the terms of the Convention or the Advisory Opinion. As provision is made for a Sponsoring State to "*adopt laws and regulations and to take administrative measures*" that depend on its own legal system, we do not consider it necessary or appropriate that the regulations specify the legal requirements for a Sponsoring State to meet its legal obligations. This is the sovereign prerogative of the Sovereign State.