TEMPLATE FOR SUBMISSION OF TEXTUAL PROPOSALS DURING THE 28TH 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.

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 22(1).

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.**

   The Contractor may~~, [solely for the purpose of raising financing to effect its obligations under an exploitation contract and only] [with the prior consent of the sponsoring State or States and of the Council, based on the recommendations of the Commission],~~ mortgage, pledge, lien, charge or otherwise encumber all or part of its interest under an exploitation contract ~~[for the purpose of raising financing to effect its obligations under an exploitation contract]~~.

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

   - We oppose the proposed amendments to Draft Regulation 22(1).

   - We consider that the proposed amendments are inconsistent with the Convention and impose restrictions *ultra vires* to the Convention.

   - First, Annex III (*Basic Conditions of Prospecting, Exploration and Exploitation*) of the Convention does not prescribe limitations on a Contractor's ability to securitize its exploitation contract. Further, Annex III, Article 13 (*Financial terms of contracts*) is detailed and prescriptive regarding the "*rules, regulations and procedures concerning the financial terms of a contract between the Authority and the entities*", but is silent on limiting encumbrances.

- We therefore consider that, if the State Parties of the Convention had intended such a restriction to be imposed on exploitation contracts, such a condition would have been provided for in Annex III or elsewhere in the Convention.

- Secondly, Annex III, Article 17 of the Convention provides the "matters" on which the Authority shall adopt regulations. We do not consider that terms concerning securitization of exploitation contracts between a Contractor and a third party falls within the scope of these matters.

- Thirdly, we consider that it is market practice for globally significant megaprojects, such as projects envisioned to take place in the Area, that securitization of an exploitation contract is readily available. Market practice shows that in megaprojects the terms of securitization are reflected in security agreements after the financing arrangements are known. The inclusion of restrictions and requirements in relation to securitization in the regulations is therefore likely to impair the bankability of the project, limit financing and/or increase the cost of finance available for the project.

- Fourthly, we agree that it is unreasonable to require a recommendation from the Commission or "*consent*" from the Sponsoring State or Council to use an exploitation contract as security. From a practical perspective, the amount of time required to procure a recommendation from the Commission and consent from the Council would cause the financing arrangements to be dictated and governed by the internal machinery of the Authority. Further, we do not consider it appropriate that the Council has a right to withhold its consent to the grant of an encumbrance over an exploitation contract, as no such right or power exists under the Convention.

- Finally, we consider that any concerns regarding securitization of an exploitation contract can be addressed by the inclusion of additional terms in the exploitation contract or through a side agreement on a case-by-case basis.

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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 22(4).

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.**

   ~~*4. [The] Council may require that the beneficiary of the encumbrance referred to in paragraph 1 above:*~~
   ~~*(a) Shall subscribe to any internationally adopted standards for the extractive industries which are widely accepted; and*~~
   ~~*(b) Shall be properly regulated through a national financial conduct authority in accordance with the Guidelines.*~~

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

   - We oppose the proposed inclusion of Draft Regulation 22(4).

   - We consider that Draft Regulation 22(4) imposes restrictions on Contractors that are *ultra vires* to the Convention.

   - Annex III (*Basic Conditions of Prospecting, Exploration and Exploitation*) of the Convention does not impose limitations on a Contractor securitizing its exploitation contract, whether in the form of requirements on beneficiaries obtaining security over exploitation contracts or otherwise.

   - Further, Annex III, Article 13 of the Convention is detailed and prescriptive regarding the "*rules, regulations and procedures concerning the financial terms of*

a contract between the Authority and the entities". Article 13 is silent on requirements imposed on beneficiaries obtaining security over exploitation contracts. In particular, the reference to national financial conduct authorities would result in the Council being able to cast judgment on national regulatory bodies across all relevant jurisdictions.

- We therefore consider that, if the State Parties of the Convention had intended such a restriction to be imposed on exploitation contracts, such a condition would have been provided for in Annex III or elsewhere in the Convention or the 1994 Agreement.

- Annex III, Article 17 of the Convention provides the "matters" with respect to which that the Authority shall adopt regulations. We do not consider that terms concerning securitization of exploitation contracts between a Contractor and a third party (including any requirements for such third party to subscribe to any standards or to be regulated by any authority) fall within the scope of the matters to be included in the Regulations.

- We consider it market practice that as part of globally significant mega projects, such as projects involving activities in the Area, securitization of an exploitation contract is readily available. Market practice shows that in such mega projects, the terms of securitization are reflected in the security agreements after the financing arrangements are known. Therefore, including restrictions and requirements in the Regulations is likely to impair the bankability of the project, limit financing and/or increase the cost of finance available to the project.

- In particular, Draft Regulation 22(4) introduces unnecessary uncertainty as to what it means to be "properly" regulated by a national financial conduct authority, what constitutes "internationally adopted standards for the extractive industries", and how parties will be able to show that these requirements are met.

- Finally, we consider that any concerns regarding securitization of an exploitation contract can be addressed by the inclusion of additional terms in the exploitation contract or through a side agreement on a case-by-case basis.