January 22, 2018

Comments on the Draft Regulations on Exploitation of Mineral Resources in the Area

Marawa Research and Exploration Ltd. (Marawa) wishes to thank the Authority for the opportunity to provide input into the Draft Regulations on Exploitation of Mineral Resources in the Area and is pleased to grant its consent to the Authority to disclose the information contained in this document.

The timely development of commercially viable regulations is required for the development of a new cleaner metals industry to meet the world's clean technology and clean energy needs. The Draft Regulations represent an important step forward for the ISA and its stakeholders. Marawa wishes to acknowledge the work of the Authority in developing the Draft Regulations and designing a transparent and timely process for the review and finalization of these Regulations. In particular Marawa appreciates the Authority's willingness to adapt its regular schedule of meetings to facilitate more than one Council session per year.

Marawa would also like to acknowledge the significant work involved in drafting the Regulations and appreciates the Authority's efforts to accommodate all stakeholders. The draft regulations are laid out in a logical manner and provide a comprehensive regulatory framework for exploitation.

Marawa believes that there are a few areas that as currently drafted would prove problematic and potentially prevent the industry from being commercially viable. Respectfully we would like to highlight the following areas of concern:

<u>Recommendations becoming regulations and the implications for contractual certainty</u>

The draft regulations contain numerous references to the "Recommendations" issued by the LTC and these appear to imply that they are mandatory. If this were the case, the "Recommendations" would in actuality serve as regulations, which, if frequently changed and/or updated, would result in an unstable regulatory regime. The resulting uncertainty would not allow Contractors to operate with confidence, and this would hinder investment, making it impossible to secure financing.

Mining jurisdictions with a track record of a stable and consistent regulatory regime are able to attract investment because they provide the confidence and certainty required by investors. Until such time as the Authority has a track record as a regulator it must be absolutely clear that contracts will not be changed without the mutual consent of both parties.

In addition to providing confidence and certainty, Recommendations that are in effect becoming regulations would appear in contravention to **Annex III, Article 19 of the Convention,** which requires both parties consent before a contract is revised.

<u>Stability of Contracts and Regulations</u>

Marawa acknowledges that Regulations will need to updated from time to time to reflect new practices and knowledge. Marawa would recommend that the Regulations at the time of the contract become part of the contract and any future changes be incorporated by mutual agreement.

The Regulations have a fundamental impact on the Contractor's right, any changes to these Regulations would be similar to the Regulatory Body making a unilateral change to the Contract terms. As such, Marawa recommends that changes to material aspects of the Regulations should only be applied to new Contractors, and not Contracts that are already in existence.

It is vital that the Authority recognize and respect the sanctity of contracts already signed and not change the terms without the consent of the Contractor. Marawa would note that there is a precedent of the ISA and Contractors working together to change terms within existing contracts. For example, Exploration Contract Annual Fees were increased, by mutual agreement, for the benefit of the ISA.

Production and commercial requirements

Draft Regulations 7(4)(a), 30, 32 and 33 appear to prescribe commercial production criteria or obligations upon the Contractor to change operations or alternatively to limit the ability of Contractors to vary operations to accommodate changes for example in the external economic environment or as a response to technological changes. This is particularly concerning to Marawa.

Provided such a change does not cause unlawful harm and remains within the parameters of the contract conditions and complies with the ISA's regulations, the Contractor should be free to make modifications to its plan as it deems necessary in order to achieve the required commercial, technical or environmental outcome. Contractors must have this flexibility to respond to operating, technical and market forces which will come into play and impact operations from time to time. The mining industry, and in particular metal prices, change quickly, and it would not be appropriate for the Contractor to have to seek approval from the ISA prior to making such changes if it has genuine reasons to modify its production rates. It is also not commercially viable to require a Contractor to apply to the ISA to change or suspend its production or have limits placed on its production. Ultimately, a Contractor's production rate, and changes to its production rate, are commercial decisions that should not be dictated by the Regulatory Body. For example, it would be unacceptable if a Contractor were "forced" to continue producing at a loss. We wholeheartedly agree with keeping the ISA informed of such changes, but we do not agree with the need to seek prior approval for commercial decisions.

Additionally, Contractors should be encouraged to develop organizations that strive to continually improve operational performance to build margins and improve environmental performance and safe operations that will drive the industry forward. This innovation will be hampered if Contractors do not have the ability to make changes within the parameters of their contract without ISA approval.

For these reasons Marawa would also recommend that **Draft Regulation 46** provide greater flexibility for Contractors to modify their plans of work and Contractors should not be prevented from modifying their Plan of Work to meet market conditions.

Given the significant up-front capital expenditure that will be incurred prior to commercial production, Contractors will be incentivized to maximize production and it is hard for Marawa to contemplate a situation where a Contractor would attempt to reduce or suspend its production unless there was a very serious reason to do so. It is understandable for the Regulatory Body to take measures to ensure that an operator brings the project in to commercial production within a reasonable time frame of being granted an exploitation permit. However, once that Contractor has expended significant capital and commenced commercially production, we do not believe it is a genuine risk that the Contractor would then suspend or minimize production unless it was compelled to due to market forces etc.

Marawa notes that the 1994 Implementation Agreement specifically removed the production policies contained in UNCLOS because it was recognized that it was not possible for commercial entities to invest in this industry while such policies were in place. As currently worded, the above-mentioned Regulations could artificially regulate production, which Marawa does not believe is the ISA's intent.

Specifically, the above-mentioned Draft Regulations, do not appear to be consistent with Section 6(1)(a) of the Implementation Agreement, which states "*development of the resources of the Area shall take place in accordance with sound commercial principles*". Marawa does not believe it would be commercially sound for the ISA to "order a decrease or the cessation or suspension of production" because the ISA does not believe the production is efficient. Provided a Contractor is not causing unlawful harm and remains within the parameters of the contract conditions and complies with the ISA's regulations, the Contractor should be free to make modifications to its plan as it deems necessary in order to achieve the required commercial, technical or environmental outcome.

To ensure transparency and ensure that the Authority is aware of and understands why a Contractor is modifying production, an option to consider, may be to provide the Secretary General with the ability to request the Contractor provide the rationale within 90 days for as to why production is deviating from the approved mine plan if the variance is ±25%.

Transfer of rights

Marawa believes that **Draft Regulation 16** which pertains to transfer of rights and obligations is uncommercial and will prohibit investment. For example, **Draft Regulation 16(3)** which states *"The terms and conditions of the transferee's exploitation contact shall be those set out in the standard exploitation contract annexed to the Regulations that is in effect on the date that the Secretary-General executes the assignment and novation agreement"* has the potential to significantly diminish the value of the Exploitation Contract as it has the potential effect of changing the contractual terms of the Exploitation Contract upon a transfer. This could also significantly impair a Contractor's ability to finance the project, as a financier/security holder will have to accept that if they exercise their security they will not be obtaining an Exploitation Contract on the terms that were in existence at the time of financing, but rather, they must accept the Exploitation Contract terms that are set out in the Regulations at the time of transfer, which could significantly reduce the value of the project. This uncertainty would inhibit project financings. Contractors and the industry require certainty. To provide this certainty, Marawa recommends that the terms applying to the transferor at the time of the transfer would also apply to the transferee.

Additionally, Clause 16 is structured as if the transferee is reapplying for the exploitation contract, rather than being the recipient of the transfer of an existing contract. As worded this would be an impediment to project financing as it would not be possible for the contract to act as security to a financing.

Marawa also believes that **Draft Regulation 16 (6 e)** is prohibitive. The transfer of rights should not be dependent on the transferee's ability to operate. For examples, investors such as a bank may wish to take over the rights with the intent to sell them. In that situation it is unlikely that a bank would operate the commercial production. Rather, the bank would likely look to sell the title to an operator. However, it would be important for that bank to obtain the title first. To accommodate these types of financiers, Marawa would recommend revising **Draft Regulation 16 (6 e)** to read: "*prior to carrying out seafloor mineral activities, the transferee must be able to demonstrate they can meet the requirements set out in regulation 7;*".

We note that **Annex X (Standard Clauses for Exploitation Contract), Section 15.3** stipulates, "The terms, undertakings and conditions of this Contract shall inure to the benefit of and be binding upon the parties hereto and their respective successors and assigns." Marawa fully supports this stipulation and this concept of inurement must be reflected in the **Draft Regulation 16**. That is, the terms of the contract must stay consistent upon a transfer, and should not be changed by forcing the transferee to be subject to a different regulatory regime as that to which the transferor operated.

Scoping Report

Marawa is concerned that that if the Exploitation Code requires an Environmental Scoping Report, this may imply that environmental work cannot meaningfully commence until after the Exploitation Code is adopted. This is because such environmental work will presumably follow the Scoping Report, however, it would presumably not be possible to submit the Scoping Report until after the Exploitation Code is adopted. Marawa is concerned that this would delay the ability to carry out environmental work and as such Marawa recommends that an Environmental Scoping Report should not form part of the Exploitation Code.

Thank you again for the comprehensive and transparent consultation process and for the opportunity to provide comment on the draft regulations. If additional clarity, please do not hesitate to contact me.

Regards,

Tiimi Kaiekieki
Chairman