REVISED SUBMISSIONS OF THE GOVERNMENT OF THE REPUBLIC OF NAURU ON THE DRAFT MINING REGULATIONS

The Government of the Republic of Nauru congratulates the International Seabed Authority (including the Legal & Technical Commission and the Council) for the work that has gone into producing the latest iteration of the draft Mining Regulations.

It acknowledges that it is work in progress.

As a Sponsoring State from a developing country, Nauru would like to see work on negotiating, and adopting the Mining Regulations concluded as quickly as practicable, but without compromising the requirements of protecting the marine environment. Commercial investors and contractors do not have the luxury of a protracted process of negotiations.

In this regard, Article 145 of UNCLOS must be heeded:

"**Protection of the marine environment**

Necessary measures shall be taken in accordance with this Convention with respect to activities in the Area to ensure effective protection for the marine environment from harmful effects which may arise from such activities. To this end the Authority shall adopt appropriate rules, regulations and procedures for inter alia:

(a) the prevention, reduction and control of pollution and other hazards to the marine environment, including the coastline, and of interference with the ecological balance of the marine environment, particular attention being paid to the need for protection from harmful effects of such activities as drilling, dredging, excavation, disposal of waste, construction and operation or maintenance of installations, pipelines and other devices related to such activities;

(b) the protection and conservation of the natural resources of the Area and the prevention of damage to the flora and fauna of the marine environment."

Nauru submits that respect for Article 145 of the Convention is fully consistent with commercially viable mining of the deep seabed and that the twin goals of mining and environmental good governance and sustainability are compatible. It is ultimately a question of balance.

We recognize the importance of a sound regulatory framework. From a commercial perspective it must be self-evident that such a framework must be stable, transparent and predictable. These are essential prerequisites that would facilitate long term capital investments in a fledgling industry that is recognized will require significant up-front capital investment.

Instability and uncertainty in a rule-based regime will be a disincentive to commercial mining. In this connection, Nauru would submit that the following be considered as fundamental principles:

(i) any changes made to the Regulations should only apply to existing exploitation contracts by mutual agreement with the Contractor;

(ii) if the Contractor is compelled to comply with the Regulatory change, then Contractors with existing exploitation contracts must be compensated to the extent that the Regulatory change causes the Contractor to suffer any material loss or damage; or

(iii) ensure that no Regulation operates to create an artificial disadvantage for Contractors relative to land-based miners.

Nauru makes these submissions, cognizant of Article 140 of the Convention which we consider must inform the drafting of the Regulations:

Article140 Benefit of mankind

1. Activities in the Area shall, as specifically provided for in this Part, be carried out for the benefit of mankind as a whole, irrespective of the geographical location of States, whether coastal or land-locked, and taking into particular consideration the interests and needs of developing States and of peoples who have not attained full independence or other self-governing status recognized by the United Nations in accordance with General Assembly resolution 1514 (XV) and other relevant General Assembly resolutions.

2. The Authority shall provide for the equitable sharing of financial and other economic benefits derived from activities in the Area through any appropriate mechanism, on a non-discriminatory basis, in accordance with article 160, paragraph 2(f)(i).

- **Role of Sponsoring State and Effective Control:** Effective regulation of activities in the Area requires the International Seabed Authority (ISA) to be clear on the legal identity of the regulated entities and for Sponsoring States to have national legislation in place.
- There are some good sponsoring state laws in place already, such as Nauru's 2015 International Seabed Authority Act. To what extent are these precedents being taken into account in developing the ISA regime? It would be helpful for the ISA to complement, and not undermine, the existing regimes within domestic law. The Secretary-General's report on sponsoring State laws indicates that the Secretariat will prepare by the of 2018 "*a comparative study of the existing national legislation with a view to deriving common elements therefrom*": https://www.isa.org.jm/document/isba24c13. Nauru submits that this study should also explicitly consider the fit between these domestic laws and the Exploitation Regulations, and highlight any potential

- **Contract Renewal:** The process described in Draft Regulation 21 may be overly inclined toward renewal, in that it makes no requirement for the contractor to submit a review of overall performance (environmental, financial, or regulatory) under the initial contract period and provides no obvious opportunity for the contractor, Commission, or Secretary General to recommend amendments or ensure the new Plan of Work incorporates the most recent Good Industry Practices and Best Environmental Practices. There is also no explicit requirement for the contractor to submit a new Plan of Work or for the Commission to review the renewal application to ensure a renewal would continue to benefit mankind as a whole and provide effective protection of the marine environment, both of which are required under the Convention. The foregoing is not intended to make it more difficult to renew contractor licenses. Rather, it underscores the importance of ensuring that Contractors are mindful of their obligations towards the marine environment. The ISA while not compromising principles and its regulatory role, should avoid the temptation to be overly legalistic and pedantic when it considers contract renewal where Contractors have been bona fides and generally been compliant with environmental standards established by the ISA.

- **Financial Issues:** It is important that the financial model ensures that activities in the Area benefit mankind as a whole as required under Article 140 of the Convention and provides the ISA with enough funds to effectively manage the contract at all stages, from review and approval, to monitoring, compliance, closure, and any post-closure monitoring that may be required. A careful comparative analysis of the various proposed models would be beneficial. Currently, the draft regulations do not contain sufficient information to judge the adequacy of proposed models. Further, the common heritage of mankind (CHM) is referenced as a Fundamental Principle in the new DR 2, but it is not operationalized anywhere in the proposed regulations. The regulations require the Commission to explicitly consider whether potential exploitation contracts benefit mankind as a whole.

- **Importance of REMPS**: Seabed mining – like all mining – will have environmental impacts. There is anecdotal evidence and recent studies which suggest seabed mining will likely result in some loss of biodiversity.

- In order to protect life and ensure the effective protection of the marine environment as required under the Convention, it is desirable that the regulations should require a REMP be in place before mining occurs and should require contractors to comply with REMPs, including any rules or standards established therein. Consideration could also be given to REMPs to include large protected areas that are off limits to mining. It is suggested that the regulations should prohibit the approval of contracts in these protected areas. REMPs are currently referenced three times in the draft regulations as "regional environmental management plans, if any" (Draft Regulation 2, Draft Regulation 46, Annex VIII). The term "if any" should be struck and the regulations should prohibit the approval of exploitation contracts in regions without an approved REMP.

- **Standards and Guidelines**: The regulations currently put a number of contractor obligations under 'standards and guidelines'. It is unclear how such standards and guidelines will be developed; who will have the ability to request the development of new standards or guidelines or to initiate a review of existing standards and guidelines and as currently written they are mandatory for contractors. The ambiguity around the development of the standards and guidelines and their mandatory nature will result in an unstable regulatory regime as new standards and guidelines if mandatory – and easily changeable - could significantly impact a contractor's ability to operate. Guidelines should not be legally binding in order to avoid being overly prescriptive and stifling innovation. Importantly, if guidelines are legally binding they should be called regulations and be subject to the same rigorous review process as Regulations. The regulations should address each of these issues explicitly and a process should be established to ensure the development and adoption of standards and guidelines that are commercially viable and achievable. In the interests of transparency and ensuring there is a stable regulatory system, the process to develop standards and guidelines and how they are applied to contractors should be made clearer so that contractors understand their responsibilities beforehand.

- **Environmental Liability Trust Fund:** The proposed creation of an Environmental Liability Trust Fund is supported and the concept is well intentioned. However, several of the activities proposed to be supported through this fund (e.g., research and training) are not appropriate uses of a liability fund and should be financed through other means. Nauru recommends the liability trust fund be designed to specifically address the liability gap identified by the Seabed Disputes Chamber.

- **Approval Bias**: While it is understood that the LTC will not approve an application that does not meet the regulatory requirements, the regulations should be explicit that an application can be disapproved for failure to effectively protect the marine environment. (This could be made explicit in Draft Regulation 16)

- **Impact Areas:** The current draft regulations no longer include the term "impact area" using instead the terms "contract area", "mining area" and "project area". It is important for contractors to identify their predicted impact area as it will allow the Commission to assess whether environmental harm will be fully contained within the contract area. The regulations should also explicitly require the establishment of Preservation and Impact Reference Zones, and set the terms for their use.

- **Stakeholder Input**: Stakeholders should have the opportunity to comment on the entire Plan of Work, not just Environmental Plans but it must be acknowledged that Contractors need to have the ability to design and implement a commercially viable mine plan that meets the regulatory requirements. Further, while the LTC is now required to take stakeholder comments into account, they are not required to *respond* to those comments. The LTC should be encouraged to respond when possible, recognizing that the number of comments and level of detail may make this unrealistic. If it is unrealistic to respond to

comments, the LTC should consider releasing a summary of its decision and the rationale for that decision to ensure transparency and accountability.

- **Transboundary Harm:** Related to the idea of impact areas and stakeholder input (above) – it is important to know whether mining impacts will cross into coastal State jurisdictions, and, if a stakeholder expresses concern about potential or actual transboundary harm the LTC should be required to respond to that concern. Currently, Draft Regulation 4 puts responsibility on the coastal State to notify the Secretary General of concerns of Serious Harm in their waters. If the Secretary General determines there are "clear grounds for believing that Serious Harm is likely to occur, the Secretary General shall issue a compliance notice." This implies the review would happen after a contract has already been approved. The draft regulations would be improved by facilitating such a review at the approval stage as well as allowing coastal States to register concerns after a contract is in place. The draft regulations would be improved by: requiring contractors to notify neighbouring states when submitting an application, requiring the LTC to respond to stakeholder comments (including comments from coastal States), and putting the onus on the contractor to demonstrate activities will not cause transboundary harm and to verify this through regular monitoring and reporting. Additionally, the regulations should clarify the criteria and process the Secretary General will use in determining whether there are "clear grounds for believing Serious Harm is likely to occur" and what avenue a State would have to appeal such a determination.

- Nauru would like to see more discussions, policy, or regulatory text from the ISA that addresses the dual regulatory roles of ISA and States, respectively, and specifically how the ISA will coordinate in the performance of its functions with sponsoring States during a contract period. Nauru supports the idea of the development of a matrix of duties and responsibilities of regulatory actors, highlighting (i) the unwelcome vulnerability that a SIDS sponsoring State is exposed to in the interim.

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