WRITTEN SUBMISSION OF THE GOVERNMENT OF THE KINGDOM OF TONGA ON THE INTERNATIONAL SEABED AUTHORITY'S DRAFT EXPLOITATION REGULATIONS

I INTRODUCTION

1. The Government of the Kingdom of Tonga (Tonga) welcomes the opportunity to provide comments on the International Seabed Authority's (the Authority) draft regulations on the Exploitation of Mineral Resources in the Area (Draft Regulations)[1] as requested in the Authority's Council document ISBA/23/C/12 during its 23rd Session.

2. As a small island developing State in the Pacific, a State party to the 1982 United Nations Convention on the Law of the Sea (UNCLOS) and the 1994 Part XI Implementing Agreement, and a Sponsoring State since 2011, Tonga continues to advocate for the need to ensure an overall healthy and resilient ocean, the sustainable use of mineral resources in the Area, and the effective participation of small island developing States.

3. Tonga in this submission, would like to comment on the Draft Regulations under three main subsections under section II of this submission. These three subsections will focus on (A) the overall development of the Draft Regulations; (B) address the questions provided in the Annex (attached and marked 'A') of the Authority's Council document ISBA/23/C/12; and (C) further comments on specific regulations. The comments provided are preliminary and are without prejudice to any future position Tonga may have.

II COMMENTS ON THE DRAFT REGULATIONS

A Overall Development of the Draft Regulations

4. Tonga is of the view that the overall development of the Draft Regulations must be:

   (a) in line with the provisions of UNCLOS, the Part XI Agreement, and the principle of Common Heritage of Mankind;
   (b) developed in a manner whereby exploitation in the Area is carried out for the benefit of humankind as a whole;[2]
   (c) sufficiently comprehensive to cover all stages of the DSM exploitation phase, thereby, ensuring all relevant issues are addressed; and
   (d) transparent and inclusive, ensuring the engagement of a wide array of stakeholders, especially small island developing States.

[1] As contained in the document ISBA/23/LTC/CRP.3 date 8 August 2017
[2] Commonwealth Secretariat and the Pacific Community Advisory Note (November 2017) p.2

B QUESTIONS CONTAINED IN ANNEX A

1. Do the draft regulations follow a logical structure and flow?

5. The structure of the Draft Regulations can be further improved to achieve a more logical flow. It will continue to remain important to determine how the Environment and Directorate Regulations, as well as the financial mechanism, are to be integrated into the overall framework of the Draft Regulations. As the Authority's institutional goal is to develop an entire Mining Code composed of a series of regulatory frameworks and guidelines, it would be most desirable for the terms and definitions to be uniform throughout the relevant documents. Given this is work in progress, the matter of logical structure and flow can be best dealt with after matters of substance are settled.

2. Are the intended purpose and requirements of the regulatory provisions presented in a clear, concise and unambiguous manner?

6. While the purpose of the regulations as stated in the Preamble (i.e. to provide for the Exploitation of the Resources of the Area) is clear and concise, the purpose should be further elaborated to include the Authority's mandate under UNCLOS to operationalize the principle of the common heritage of mankind and the Authority's obligation to ensure effective protection of the marine environment.

3. Is the content and terminology used and adopted in the draft regulations consistent and compatible with the provisions of UNCLOS and the 1994 Agreement?

7. The Draft Regulations are clear that there is a distinction between "effective protection of the marine environment" as a regulatory standard to be applied as opposed to using the threshold of "serious harm" as the minimum standard. Such distinction is consistent with UNCLOS and the 1994 Agreement. The definition of "serious harm," however, needs to be revised to ensure that such regulatory standard is based on best available science and the precautionary principle.

4. Stable, Coherent and time-bound framework to facilitate regulatory certainty for contractors to make the necessary commercial decisions in relation to exploitation activities

8. On the issue of stable, coherent and time-bound framework, we recognize **certainty** as essential not only for the operation of the contractors but also for ensuring compliance. We believe that a number of provisions are ambiguous in that regard and need set time frames. For example, in Draft Regulation 15(1) & (2), the time in which the Contractor is to disclose information to the Authority, and the period of time which the Secretary-General and sponsoring State are to provide their written consent or refusal, is not entirely clear and allows for a possible situation of unnecessary delay.

250 EAST 51ST STREET, NEW YORK, NY 10022
TEL: (917) 369- 1025 – FAX (917) 369- 1024
EMAIL : tongaunmission@gmail.com

9. The need for a set period of time is essential to see that swift action is taken, when necessary, to ensure the appropriate protection of the marine environment and its biodiversity. Unreasonable delay must be avoided in action or in addressing an omission to provide proper guidance and certainty to all stakeholders. In this regard, setting certain deadlines with an option for extension could be useful. Other relevant provisions that need clarity include DR24(1), DR82, 85(4)(c), Annex III(h) and (i).

10. Tonga notes that while uncertainties may exist, further steps need to be taken to define specific provisions that will assist in providing regulatory certainty, such as the 'date of commercial production'. Such date can have several implications on contractors' operations, including the annual fees (DR49) and royalty payments (DR50). Therefore, Tonga welcomes footnote 7 in page 103 under the use of term and scope for 'Commercial Production' that a clearer definition of commercial production will be needed.

5. Appropriate balance achieved between the content of the regulations and that of the contract

11. On the issue of balance, at this stage, Tonga is of the view that further work on the content of the Draft Regulations is needed to ensure that an optimal, equitable, and practical balance is reached between the need for economic and social development, and the need for environment protection. Once this aspect is comprehensively addressed, further specific matters can then be addressed in the contract. A provision allowing for review is vital to ensure that the specificities in the contract are up-to-date. At this stage, the content of the Draft Regulations still need provisions, which reflect sound commercial principles under Section 6 of the Annex to the Part XI Agreement and the protection of the marine environment from serious harm as defined under the Convention, implementing Agreements and the Mining Code.

Specific Comments

1. Role of sponsoring States

12. The provision is very broad and makes references to relevant regulations under the Draft Regulations and Articles under the Convention. However, Tonga views that further clarification is needed to determine the extent to which Sponsoring States are deemed to have taken all necessary measures to secure compliance with the relevant provisions cited. The primary role of enforcement lies in the mandate of the Authority pursuant to Article 153 of the Convention ***with the assistance*** of Sponsoring States**.** As such, clear provisions setting out cooperation and collaboration between the Authority and the Sponsoring State is necessary to ensure that there is clarity in the roles and responsibilities relating to monitoring and enforcement measures to ensure effective governance and to avoid duplication. As such, we see merit in developing provisions which set out cooperative elements, particularly in the sharing and communication of information in relation to activities in the Area, whether it be obtained by either the Authority or the Sponsoring State, subject of course to matters of commercial interest and the national laws of a Sponsoring State.

250 EAST 51ST STREET, NEW YORK, NY 10022
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EMAIL : tongaunmission@gmail.com

2. Contract area

13. Reference to contract area is appropriate when determining the approved lot to be allocated to a Contractor. However, Tonga is of the view that an aspect which needs to be featured in the Draft Regulations is the "Impact Area" and the role of contractors in these respective areas. This will help ensure that affected areas which do not fall within the definition of "contract area" are monitored to ensure effective protection of the marine environment

3. Confidential information

14. Tonga is of the view that elaborating what information or data qualifies as confidential is essential to ensure transparency in DSM processes. In this regard, we welcome the current draft as is. Tonga would like to see the broad provisions set out in the current draft, specifically setting out the types of information that are excluded. Regarding information relating to the protection of the marine environment and human health, the Convention in Art. 14 of Annex III makes it clear that data necessary for the formulation by the Authority of rules, regulations and procedures concerning protection of the marine environment and safety, other than equipment design data, shall not be deemed proprietary. Therefore, the Draft Regulations need to be consistent on that point. Tonga is of the view that perhaps the section on confidentiality can be further strengthened with cosmetic changes to clarify the differences in the subparagraphs.

16. A set of criteria and procedure that will allow an objective evaluation of the request by an applicant to seek information as confidential should be established. Such criteria may include a requirement for the applicant to provide information as to the nature of any information and a general description of the information so that the Council can decide based on the established criteria and procedure.

4. Administrative review mechanism

17. The draft regulations provide a new review mechanism under section 92. Whilst we understand that an administrative review mechanism provides an effective and accessible dispute resolution of ISA decisions, the development of this mechanism should be approached with caution. Tonga views that further elaboration on DR92 (2) is necessary to ensure that there is clarity on the types of disputes subjected to this mechanism conforms and is consistent with Article 187 and 188 of the Convention.

5. Use of exploitation contract as security

18. On the use of exploitation contract as security as reflected in DR 15, the requirement for obtaining consent from both the Authority and the Sponsoring State is important. We note that sub-paragraph (2) requires the Contractor to disclose the requisite information to the Authority. Tonga views that such information should also be disclosed to the Sponsoring State to ensure the decision to grant its consent is based on the same information that was received by the Authority.

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19. Moreover, in pledging or mortgaging a contract, depending on the terms and conditions, implications of enforcement, liability and obligations may arise. If rights and duties are to be assigned, there should be an opportunity for review to ensure that such obligations and duties will be met by the assignee. DR7 requires an assurance of financial and technical capability and such assurance should be met by the assignees.

6. Interested persons and public comment

20. Rather than using the term "interested persons," it may be preferable to use the term "stakeholders" which is commonly used in various fora. Transparency should be the driver in stakeholder engagement so that there is a proper framework that will allow capacity to solicit and convey stakeholder submissions in the evaluation process.

C Additional Specific Comments

DR Part IV: Environmental Matters

21. Strategic or regional environmental management plans (REMPs) are imperative and should be incorporated into the Draft Regulations. These REMPS should provide:
    a. representative and well-connected areas to be set aside from mining; and
    b. any additional regulations that may be necessary for the effective protection of that particular region's marine environment.

DR Part V: Obligations of the Contractor

22. Preventing and responding to incidents (draft regulation 40(3) page 26)**:** Further clarity is necessary in light of the provisions on available dispute settlement mechanisms as provided under Article 187 of the Convention. Further, there needs to be clarity as to whether or not domestic dispute settlement mechanisms are to be exhausted prior to utilizing the mechanism under Article 187.

DR Part VII[3]: Financial Terms of an Exploitation Contract

23. Annual Fixed Fees (Draft Regulation 49, page 30): While recognizing that it is important to ensure optimum revenues for the Authority from the proceeds of commercial production, further elaboration is necessary to clarify the mechanism and factors that the Council will consider as the basis for the annual rate per square kilometer. This is crucial, as the annual rate determines the annual fixed fee to be paid by a Contractor and will consequently impact the Authority's revenue.

[3] We note a separate consultation exercise will take place on Part VII, but these are only preliminary views to be noted for further discussion.

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24. Definitions (Draft Regulation 51, page 31): An updated report by the Secretary-General on the on-going financial model discussion would be necessary, to consult Member States and other relevant stakeholders in addressing the existing gaps in this section. This includes the *'number of years'* for defining the First and Second Period of Commercial Production. Addressing this gap also impacts other sections of the Draft Regulations such as the valuation of mineral-bearing ore in Draft Regulation 52. In addition, it is also necessary to include a definition for *'undue inconvenience'* mentioned in paragraph 3 of Draft Regulation 65 (page 36). The rationale is that in the absence of such definition, a Contractor may consider anything as undue inconvenience to avoid any inspection or audit of its Records, and therefore would not serve purposes of due accountability and transparency of finance provisions.

25. Authority may issue guidelines (Draft Regulation 55, page 33): Tonga supports this important role of the Secretary-General in providing guidance from time to time regarding the calculation and payment of royalties. We believe such guidance is critical to avoid any unforeseen disruptions towards maintaining fiscal stability and serving the interest of sharing sustainable benefits as *common heritage of mankind*. In addition, in order to guarantee the transparency of finance provisions, the Secretary-General should consult on 'all' requests seeking clarification on his guidance with respect to the calculation and payment of royalties. However, further elaboration would be necessary in clarifying what type of request would receive *'appropriate'* consultation by the Secretary-General, as mentioned in the second paragraph of Draft Regulation 55.

26. Information to be submitted (Draft Regulation 61, page 34)**:** In paragraph 1(c), further clarification would be necessary to clarify, who/what is *'a suitably qualified person'* and *'certified laboratory'* with the responsibility for verifying the valuation and the basis of the valuation of the minerals. While we believe that there is credibility on the minerals valuation, the bodies responsible for verifying such valuation also need to be credible themselves. In addition, in paragraph 1(d), it would be necessary to include detailed information of all contracts and sale or exchange agreements relating to not only the 'sale' of the mineral-bearing ore removed from the Mining Area, but also on mineral-bearing ore *'removed without sale'*. Such requirement would be to achieve consistency throughout this section, e.g. in 1(c) of Draft Regulation, Draft Regulation 50 and Draft Regulation 65 (4a). Lastly, in paragraph 3, clarification is needed as to whether it is 'within' or it should be 'after' 90 days from the end of a Calendar Year that the Contractor shall provide an audit statement. Further guidance is necessary as to whether such audit statement would be shared with the Sponsoring State of that particular Contractor.

27. Overpayment of royalty (Draft Regulation 63, page 35)**:** In paragraph (2), for consistency purposes throughout the text, the word *'credit'* should be used instead of *'apply'*, consistent with the reference made in paragraph (5) of Draft Regulation 49.

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28. Proper books and Records to be kept (Draft Regulation 64, page 36): In paragraph 2(c), Tonga suggests that the information on 'liabilities' is provided. Such requirement will enhance transparency and accountability, as including detailed information on liabilities will allow the set of financial information required to be provided to be comprehensive, so that informed decisions can be made. Such information will be useful for existing and potential investors in the exploitation industry. Further, the information on liabilities would also be useful for a sponsoring State to monitor the sponsored Contractor's performance, as they are one of our important domestic revenue sources, through charged license fees.

29. Assessment by Authority (Draft Regulation 66, page 37): In paragraph (3), Tonga believes that further elaboration is necessary to clarify the meaning of *'additional royalty liability'* that the Secretary-General may levy on the Contractor, and how such additional royalty liability would be computed and assessed.

30. Exchange Rate to be used for royalty payments (cross-cutting): Tonga suggests that there needs to be a clear reference on the exchange rate to be used for royalty payments. For example, under Draft Regulation 68 (interest on unpaid royalty), the Special Drawing Rights interest rate prevailing on the date the amount became due and payable is used for determining the interest on unpaid royalty. A similar reference should be made for the exchange rate to be used when paying royalty to the Authority and that there is a requirement for mandatory disclosure of such information. Such process would benefit the Contractor to help better manage its cash-flow by accounting for any possible exchange rate risks under its operational costs. Also, the information would benefit the Authority to be more aware and to have a better understanding of the context and circumstances of the international markets, as one of its factors to assist its review of the payment mechanism under Section 9.

III CONCLUSION

31. Tonga understands that the development of the Draft Regulations is an ongoing process and the input member states and stakeholders must be carefully considered.

Government of the Kingdom of Tonga

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250 EAST 51ST STREET, NEW YORK, NY 10022
TEL: (917) 369- 1025 – FAX (917) 369- 1024
EMAIL : tongaunmission@gmail.com