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PERMANENT MISSION
OF THE KINGDOM OF TONGA TO
THE UNITED NATIONS

The Permanent Mission of the Kingdom of Tonga to the United Nations presents its compliments to the Secretary-General of the International Seabed Authority, and has the honor to recall the invitation to Members and Observers of the Authority as well as other Stakeholders to submit comments on the revised draft regulations on exploitation of mineral resources in the Area by today, 30th September 2018.

The Permanent Mission has further the honor to convey herewith a letter from the Secretary for Foreign Affairs attaching thereto the Kingdom of Tonga's written submission on the said draft regulations on exploitation of mineral resources in the Area.

The Permanent Mission of the Kingdom of Tonga to the United Nations avails itself of this opportunity to renew to Secretary-General of the International Seabed Authority the assurances of its highest consideration.

Secretary-General
International Seabed Authority
KINGSTON

Sunday, 30th September 2018

KINGDOM OF TONGA
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PERMANENT MISSION
OF THE KINGDOM OF TONGA TO
THE UNITED NATIONS

Written submission of the Kingdom of Tonga on the Draft Regulations on Exploitation of Mineral Resources in the Area

Sunday, 30th September 2018

Dear Sir/Madam

Re: Draft Regulations on Exploitation of Mineral Resources in the Area (ISBA/24/LTC/WP.1/Rev.1)

Please find enclosed a submission prepared by the Government of the Kingdom of Tonga on the Draft Regulations on Exploitation of Mineral Resources in the Area as contained in ISBA/24/LTC/WP.1/Rev.1).

The positions contained herein are Tonga's positions to date. Given the progressive development of the exploitation regulations, the positions contained herein are without prejudice to any future position Tonga may hold.

The Government of the Kingdom of Tonga also grants its consent to have the submission published.

Sincerely,

for Mr. Mahe 'U. S. Tupouniua
Secretary of Foreign Affairs

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

I INTRODUCTION

1 At the 24th Session of the Council of the International Seabed Authority, the Government of the Kingdom of Tonga (Tonga) intervened on the current draft of the regulations for the Exploitation of Mineral Resources in the Area (Draft Regulations)[1]. This submission will further elaborate and build upon the interventions which Tonga made.

2 As a member of the Council, a small island developing State surrounded by the Pacific Ocean, 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 remains committed to ensuring that the exploitation regulations are developed in a manner which balances sustainable exploitation and protection of the environment.

3 Given the Legal and Technical Commission's further work on elements highlighted in Part II of ISBA/24/C/20, Tonga will confine its submission to addressing three broad areas which are, firstly (A) the overall development of the Draft Regulations; secondly (B) matters which require further guidance as contained in the document ISBA/24/C/20 and thirdly (C) specific comments on the Draft Regulations as a whole.

4 The comments contained herein are preliminary and are without prejudice to any future position Tonga may hold.

[1] As contained in the document ISBA/24/LTC/WP.1/Rev.1

II COMMENTS ON THE DRAFT REGULATIONS

A Overall development of the Draft Regulations

5 The overall development of the Draft Regulations will require ensuring that a delicate balance is struck between sustainable exploitation and protection of the marine environment. In doing so, it is fundamental that the regulations be developed in line with the spirit and provisions of UNCLOS, the Part XI agreement and key underlining principles which include the principle of the common heritage of mankind, the protection and preservation of the marine environment and intergenerational equity and cooperation and coordination in the administration and regulation of the Area.

6 It is crucial that the Draft Regulations be comprehensive enough to cover all stages of the deep seabed mining exploitation phase to ensure the relevant issues are captured and addressed in order to clearly set out the appropriate process, the roles of each stakeholder in the process, including, the transition from exploration to exploitation, the implementation of environmental measures, the extraction of minerals, the closure plans for mining sites amongst others. As highlighted, the common heritage of mankind, is the underpinning principle which must be operationalized in the provisions of the draft regulations.

7 Transparency in the development of the exploitation regulations will remain a vital component and therefore continuing to engage a wide array of stakeholders in the process will ensure all interests and concerns are considered, addressed and reflected in the text and thereby developing a robust set of Draft Regulations.

B Matters Requiring the Council's Direction, Guidance or Comment

8 On matters requiring the Council's Guidance on matters contained in Part III of the document ISBA/24/C/20, Tonga submits the following contributions:

Structure

9 The structure of the Draft regulations should be kept under review as the regulations evolve to ensure a logical flow and clarity. The incorporation of a content page as well as

the new regulation on the fundamental principles are key additions that have improved the structure of the regulations.

Balance of rights and obligations

10 On the issue of balance of rights and obligations, particularly as it relates to the protection of the environment under Part III and Part IV we are of the view that it can be further strengthened. For example, REMPs to be factored into environmental reports, such as Environmental Impact Assessment (EIA), Environmental Impact Statement (EIS), Environmental Management and Monitoring Plan (EMMP) and form part of the application for the exploitation contract for purposes of approval and subsequently, for compliance. Additionally, consideration should be made on access to the Environmental Liability Trust Fund (DR52) by small island developing coastal States affected by transboundary impacts of activities in the Area.

The role of organs of the Authority and the balance of the authority

11 On the issue of the roles of organs of the Authority and the balance of authority we are of the view that the Draft Regulations can be further strengthened by —

- factoring in organs of the Authority which are yet to evolve, in particular the Economic Planning Commission and its various roles and responsibilities.
- ensuring a clear asymmetry of decision making to clarify the types of decisions that can be delegated and to whom as permitted under UNCLOS, and the conditions or guidance upon which a decision will be made;
- providing clear guidance on considerations to be made, when decision-making responsibilities are delegated

Confidentiality of the information

12 On the issue of confidential information, we are of the view that having a list or clear criteria of what is confidential would be useful. Such criteria must be balanced to ensure that it is not overly broad so as not to hinder a robust transparent process of consultations.

Annual Fixed fee

13 On the issue of annual fixed fees as it currently stands under Draft Regulation 87, the purpose and function of this fee (which is calculated by reference to the size of the contract area) may warrant further examination. For example

i. If the purpose of the fee is to bring additional revenue to the ISA, then it would seem more sensible for it not to be credited against the royalty.

ii. If the purpose of the fee is to incentivise Contractors to relinquish parts of the contract area where they are unlikely to undertake future production, then a legal power and procedure to enable relinquishment should be included in the Draft Regulations.

iii. If the purpose of the fee is to cover ISA administrative costs, the fees would (i) be applied from the contract commencement date (not from Commercial Production, which may be achieved some years after the contract has started), (ii) not be credited against the royalty, (iii) not link with the size of the contract area unless regulatory costs are deemed likely to be vary from contract to contract, according to site size.

iv. If the purpose of the fee is to bring an early tranche of royalty payment, then it would seem sensible for it to commence from contract start date, given that royalties are to be paid annually and upon commencement of Commercial Production, in any event.

Inspection mechanism

14 On the issue of the inspection mechanism, while it is still under review, we think that it would be useful to explore appropriate remote monitoring technologies, and the administrative and operative costs it entails.

C Specific Comments on Draft Regulations

15 Tonga submits the following specific comments on the Draft Regulations:

Part I: Introduction

16 On Part I of the Draft Regulations, Tonga submits the following:

a. In Draft Regulation 1 paragraph 4, the phrase "due regard" should be used as reflected in UNCLOS.

b. On paragraph 5, it is imperative that the standards and guidelines are developed based on best available science and best practices, that they are developed and applied to the relevant documents (i.e. REMP, EIS, EIA, EMMP etc.) and the

modalities of implementation and compliance mechanism (e.g. what requirements will be binding and on whom, the process of initiating a review and amendment of the existing standards and guidelines, etc.) are explicitly set out in the regulations.

c. In Draft Regulation 2, under paragraph 1, referencing article 136 of UNCLOS could be considered.

d. In Draft Regulation 3, whilst there is an obligation to exchange information with the Authority, there must be a robust mechanism to implement a corresponding obligation on the part of the Authority to build relevant capacities, in particular of small island developing states, to enable an effective exchange of information as envisaged by the text, so that the process is truly inclusive and transparent.

e. In Draft regulation 4, paragraph 2, clarity is needed as to whether or not a joint submission can be made by adjoining coastal States. An additional consideration would be for the contractors to notify the Secretary-General and the coastal States where activities are likely to cause serious harm.

Part II: Applications for approval of Plans of Work in the form of contracts

17 On Part II of the Draft Regulations, Tonga submits the following:

a. On Draft Regulation 7, when making proposals in relation to compliance, practical considerations must also be made to jurisdictional issues particularly in situations of multiple sponsorships.

b. On Draft Regulation 13, references to economic viability should be made throughout the regulation, and clear definitions are necessary for all economic terms as such terms may vary among stakeholders.

c. Environmental reports and audits must be updated throughout the relevant stages of the exploitation contract and the updates should include information and consideration on changes to the ecosystem, scientific knowledge and advances in technology.

d. Wider public consultation is critical to ensure transparency and accountability in the process, and in the case of SIDS, to factor in the appropriate mode and means of communication to communities in addition to web-based consultations.

Part III: Rights and obligations of Contractors

18 Under Part III, Tonga submits the following:

a. On Draft Regulation 19, the issue of rights and exclusivity under an exploitation contract is vital in ensuring security of tenure. However, the practical reality is that whilst this exists, the issue of "reasonable regard or due regard" to other marine users comes to the fore, and we would like to refer to the document prepared by the Secretariat under ISBA/22/C/3* which poses some useful considerations which the Commission can consider in addressing the issue of balancing the multiple interests which appear throughout the draft regulations.
b. On Draft Regulation 21, in respect of sponsorship for duration of the contract: we note that the Draft Regulations require a contractor to have a sponsorship certificate for the entirety of the period of the contract. With the lengthy contract period currently envisaged by the Draft Regulations, we see this as a potential problem noting the implication of undermining national sovereignty where a State may choose to terminate its sponsorship of a contract for a number of reasons including those which are not within the control of the sponsoring Government. Whilst it is understandable that there is a need for certainty in the regulations, there must be at least a process under which the Sponsoring States can withdraw sponsorship and for the Contractors to find new Sponsor(s) to fulfill their obligations and ensure their rights are not affected.
c. On the Termination of sponsorship, whilst there are provisions for termination of sponsorship, which may alleviate some of the concerns regarding a State's sovereign choice whether to continue to sponsor a Contractor or not, we feel that these provisions can still be strengthened to enable balancing the rights and obligations both of the sponsoring State and the Contractor without imposing any undue influence on, or undermining the sovereignty, of a sponsoring State.
d. On Draft Regulation 30, further clarification needs to be made on the following matters:
    i. Whether the contractor has to request permission to prolong its suspension in advance the expiration of the initial 12 months;
    ii. Whether "more than one suspension" permitted under Draft Regulation 30(2) means consecutive 12month periods or some other time period; and
    iii. Who determines whether reduction or suspension is required for the purposes of Draft Regulation 30(4)
e. On the issue of transferring rights and obligations under a contract from one Contractor to another, we note that the prior informed consent of the Council, on

the recommendation of the Commission, is needed. We reiterate that these rights and obligations and the proper fulfilment thereof are tied to certain rights and obligations of the sponsoring State. As such, we propose that the sponsoring State's prior consent is also required. A sovereign sponsoring State must be afforded the opportunity to decide whether it wishes to sponsor a different entity or whether it can terminate its sponsorship.

Part IV: Protection and preservation of the Marine Environment

19 Under Part IV and on the topic of protection and preservation of the marine environment in general, Tonga submits the following:

a. Regional environmental management plans should be in place prior to any approval for seabed mining takes place. The term "if any" as referenced in the regulations should be removed.

b. It is imperative that the protection of the marine environment and the protection of human life are legally binding rather than discretionary as highlighted in Articles 145 and 146 of UNCLOS.

c. On Draft Regulation 53, we fully support the proposed creation of an Environmental Liability Trust Fund. In order to ensure that the Fund fulfills its purpose, it must be designed to specifically address the liability gap as highlighted in Advisory Opinion No.17 of 2011 of the Seabed Disputes Chamber and as reflected in sub-paragraph 53(a).

d. We find purposes set out under subparagraphs (b) to (e) of Draft Regulation 53 to be useful and in line with the spirit of UNCLOS and the Part XI agreement and would like to see the establishment of a separate fund to cater for such purposes. This can be referred to as an Environmental Protection Trust Fund.

e. Additionally, having a clear set of Strategic environmental goals and objectives would be useful as highlighted by the Deep Ocean Stewardship Initiative.

Part VII Financial terms of an exploitation contract

20 Under Part VIII, Tonga submits the following:

a. Under Draft Regulation 61 on Financial Incentives, we appreciate the inclusion of specific provisions that ensure a uniform and non-discriminatory provision of incentives, which we consider important, particularly in light of fostering the technology transfer and capacity building for developing States, including SIDS.

While the inclusion of this section in the revised Draft Regulations is crucial, we are of the view that further clarity on the criteria, method, and the process upon which the Council is to provide such incentives in an equitable and non-discriminatory manner, taking into account the interests of all States, is important and requires clear reflection in the regulations;

b. In Draft Regulation 62, reference is made to Appendix IV which at present attempts to provide the baseline details and determinants upon which the calculation of royalty payments payable by a Contractor is to be made. Though it is noted that there remains further work to be done in fleshing out the applicable rates and definitions in this Appendix, we wish to highlight the importance of ensuring the ongoing incorporation of the various aspects of the ongoing developments of the financial model as led and undertaken by MIT. Further, we note that the tables in this Appendix are to be considered and adopted from time to time as exploitation activities evolve. Given that it is expected to be a consistent exercise by the Council, we suggest the specification and outlining of an inclusive and clear process through which the ongoing adoption of the tables over time are to be considered and made. Such process will ensure a comprehensive and inclusive consideration and channel of input and contribution by all relevant stakeholders and organs of the Authority in the ongoing determination/adoption of the contents of the tables;

c. In Draft Regulation 68, specific reference is made to the terms "special circumstances." This reference is made in relation to the possible case where the Authority may consider granting permission for a Contractor to pay royalties by way of instalments. As has been raised in the past, the definition of such terms in this context would ensure the proper and fair consideration by the Authority is made when considering whether to grant its permission;

d. In Draft Regulation 69, we note the requirements outlined in terms of the various information to be clearly included and stated therein by Contractors. Sub-regulation 1(c) highlights the requirement of verification by a "suitably qualified person" in relation to the value and basis of valuation of the mineral-bearing ore sold or removed from the Mining Area by the Contractor. In this regard, it is important that there be clear, appropriate and robust criteria in relation to the selection of such persons given the ultimate bearing the verification may have on the valuation of minerals extracted, the corresponding royalty payments to be paid

and hence the Authority's revenues. The need for clear and robust criteria is likewise relevant and important under Draft Regulation 73 on the audit and inspection by the Authority particularly in relation to the required input/contribution of an "inspector" in sub-regulation 3.

e. In Section 4 on records, inspection and audit, specifically under Draft Regulations 72 and 73, we note the specific requirements stated therein for the Contractors to adhere to keeping proper books and records and a robust audit and inspection modalities to be implemented and enforced by the Authority, respectively. Providing further details on such requirements may be provided through the guidelines and standards to be developed by the Secretary General, or an appropriately mandated organ such as the Economic Planning Commission, for the effective implementation of and compliance with provisions of the regulations.

III CONCLUSION

21 Tonga understands that the development of the Draft Regulations is an ongoing process and the input of all must be carefully considered and the results of the consultations are reflected in the regulations.

Government of the Kingdom of Tonga

30 September 2018