**TEMPLATE FOR SUBMISSION OF TEXTUAL PROPOSALS DURING THE 27TH SESSION: COUNCIL - PART III**

*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:**

   President's Text

2. **Name(s) of Delegation(s) making the proposal:**

   The Ocean Foundation, Observer

3. **Please indicate the relevant provision to which the textual proposal refers.**

   Part III: Rights and obligations of Contractors

   Regulation 18bis: Obligations of Contractors

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.**

   Part III, Regulation 18bis:

   2. Each Contractor~~s~~ that is awarded an Exploitation Contract hereunder, together with all of its~~, their~~ holding companies, subsidiaries, affiliated and ~~Ultimate Parent~~ parent companies, Ultimate Beneficial Owner(s), agencies, partnerships, subcontractors, and suppliers shall be held jointly and severally liable for the performance ~~compliance~~ of the Exploitation Contract by such Contractor in accordance with its terms, these Regulations, and the Rules of the Authority, including, without limitation, for any and all damages~~.~~ ~~Particularly, they shall be jointly and severally liable for the obligation of compensating damages~~ arising from Exploitation Activities conducted by such Contractor or any of its affiliates, subcontractors, or suppliers.
   3. ~~Whether~~ In the event a Contractor~~s~~ fails to comply with any of its~~their~~ payment obligations under the Exploitation Contract, these Regulations, or the Rules of the Authority, its holding company(s), parent company(s), and and Ultimate Parent Owner(s)~~Companies~~ shall be held jointly and severally responsible for promptly~~to~~ effectuating such payments to the Authority on behalf of such Contractor~~s~~.

4. Sponsoring States shall take all legislative and administrative measures to ~~assure~~ ensure that Contractors have all material, operative, and financial means to comply with the Exploitation Contract, ~~and~~ these Regulations, and the Rules of the Authority, and shall ensure and that no legal, administrative, contractual, or corporate limitation exists under the laws of such Sponsoring State that would limit the liability of any ~~shall prevent~~ Contractor~~s~~, or its holding company(s), parent company(s), and Ultimate ~~Parent Companies~~Beneficial Owner(s) hereunder from~~to~~ compensating the Authority for any~~e~~ damages arising from Exploitation activities conducted by such Contractor or any of its affiliates, subcontractors, or supplier, or prevent such persons from making any ~~and make the~~ payment to the Authority that is required ~~by the Contractors~~ under the Exploitation Contract, ~~and~~ these Regulations, and the Rules of the Authority. No Exploitation Contract shall be awarded to any Contractor until the Sponsoring State has demonstrated compliance with this requirement to the satisfaction of the Council.

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

Part III, Regulation 18bis: As drafted, proposed Regulation 18bis is imprecise and needs to be drafted to ensure that a Contractor can be held liable for its actions or inactions to the maximum extent permissible under Part XI of UNCLOS. Deep seabed mining would be an extractive industry on par with the largest globally, and liability provisions should be at least as stringent as those for analogous industries (for example the oil pollution conventions).

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   President's Text

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   The Ocean Foundation, Observer

3. **Please indicate the relevant provision to which the textual proposal refers.**

   Part III: Rights and obligations of Contractors

   Regulation 22: Use of exploitation contract as security

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.**

5. A Contractor shall file with the Seabed Mining Register a ~~summary~~ true, complete, and correct copy of any agreement that results or may result in a transfer or assignment of an ~~exploitation~~ Exploitation ~~contract~~Contract, part of an exploitation contract or any interest in an exploitation contract, including registration of any security, guarantee, mortgage, pledge, lien, charge or other encumbrance over all or part of an ~~exploitation~~ Exploitation ~~contract~~Contract.

6. The Authority shall not ~~be obliged to~~ provide any funds or issue any guarantees or otherwise become liable directly or indirectly in the financing of the Contractor's obligations under an ~~exploitation~~ Exploitation ~~contract~~Contract.

7. As a condition to giving consent under this regulation, the beneficiary of any encumbrance referred to in paragraph 1 above shall agree to assume all of the obligations of the Contractor upon any foreclosure, including, without limitation, all payment obligations to the Authority required under the Contract, these Regulations, and the Rules of the Authority.

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

Clause 5: A summary of the relevant agreement is insufficient and not typical of how records of security interests typically operate – the full contract should be filed, and be of public record (as is the case for aircraft security agreements, or land mortgages, for example). Certain proprietary commercial terms can be scheduled and kept confidential. Clause 6: It is essential that the Authority not be involved in the financing or guaranteeing of any Contractor's obligations under any exploitation contract. To do so would constitute a massive conflict of interest. Clause 7: We agree with the spirit of the proposed amendment to #5 set out in the March 3 markup to the President's Text ("Nothing in this regulation shall relieve a Contractor of any obligation or liability under its exploitation contract, and the Contractor shall remain responsible and liable to the Authority for the performance of its obligations under its exploitation contract in the event of a termination of sponsorship.") However, in practice, if a lender has foreclosed on a Contractor, the Contractor is most likely insolvent and would therefore be unable to pay any of its obligations under the exploitation contract. The draft regulations should be clear that any foreclosing party shall become liable for the obligations of the debtor Contractor into whose shoes they have stepped. That is, a debtor Contractor facing a bill for damages should not be able to declare bankruptcy or refuse to pay a judgment against it (both of which would usually constitute a default under its loan), then have a lender step in and take over the Contract without agreeing to pay for the damages of the predecessor Contractor as a condition to such assumption.

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2. **Name(s) of Delegation(s) making the proposal:**

   The Ocean Foundation, Observer

3. **Please indicate the relevant provision to which the textual proposal refers.**

   Part III: Rights and obligations of Contractors

   Regulation 23: transfer of rights and obligations under an exploitation contract

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 Commission shall consider whether the transferee:
(a) Meets the requirements of a qualified applicant as set out in regulation 5;
(b) Has submitted a certificate of sponsorship as set out in regulation 6;
(c) Has submitted a form of application as set out in regulation 7~~ if the Secretary-General considers that there is a Material Change to the Plan of Work~~;

7. Where the Commission determines, in its sole discretion, that the requirements of paragraphs 4, 5 and 6 above have been fulfilled, it shall recommend approval of the application for ~~consent~~ transfer to the Council. In accordance with article 20 of annex III to the Convention, the Council shall not unreasonably withhold consent to a transfer if the requirements of this regulation are complied with. In the event an applicant for the transfer of an Exploitation Contract fails to demonstrate to the satisfaction of the Commission that the requirements of paragraphs 4, 5, and 6 have not been fulfilled, the Commission shall not approve such transfer. In the event of any transfer arising out of a d change of control of the Contractor where the Commission determines that the requirements of paragraphs 4, 5, and 6 have not been fulfilled, the related Exploitation Contract shall terminate automatically.

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

As currently drafted, section 23, part 4(c) only requires transferees (including mortgagees/ transferees of mortgagees) to submit a new application "if the Secretary-General considers that there is a Material Change to the Plan of Work". The application contains the financial plan, all of the information about the potential applicant including corporate structure/ beneficial ownership, audited financial statements, and other crucial pieces of due diligence that the Commission needs in order to vet potential transferees. Therefore section 23, part 4(c) should require the submission of a new application upon any transfer of an exploitation Contract, whether it be due to foreclosure or otherwise (rather than limiting this to situations where the Secretary-General considers that there is a Material Change to the Plan of Work). Furthermore, the determination of what constitutes a "Material Change" should not be left to the discretion of the Secretary-General but rather should be a decision left to the Commission. Per our comments to Section 24 below, all changes of control of a Contractor should be subject to the same consent and approval requirements of Section 23. However, where an Exploitation Contract has already been so transferred without the consent of the Council via a change of control, it should automatically terminate, otherwise there would be no consequences for Contractors to engage in unauthorized transfers via changes of control.

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   President's Text

2. **Name(s) of Delegation(s) making the proposal:**

   The Ocean Foundation, Observer

3. **Please indicate the relevant provision to which the textual proposal refers.**

   Part III: Rights and obligations of Contractors
   Regulation 24: Effective control

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.**

1. For the purposes of this regulation, a "change in control" means, with respect to any Contractor or any Environmental Performance Guarantor, a tender offer, stock purchase, other stock acquisition, merger, consolidation, recapitalization, reverse split, sale or transfer of assets or other transaction, as a result of which any person, entity or group (a) becomes the beneficial owner, directly or indirectly, of securities of such Contractor or Environmental Performance Guarantor representing more than 50% of the ordinary shares of such Contractor or Environmental Performance Guarantor, as applicable, or representing more than 50% of the combined voting power with respect to the election of directors (or members of any other governing body) of such Contractor's or Environmental Performance Guarantor's then outstanding securities, or (b) obtains the ability to appoint a majority of the board of directors (or other governing body) of such Contractor or Environmental Performance Guarantor, or obtains the ability to direct the operations or management of such Contractor or Environmental Performance Guarantor, as applicable, or any successor to such Contractor's or Environmental Performance Guarantor's business, as applicable; provided, however, that a change in control shall not include the issuance by the Contractor or Environmental Performance Guarantor of equity to the public through a public offering or offerings. ~~occurs where there is a change in 50 per cent or more of the ownership of the Contractor, or of the membership of the joint venture, consortium or partnership, as the case may be, or a change in 50 per cent or more of the ownership of the entity providing an Environmental Performance Guarantee.~~

2. Where there is a change of control of the Contractor, or there is a change of control in any entity providing an Environmental Performance Guarantee on behalf of a Contractor, the Contractor shall, where practicable, notify the Secretary-General in advance of such change of control, but in any event

within 90 Days thereafter. The Contractor shall provide the Secretary-General with such details as he or she shall reasonably request of the change of control, including, without limitation, all financial information necessary for the Secretary-General to determine whether the Contractor or Environmental Performance Guarantor, as applicable, will have the financial capability to meet its obligations under the exploitation contract or Environmental Performance Guarantee. Such information may include, without limitation, updated organizational or ownership structure charts and audited financial statements of any person, entity or group exercising control over the Contractor or Environmental Performance Guarantor as a result of such change of control), which information the Secretary-General shall make available to the Commission and the Council.

3. After consulting the Contractor or entity providing the Environmental Performance Guarantee, as the case may be, the Secretary-General ~~may~~shall:

~~(a) Determine that, following a change of control of the Contractor or the entity providing the Environmental Performance Guarantee, the Contractor will continue to be able, and in particular will have the financial capability, to meet its obligations under the exploitation contract or Environmental Performance Guarantee, in which case the contract shall continue to have full force and effect;~~

(~~b~~a) In the case of a Contractor, treat a change of control as a transfer of rights and obligations in accordance with the requirements of these regulations, in which case regulation 23 shall apply; or

(~~c~~b) In the case of any change of control of an entity providing an Environmental Performance Guarantee, require the Contractor to (i) lodge a new Environmental Performance Guarantee in accordance with regulation 26, ~~within such time frame as the Secretary-General shall stipulate~~or (ii) cause the existing Environmental Performance Guarantor to reaffirm in writing all of its obligations under the existing Environmental Performance Guarantee, in each case within such time frame as the Secretary-General shall stipulate, provided that, in the event such reaffirmation or new Environmental Performance Guarantee meeting the requirements under regulation 26 is not lodged within such time frame, the Exploitation Contract shall automatically terminate.

4. Where the Secretary-General determines that, following a change of control, a Contractor or the entity providing the Environmental Performance Guarantee may not have the financial capability to meet its obligations under its E~~e~~xploitation C~~c~~ontract or the Environmental Performance Guarantee, as applicable, the Secretary-General shall inform the Commission accordingly. The Commission shall submit a report of its findings and recommendations to the Council, which the Council shall consider when determining whether to approve the transfer of the Exploitation Contract pursuant to Regulation 23.

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

Clause 1: We agree with the spirit of the regulation and proposed revisions thereto in the March 3 markup to the President's Text. However, it lacks clarity and we note that "control" should not be limited only to 50% ownership of the Contractor or a guarantor, but should also include indirect ownership and the exercise of voting rights -- for example a minority shareholder may have veto power over certain decisions, which would constitute effective control – as well as other types of exercising control over the management of the Contractor or environmental performance guarantor. Clause 3: there should be an express prohibition on any change of control of the Contractor without the prior consent of the Council. Any unauthorized change of control should trigger automatic termination of the Contract. As drafted this is permissive ("may"), and left to the discretion of the Secretary-General. A change of control where the upstream ownership of the Contractor changes is, essentially, just a transfer of the Contract to a new entity in another guise and should be treated as such. For example, in a typical energy M&A deal, a buyer would just purchase an upstream HoldCo

rather than an individual project company that holds all of the necessary permits, project contracts, etc. to operate a project. Regulation 24 should not be allowed to be an end-run around the transfer provisions in Regulation 23: just like any other transferee of a Contract, any entity that comes into the ownership structure upstream of the Contractor should be subject to the same scrutiny and requirements as the original applicant in terms of its creditworthiness/ ability to pay for damages, technical experience, etc. Clause 4: This section should apply to guarantors as well as Contractors, otherwise this would completely underline the purpose Environmental Performance Guarantee. Additionally the Council should have the right to terminate any Contract where the Contractor or guarantor is no longer sufficiently solvent to perform its obligations, including payment of damages, thus Regulations 12(4) and 13 should apply to the Council's consideration of any change of control (as they do via application of Regulation 23). As drafted this clause has no teeth.

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   President's Text

2. **Name(s) of Delegation(s) making the proposal:**

   The Ocean Foundation, Observer

3. **Please indicate the relevant provision to which the textual proposal refers.**

   Part III: Rights and obligations of Contractors

   Regulation 26 (Environmental Performance Guarantee)

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.**

   1. A Contractor shall lodge an Environmental Performance Guarantee in favour of the Authority and no later than the commencement date of any ~~production~~ Exploitation activities in the Mining Area. The Contractor shall be required to maintain an Environmental Performance Guarantee in the full amount required by the Council at all times until the satisfaction in full of all of its obligations that are the subject of the Environmental Performance Guarantee, and shall ensure that the funds available to satisfy its obligations under the Environmental Performance Guarantee be promptly replenished to the full amount required by the Council following the drawing of any amounts thereunder.

   2. (a) ter. ~~[~~Responding to, and remediating, a~~ significant~~n environmental Incident;~~]~~

   4. The amount of the Environmental Performance Guarantee shall be reviewed and updated annually, by the Council, taking into account the recommendation of the Commission and Finance Committee.

   5. The Council, taking into account the recommendation of the Commission and Finance Committee ~~A Contractor~~ shall, as a result of any review under paragraph 4 above, recalculate the amount of the Environmental Performance Guarantee within 60 Days of a review date, and the Contractor shall promptly lodge a revised guarantee in favour of the Authority.

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

   Section 1: The Environmental Performance Guarantee should be paid prior to any exploitation activities, not just "production". Damage to the seabed and ecosystem can be caused by pre-

production site surveys, test runs, etc. Lastly, it should be clear that the Environmental Performance Guarantee must outlast the contract, since environmental restoration/ remediation obligations may go on for decades after closure. Lastly where an Environmental Performance Guarantee is drawn upon, whether in full or in part, the Contractor should be obligated to top it back up to the full required amount. Section 2(a) ter.: We welcome the inclusion of Section 2(a) ter. as set out in the March 3 markup. It is crucial that the Environmental Performance Guarantee not only cover decommissioning and post-closure monitoring, but also the costs or remediating and environmental incident, and the regulations should be updated to address this throughout. However, the word "significant" should be removed as it is duplicative. The definition of "Incident" includes "Serious Harm to the Marine Environment", and "Serious Harm" in turn means "means any effect from activities in the Area on the Marine Environment which represents a significant adverse change in the Marine Environment…" We do not understand the contradiction between the first sentence of section 3 as proposed in the March 3 markup, which provides that "The Council shall decide the amount of an Environmental Performance Guarantee in Standard taking into account the recommendation of the Commission and Finance Committee", (with which we agree) and proposed new section 4/existing section 5, which provide that "The amount of the Environmental Performance Guarantee shall be reviewed and updated [annually by the Contractor]" and "A Contractor shall, as a result of any review under paragraph 4 above, recalculate the amount of the Environmental Performance Guarantee within 60 Days of a review date and lodge a revised guarantee in favour of the Authority" . The Contractor should not have the right to unilaterally recalculate the amount of the Environmental Performance Guarantee that it is obligated to provide – this should be the exclusive right of the Council to determine otherwise it completely undermines the whole purpose of the guarantee. The regulated should not be the regulators.

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2. **Name(s) of Delegation(s) making the proposal:**

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   Annex I: Application for approval of a Plan of Work to obtain an exploitation contract

   Section I: Information concerning applicant

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.**

   Revise Subsection 13(c) as follows:

   (c) Attach a copy of applicant's duly certified certificate of registration (or equivalent), together with evidence of applicant's good standing in its jurisdiction of registration and each other jurisdiction where applicant is qualified to do business as of the date of the application.

   Add new Subsection 17 as follows:

   17. Describe your corporate structure (Ultimate Beneficial Owner(s), parent company(s), subsidiary(s), publicly disclosed investor(s), and the relationships between these parties, as applicable). A chart or other illustration depicting this information shall be an acceptable format for submitting this documentation.

   Add new Subsection 18 as follows:

   18. Describe any legal or regulatory actions taken against the applicant or any of its affiliates in the last 5 years, and the resolution of such actions. If the applicant or such affiliate is a U.S. publicly traded company, the Securities and Exchange Commission's Electronic Data Gathering, Analysis, and Retrieval (EDGAR) system is an acceptable source for this information. If there have been no such actions, please include a statement to that effect.

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

Section I, Subsection 13(c): these are standard due diligence items and should be a bare minimum requirement for applicants to prove that they are not delinquent or non-existent entities. Section I, Subsection 17: Disclosure of the full corporate structure of the applicant is an essential disclosure from a transparency and creditworthiness standpoint. Applicants can be shell companies, UN sanctioned entities, etc., and it is crucial that the Council and Commission be made aware of all investors and affiliates of any applicant prior to awarding of an Exploitation Contract. Section I, Subsection 18: Prior litigation and regulatory enforcement actions should be disclosed as part of the application as a way for the Commission to determine the type and level of risk presented by awarding an exploitation contract to an applicant. The Commission should have knowledge of whether applicants have been involved in environmental litigation, contractual disputes, fraud, and other causes of action that could indicate that an applicant would be unlikely to comply with their obligations once a contract has been awarded.

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   Annex I: Application for approval of a Plan of Work to obtain an exploitation contract

   Section IV: Financial information

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   Subsection 21:

   (a) If the application is made by the Enterprise, attach certification by its [competent authority] [Director-General] that the Enterprise has the necessary financial resources to meet the estimated costs of the proposed Plan of Work, and fulfil its financial obligations to the Authority;

   (b) If the application is made by a State or a State enterprise, attach a statement by the State or the Sponsoring State certifying that the applicant has the necessary financial resources to meet the estimated costs of the proposed Plan of Work, and fulfil its financial obligations to the Authority; and

   […]

   (c) (ii) If the applicant is a subsidiary of another entity, attach copies of such financial statements of each entity with a direct or indirect ownership interest in the applicant, up through and including each Ultimate Beneficial Owner of the applicant (if such Ultimate Beneficial Owner is a juridical entity), ~~that entity~~ and a statement from each such ~~that~~ entity, in conformity with internationally accepted accounting principles and certified by a duly qualified firm of public accountants, that the applicant will have the financial resources to carry out the Plan of Work; and

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

   Applicants must be able to demonstrate that they not only have the financial resources to carry out their planned mining operations, but to also pay for all of their financial obligations, including the

obligations in proposed new clause 18 in the March 3 markup to cover costs of remediating any environmental damage the applicant may cause via Exploitation Activities, which could vastly exceed the costs of mining. Such costs many not adequately be captured by insurance, the Fund (especially if insufficiently capitalized), or by the Environmental Performance Guarantee, which as currently drafted is only applicable to closure activities. Section 21(c)(ii) should be clarified that audited financial statements should be provided for all entities in the corporate ownership chain up through the Ultimate Beneficial Owners (not just for the direct parent of the applicant).

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   Schedule, Use of terms and Scope

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   Schedule, Use of terms, and scope:

   Add the following as new definitions in the appropriate alphabetical order:

   "Exploitation Contract" means an exploitation contract entered into between the Authority and a Contractor in the form prescribed in annex IX to these regulations.

   "Environmental Performance Guarantor" means each entity or individual that provides an Environmental Performance Guaranty in accordance with these regulations.

   "Ultimate Beneficial Owner" means each individual who ultimately owns or controls, directly or indirectly and legally or beneficially, shares, capital, a right to profits or voting rights of the Applicant or any individual who otherwise exercises control over the management of the Applicant.

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

   For consistency and clarity the defined term " Exploitation Contract" should be used throughout the draft regulations in lieu of the existing term "Contract" which is capitalized but not defined, and the undefined term "exploitation contract", which are used interchangeably. A defined term for "Environmental Performance Guarantor" was added to be used in our proposed revisions to

Regulation 24. There was no defined term for “Ultimate Parent Company” as used in Regulation 18bis. We propose using “Ultimate Beneficial Owner”, which is more inclusive than “Ultimate Parent Company” as used in, since this also captures natural persons that may have a direct or indirect controlling interest over a Contractor.