TEMPLATE FOR SUBMISSION OF TEXTUAL PROPOSALS DURING THE 28TH 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:**
   Open-ended Working Group of the Council on the Financial Terms of a Contract

2. **Name(s) of Delegation(s) making the proposal:**
   Submitted by Nauru Ocean Resources Inc., Tonga Offshore Mining Ltd. and Blue Minerals Jamaica Ltd.

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

   Draft Regulation 23(1)

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 may transfer its rights and obligations under an exploitation contract in whole or in part only with the prior written consent of the ~~[Sponsoring State], and the~~ Council ~~[~~,(such consent not to be unreasonably withheld)~~]~~, based on the recommendations of the Commission ~~[~~and with notification to the Sponsoring State~~]~~.

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

- We propose to remove the reference to the Sponsoring State in Draft Regulation 23(1) as it is unclear why Sponsoring States should be able to prevent transfer of Contractor's rights under its contract with the Authority.

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

   Draft Regulation 23(3)

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.**

   3. The Commission shall consider and decide whether to recommend to the Counsel to consent to the application for consent to transfer within 90 days of the date the Commission receives the relevant application. ~~at its next available meeting, provided that the documentation has been circulated at least 30 Days prior to that meeting.~~

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

- We maintain our objection to linking transfer application approvals and similar matters to meetings of the Commission under Draft Regulation 23(3).
- The Commission only meets twice a year. This timeframe will impose significant delays upon transfers, which will impact the ability to effect the transfer in a timely fashion. The Commission is empowered to work between sessions, and its decisions on transfer applications should not be restricted to its physical meetings.
- We reiterate our previous proposal requiring the Commission to make a recommendation to the Council on the transfer application within 90 days of the date it receives the application. If necessary, the Commission should work intersessionally to achieve this objective.

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

   Draft Regulation 23(4 ALT)

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   ~~4 ALT: An application to transfer the rights and obligations under an exploitation contract shall be subject to the requirements under regulations 5 to 16.~~

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

- We oppose the text of Draft Regulation 23(4ALT) as the wording is not as clear as the current Draft Regulation 23(4).
- For clarity it is preferable to set out precisely what the relevant requirements for a transfer are, rather than rely on an unclear cross-reference to a range of other regulations.

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

   Draft Regulation 23(4)(d ter)

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. ~~[~~Before the Commission can make a recommendation to the Council for approval of a transfer~~]~~ The Commission shall verify that the transferee: […]

   ~~[d ter. Has provided written assurances of the Transferee's holding, subsidiaries, affiliated and ultimate parent companies, agencies and partnerships, as applicable, accepting responsibility as set out in regulation 18bis.]~~

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

- We oppose the proposed Draft Regulation 23(4)(d ter) which would require written assurances from a range of the Transferee's affiliates.
- As per our submission on Draft Regulation 18bis, it is not appropriate for the Authority to attempt to bind a range of other entities that have no contractual or other legal relationship to the Authority.

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

   Draft Regulation 23(5)(b)

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. The Commission shall not recommend approval of the transfer if it would:

   a. Involve conferring on the transferee a Plan of Work, the approval of which would be forbidden by article 6 (3) (c) of annex III to the Convention; or

   b. ~~Allow the transferee to monopolize the conduct of activities in the Area [with regard to the Resource category covered by the exploitation contract or the transferee would monopolize or significantly control the production of any single mineral or metal produced globally; or]~~

   c. If any circumstances under regulations 15(2) or (3) are applicable.

Explanation / Comment

Paragraph 5

- Two participants have proposed that "monopolize" should be defined (e.g. a transfer could be prohibited if it provides a transferee with over 75% of the value of production in the Area once at least two permitted areas have already entered production). I welcome proposals.
- One participant has proposed new language in paragraph 6 (new requirements on the Commission) to broaden the circumstances in which a transfer cannot be

recommended for approval – such that conduct of activities in the Area cannot be monopolised but also global production of any single mineral or metal cannot be monopolised. This may be a complex assessment. I welcome proposals.

- One participant has proposed deletion of subparagraph b.

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

- We do not support Draft Regulation 23(5)(b). There is no basis for the Authority or Commission trying to determine whether there is a monopoly on "the conduct of activities in the Area with regard to the Resource category covered by the exploitation contract".
- The requirement around monopolies is that set out in Article 6(3)(c) of Annex III of the Convention, which is already referred to in Drat Regulation 23(5)(a). There is no justification for creating an additional and new test in sub-paragraph (b).
- We object to re-defining "monopolize" in the Draft Regulations. The concept of a monopoly is complex and determining if one exists requires sophisticated analysis of a market. Domestically this often involves large regulatory agencies with expertise in competition law and policy. It would not be appropriate to attempt to shortcut that assessment via a numerical rule of the kind mentioned in the Chair's comments.
- We agree with the Chair that determining whether a transferee would monopolize or significantly control the production of any single mineral or metal produced globally is a "complex assessment". Such assessment is outside the Commission's mandate.
- Given the nature of the Area, the system of payments, and allocation of sections to Contractors it is also not clear how in fact a risk of a "monopoly" could ever arise given that additional Contractors can always apply for and be given exploitation rights in unallocated or unused parts of the Area.
- Attempting to include provisions on monopolies in the Draft Regulation could also lead to perverse and unintended consequences given the new nature of the industry and the products that will be produced. As currently drafted it could also prevent the first Contractor from undertaking any expansion or receiving new licenses until other Contractors increase their level of activity. It is not fair nor reasonable to link one Contractor's development to the progress made by others.
- The Convention and the 1994 Agreement also already contain the applicable and relevant principles that prevent monopolization, in particular Article 6(3)(c) of Annex III of the Convention. It is those provisions that control issues regarding monopolization. The Draft Regulations should not redefine these terms or requirements.

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

   Draft Regulation 23(6bis/6ter) and (8)(d)

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.**

~~[6bis. A Contractor shall pay a Transfer Profit Share, which shall be levied on a pro rata basis by the Authority on gains made from the direct or indirect transfer of rights under an exploitation contract.]~~

~~[6.ter. The Authority shall publish a Standard for the effective operation of the Transfer Profit Share.]~~

[…]

8. A transfer is validly effected only upon:

   […]

   ~~[(d) Payment of the Transfer Profit Share in accordance with paragraph 7 of this regulation and the relevant Standard.]~~

Explanation / Comment

Paragraphs 6 bis and ter

- Some participants propose amending DR 23 with a view to integrating an obligation for the Authority to levy a Transfer Profit Share on gains over a certain threshold

generated from the transfer (direct or indirect) of rights under an exploitation contract. To this end, two new paragraphs have been added after paragraph 6 of DR 23. The specific parameters and elements related to administering the Transfer Profit Share are proposed to be included in a Standard, which will facilitate subsequent reviews and/or adjustments as necessary. The participants contend that the proposal is consistent with Article 13 1(b) of Annex III of the Convention and Section 8 1(b) of the Annex to the Agreement given that the proposed Transfer Profit Share is comparable to Capital Gains Tax (CGT), which is widely implemented in landbased mining jurisdictions

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

- We oppose the inclusion of Draft Regulation 23(6bis) and Draft Regulation 23(6ter) as we do not consider there is a basis under the Convention to impose a Transfer Profit Share upon transfers of contractual rights, particularly indirect transfers.
- Article 13 of Annex III of the Convention and Section 8 of the 1994 Agreement set out the objectives that must guide the Authority's work on financial regulations. Article 13(1)(a) specifically contemplates the Authority obtaining "revenues…from the proceeds of commercial production". Article 13(1)(b) further requires the payments system to "attract investment and technology to…exploitation of the Area". Annex 13(1)(c) requires the system to "ensure equality of financial treatment and comparable financial obligations for contractors".
- A levy on transfers of rights under an exploitation contract would be contrary to these objectives as it is not clear that it would create revenues "from the proceeds of commercial production" and it would also likely discourage diversification of investment and entities operating in the Area. It could also penalize contractors with diversified shareholdings, resulting in unequal treatment. Such a levy could also result in double taxation, given existing capital gains tax regimes that will apply to entities through domestic tax laws. This would disadvantage deep seabed miners as compared to their land-based counterparts.
- A levy on indirect transfers would also be particularly complicated to administer, contrary to the principle set out in Section 8(1)(c) of the Annex to the 1994 Agreement.
- We also note that Section 8(1)(b) of the Annex to the 1994 Agreement refers to the "rates of payments" being within the range of land-based mining. We do not consider a transfer levy to form part of the "rates of payment" and so do not consider that this provision gives any support to the introduction of the Transfer Profit Share levy.