

**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 27

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.

Explanation / Comment

- In response to comments from a number of participants regarding the need for specificity with respect to Commercial Production, in February I proposed new text on commencement of Commercial Production here at Regulation 27 that: (i) provides greater specificity and an objective standard of assessment, to be included in Standards, and (ii) allows for verification and confirmation by the Authority. I would welcome further proposals by participants on what the “thresholds” or parameters to be included in the Standards would be, including comments on the proposed thresholds now in the Standard.

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

- We consider that it is essential that the Draft Regulations provide for a specific threshold for the commencement of Commercial Production. This can be done either in the text of Draft Regulation 27 or be included in the definition of the term “Commercial Production”. We do not consider it acceptable for such an important milestone to be left for further discussion and subsequent incorporation into Standards and Guidelines.
- We note that although there are different approaches adopted in various land-based mining regulatory systems, we consider that tying the commencement of commercial production to achieving a certain percentage of the project’s capacity over a 90-day

period would be the clearest and most appropriate solution. For example, the benchmark of achieving 60% of rated capacity over a 90 day period is widely used in Canadian jurisdictions and is reflected in the Model Mining Development Agreement developed by the IBA. Using a set percentage would exclude subjectivity and ensure that the benchmark is fit for each specific Contractor and their exploitation plan.

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Draft Regulation 27(2)-(5)

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[\[2. Once Commercial Production has begun, the Contractor shall promptly notify the Secretary-General of the date of commencement of Commercial Production. Upon notification, the Secretary-General shall notify members of the Authority, in particular coastal states in close proximity to the Mining Area, that Commercial Production has begun and the location of the Mining Area](#)

~~2-bis. Once the Contractor determines that it is engaging in sustained large-scale recovery operations which yield a quantity of materials in excess of the thresholds specified in the Standards, the Contractor shall promptly notify the Secretary General of the proposed date of commencement of Commercial Production together with supporting documentation and other evidence as specified in the Standards. The Secretary General shall transmit the notification and supporting documentation and evidence to the Commission, which shall consider the proposal and supporting materials and approve or reject the Contractor’s proposed date.~~

~~3. Promptly following approval or rejection by the Commission, the Secretary General shall, as applicable, confirm the date of commencement of Commercial Production to the Contractor, or notify the Contractor of the rejection and invite the Contractor to re-submit its proposed date of commencement of Commercial Production under Regulation 27(2).~~

~~4. Upon confirmation, the Secretary General shall notify members of the Authority, in particular coastal states [in close proximity] [adjacent] to the [Mining Area][Contract~~

~~Area], that Commercial Production has begun and the location of the Mining Area(s).~~

~~5. — The date of commencement of Commercial Production, will be the date confirmed to the Contractor according to Regulation 27(3).]~~

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

- We propose reinstating the previous version of Draft Regulation 27(2) and deleting Draft Regulation (2bis)-(5). We consider Commercial Production should begin per the definition set forth in the Draft Regulations and should be determined by the Contractor in accordance with that definition.
- Commencement of Commercial Production should not require an extra layer of review and determination by the Commission, which serves no substantive purpose and will only result in further delays, especially at a time when any delay will have a significant commercial risk to the Contractor.
- We consider such delays would impact the Contractor's ability to meet its obligation to make "reasonable efforts" to bring the Mining Area into Commercial Production in accordance with its Plan of Work under Draft Regulation 27(1).
- If the language is maintained, we note that Draft Regulation 27(4) should refer to Mining Area only, as the Contract Area does not appear to be relevant in this context.

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Draft Regulation 27(ALT 2-5)

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~~ALT to 2-5~~

~~{2 The commencement of Commercial Production shall be based on the maintenance of a certain level of production capacity for a specified number of days in accordance with the relevant Standard.~~

~~3 Any failure on the part of the Contractor to comply with this regulation and the relevant Standard may be considered under the General anti-avoidance rule established pursuant to Regulation 77 and other applicable Rules, Regulations, and Procedures.}~~

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

- We consider that Draft Regulation 27(ALT 2) is unnecessary and it is preferable to ensure that the requirements around what constitutes Commercial Production to be set through an appropriate definition in the Draft Regulations and then through the determination of the relevant Contractor.
- We also oppose Draft Regulation 27(ALT 5) as it is not every instance of failure to comply with Draft Regulation 27 will be avoidance for the purposes of Draft Regulation 77. To the extent that the anti-avoidance rules apply, this will occur on their own terms and there is no need to explicitly cross-refer to them here. Doing so only creates ambiguity and potential unfairness.