

2/07/2018

Mr Chris Brown

Dear Chris

TOML comments on the updated Draft Exploitation Regulations

Tonga Offshore Mining Limited (TOML) would like to commend you and the authority on the progress made in drafting this critical set of regulations and we offer the following comments that we trust you will find constructive in nature.

Draft Regulation 2.2 (d) (Protection of Developing Countries)

No objection to this clause in principle but it is best managed from the level of the act. Regulations are more to help the contractor and administrator work more effectively in the area. TOML notes that the introductory text to Regulation 2.2 refers to the “balanced growth of international trade” and the “over-all development of all countries, especially developing States”. However, TOML is concerned that paragraph (d) could be misinterpreted as providing that existing on-shore mining projects are afforded some type of priority (or even a veto) and the clause could be invoked in an inappropriate attempt to place restrictions or limits on production from an exploitation contract. We suggest that it be removed as it is inappropriate for such protectionist measures to be included the Draft Regulations.

Draft Regulation 2.5

TOML proposes that the phrase “harmful effects” (which is unconstrained) be changed to “Serious Harmful effects” or “harmful effects that may arise from exploitation that significantly exceed those permitted under the exploitation contract and plan of work in accordance with...”.

Draft Regulation 16.2 (b)

TOML proposes that the text be changed to “...likely to cause significant undue interference...” so that Contractors can mine close to the boundaries of their contract areas without neighbours trying to block development due to, for example, trace changes in water chemistry.

Draft Regulation 17

This review period needs to be fixed (eg 60 days), or else the application should be considered to have been approved.

Draft Regulation 21

Regulation 21 is written in terms of a “renewal” after the initial 30 year term. In substance, the regulation seems to deal with contract “extension” rather than “renewal”.

TOML submits that, instead of a maximum 10 year renewal period (or extension), a maximum of 15 years fits better with expected capital life and would encourage new improvements and developments in technology at the time, e.g. as intended in Article 17(2)(b)(iii) of UNCLOS.

Draft Regulation 23

TOML supports the inclusion of this regulation, but submits that it would be more appropriate for the consent to be issued by the “Secretary General on behalf of Council” with “approval not to be unreasonably withheld”. The rationale for this proposed change is that such arrangements may need to be made quickly, especially in times of adverse economic conditions, and the change reflects the normal practice with on-shore mining and deep seabed mining should be no worse off

Draft Regulation 23.4

TOML proposes that the text be changed to “...shall agree upon foreclosure to undertake or develop to undertake Exploitation activities in accordance...”. In some situations, this will allow financial parties to retain technical operators in good time and allow for significant operational improvements to be made.

Draft Regulation 24.1

For the same reasons it suggested a similar change to Regulation 23, TOML proposes that the consent be issued by the “Secretary General on behalf of Council” with “approval not to be unreasonably withheld”.

Draft Regulation 24.4 (c)

TOML submits that paragraph (c) be qualified by inserting “if the Secretary General considers that the plan of work with materially change from that already approved,” at the start of the paragraph.

Draft Regulation 24.10

TOML submits that Regulation 24.10 be deleted as this removes considerable security/certainty for the transferee and may make it difficult to reach agreement. It could also be inconsistent with the terms of the Contract: “The terms, undertakings and conditions of this Contract shall inure to the benefit of and be binding upon the parties hereto and their respective successors and assigns” (section 14.3).

Regulation 30.4

The present draft language should be changed to:

“.....is required to:

- (a) stop or reduce environmental disturbance or impact that significantly exceeds that expected in the Plan of Work; or
- (b) protect human health and safety.”

Regulation 31

TOML submits that Regulation 31 inserts an element of uncertainty and is unnecessary. If a Contractor is operating in accordance with its Work Plan (as approved when the exploitation contract was granted), there should be no scope for the Secretary-General to direct the Contractor to take “corrective measures” particularly where that direction is based on the rather vague and nebulous concepts outlined in Regulation 31.1. If the draft regulation is retained, the obligation to comply with any such direction needs to allow the Contractor a

reasonable period to implement the direction.

Draft Regulation 33.2

TOML proposes that “including the activities of the Contractor and the activities of other Contractors” be inserted at the end of the regulation.

Draft Regulation 36.2

TOML proposes that the phrase “, and confirms the occurrence of,” be inserted following “becomes aware of” to allow for filtering of trivial events and false or erroneous reports.

Note also TOML’s comments on Appendix 1, below.

Draft Regulation 38.2

TOML submits that the requirement in this regulation that underwriters waive any rights of recourse against the Authority may be unacceptable to most potential underwriters making it difficult or impossible for Contractors to obtain insurance complying with the regulation. Further, the language appears to contravene Section 7.3 of the Exploitation Contract, which provides that the Authority is liable in some circumstances e.g. for wrongful acts or omissions of the Authority.

TOML suggest that the regulation be modified to provide for the Contractor to use reasonable endeavours to obtain such insurance.

Draft Regulation 41.3

It may not always be practical for Contractors to keep and preserve “in good condition” samples, particularly biological samples. The regulation should be qualified by inserting “To the extent practical” at the start of the regulation.

Draft Regulation 46

Given Draft Regulation 46(b) creates a legal obligation on the Contractor to ensure the application of Best Available Techniques and Best Environmental Practice, TOML submits that it is important that those two terms are defined in such a way as to make the requirement commercially viable and be based on reasonable economic and practical constraints.

Draft Regulation 48.1

This needs to be “or” between (a) and (b) . The treatment of Mining Discharges should be covered in an approved Work Plan. The Contractor should not be required to make material changes to the Work Plan simply because the Authority revised its Standards or adopts new ones.

Draft Regulation 50.6

TOML suggests inserting “(acceptable to the Contractor)” following “an independent competent person”.

Draft Regulation 55.4

TOML proposes that “After consulting the Contractor” be changed to “With the agreement of the Contractor”.

Draft Regulation 63.1

While TOML does not disagree with the Secretary-General being able to issue Guidelines on administrative matters from time to time, the amount and method of calculation of the royalty should be fixed at the time of issuance of the exploitation contract and this should be clear in this regulation.

Draft Regulation 83.2

The certainty implied in earlier regulations is undermined If the Council has an unrestricted ability to change the annual rate. TOML proposes that any change is limited to changes in global inflation. Further, the fee should not be too high otherwise it could encourage poor behaviour (e.g. areas being mined less efficiently).

Draft Regulation 83.5

TOML agrees with the principle underlying this regulation, but suggests that “may” be changed to “will”.

Draft Regulation 86.1

Please change to “service provided to the Contractor”.

Draft Regulation 92

TOML suggests that the language be changed to “recognized experts, including Contractors,” as, in practice, the Contractors will be the real experts.

Draft Regulation 94.6

While the revised regulations meet some of our concerns, TOML believes that the draft regulation should have reasonable limitations on the powers of inspectors beyond a mere requirement to “avoid any undue interference with the safe and normal operations of the Contractor and of vessels and installations”. As noted below, Regulation 96 gives Inspectors broad powers which, if improperly used, could interfere with a Contractor’s operations. For example, the Inspector could order a Contractor to retrieve deep-sea mining equipment in order for it to be inspected which could cause a significant loss of revenue from equipment down-time.

TOML proposes that Regulation 94.6 be amended to read as follows:

- “6. Inspectors shall:
- (a) follow all reasonable instructions and directions pertaining to the safety of life at sea given to them by the Contractor, the captain of the vessel or other relevant safety officers on board vessels and Installations; and
 - (b) to the maximum extent possible, refrain from any undue interference with the safe and normal operations of the Contractor and of vessels and Installations unless the Inspector has reasonable grounds for believing that the Contractor is operating in breach of its obligations.”

Draft Regulation 96.1 (e) and (h)

As noted above, Inspectors have broad powers that, if improperly exercised, could have a significant cost to Contractors. TOML proposes that paragraphs (e) and (h) be qualified by inserting “Unless it will unreasonably interfere with the Contractor’s operations,” at the start of the paragraphs. TOML believes that these amendments are necessary because (a) inspection and testing of much equipment is often not possible at sea or it may not be safe to do so while operations are underway, and (b) the cost of suspending operations to accommodate an inspection may be prohibitive.

Draft Regulation 99

The Inspectors and their judgements need to be held accountable. TOML proposes that Regulation 99.2 to amended to include the payment of compensation to a Contractor for any losses suffered by the Contractor in complying with unreasonable, unwarranted or unjustified instructions or directions issued by Inspectors.

Annex I

There needs to be some streamlining of the steps in the flow-sheet and reduction of the deadlines otherwise simple addition indicated that it will take about 2 years to get approval with significant loss of value to the contract and income to the Authority.

Annex X, Section 3.3 (a)

TOML requests that this paragraph be deleted as (a) this is either obvious or confusing depending on context and (b) reduces certainty in the Contract.

Appendix I

These should be in line with other industries, MSRs etc., with reasonable materiality thresholds. At a minimum, TOML suggests that the following items be qualified as set out below:

- “3. Occupational Lost Time Illness
4. Occupational Lost Time Injury
8. Significant leak of a hazardous substance
- 10 Adverse environmental conditions with likely significant Safety and/or Environmental consequences
11. Significant threat or breach of security
15. Significant contact with fishing gear”

Note also TOML’s proposed change to Draft Regulation 36.2 above.

DEFINITIONS

TOML proposes the following changes:

Environmental effect – TOML suggests that “material” be inserted between “any” and “consequences”.

“Feasibility Study” – The reference to “a final decision by a financial institution to finance the development . . .” confuse a feasibility study with a bankable feasibility study. TOML suggests deleting everything after “are considered”

“Serious Harm” – TOML suggests adding “. . . and beyond that which was reasonably anticipated in the Plan of Work or Contract” At the end of the definition

“Stakeholders” – TOML suggests that the definition be changed to read:

“... a natural or juristic person or an association of persons with a direct interest of any kind or who may be directly affected by the proposed or existing Exploitation activities under a Plan of Work in the Area.”

Other interested persons can easily enough work through those with a direct link to the work.