

**TEMPLATE FOR SUBMISSION OF TEXTUAL PROPOSALS DURING THE 27<sup>TH</sup> 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](mailto: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 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)~~ 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

~~(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 Exploitation Contract 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.