Permanent Mission of the Republic of Nauru
to the International Seabed Authority

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The Permanent Mission of the Republic of Nauru to the International Seabed Authority presents its compliments to the Secretariat of the International Seabed Authority and has the honour to transmit the Republic of Nauru's Non-paper on State Sponsorship of Activities in the Area and the interpretation of the "Effective Control" Requirements.

The Permanent Mission of the Republic of Nauru to the International Seabed Authority avails itself of this opportunity to renew to the Secretariat of the International Seabed Authority the assurances of its highest consideration.

New York, 12th April 2024

PERMANENT MISSION OF THE REPUBLIC OF NAURU - NEW YORK

Secretariat
of the International Seabed Authority
Kingston, Jamaica

REPUBLIC OF NAURU

Non-Paper by Nauru on State Sponsorship of Activities in the Area and the Interpretation of the "Effective Control" Requirements

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1 Executive summary

1.1 This non-paper considers the concept of effective control within the context of the United Nations Convention on the Law of the Sea (UNCLOS), State law and practice, ISA precedent, and jurisprudence from the International Tribunal for the Law of the Sea (ITLOS).

1.2 The interpretation of effective control as one of "effective regulatory control", which typically flows from the State of nationality of an applicant, appeared settled, at least in the context of the International Seabed Authority (the Authority or ISA) and State practice for applications made under the ISA's exploration regulations and ongoing sponsorship requirements. Nevertheless, an alternative interpretation has been proposed as part of the negotiation of the draft exploitation regulations by the ISA Council. This alternative interpretation would take account of where the management or operational control of an applicant or contractor is exercised, the location of relevant assets, or ultimate beneficial ownership of the applicant – a test of "effective economic control". This matter has been of concern for some ISA delegations where the contractor is an entity incorporated in a developing State with an overseas parent holding company located in a developed State.

1.3 The paper also discusses the policy considerations and practical challenges that would result if an effective economic control test were to be adopted by the ISA. In brief: -

1.3.1 The **proposed change to the interpretation of effective control would be a radical departure from the ISA's past practice** that would run contrary to over a decade of implementation of Part XI of UNCLOS by the ISA and sponsoring States and the legitimate expectations of contractors.

1.3.2 The **proposed change would undermine a key aim of Part XI – to increase the effective participation of developing States in activities in the Area**. Moving to a test of effective economic control risks providing an effective veto to developed States and their capital rich companies regarding activities in the Area.

1.3.3 The **proposed change is not needed to comply with UNCLOS and its linkage to liability concerns is not credible**. There are clearer and more certain ways to ensure concerns around liability are addressed, as compared to a blunt change to a long relied upon approach to what effective control means.

1.3.4 The **proposed change would raise a host of practical problems in terms of implementation and significantly increase the regulatory workload of the Authority** at the expense of the sovereignty of sponsoring States and certainty for contractors. It would place the Council in the position of adjudicating matters that are within the sovereign rights of States (namely, the decision whether to issue a certificate of sponsorship).

2 UNCLOS and Regulatory context

2.1 The requirements for sponsorship are set out in UNCLOS (Article 153(2)(b) and Annex III, Article 4(3)). In particular, article 4(3) of Annex III of UNCLOS states that:

> "Each applicant shall be sponsored by the State Party of which it is a national unless the applicant has more than one nationality, as in the case of a partnership or consortium of entities from several States, in which event all States Parties involved shall sponsor the application, or unless the applicant is effectively controlled by another State Party or its national, in which event both States Parties shall sponsor the application. ... "

2.2 Article 4(3) of Annex III also specifies that the criteria and procedures for implementation of the sponsorship requirements are to be set out in rules, regulations and procedures (RRPs) of the ISA.

2.3 Nauru considers that the text of article 4(3) establishes nationality as the overarching requirement for State sponsorship and that the requirement for possible dual sponsorship that it contemplates arises only where the State of nationality does not exercise effective control over its sponsored entity, and where such control is exercised by another State or its nationals.

2.4 A different formulation is presented in UNCLOS as regards notification of the submission of a plan of work for a reserved area in Annex III, Article 9(4). An applicant under that paragraph must be a State Party which is a developing State, or a natural or juridical person sponsored by it and effectively controlled by it or by another developing State.

2.5 The intent of this provision is to ensure that developing States and their persons can access the reserved area and thereby participate in and benefit from activities in the Area. This intention can only be realised if "effectively controlled" in article 9(4) is read as meaning effective regulatory control. It allows developing States to sponsor juridical persons within their jurisdiction to undertake activities in the Area, as long as they exercise proper regulatory control over those persons.

3 ITLOS context

3.1 In its 2011 advisory opinion, the Seabed Disputes Chamber (SDC) referred to the issue of effective control in two paragraphs:

> "The connection between States Parties and domestic law entities required by the Convention is twofold, namely, that of nationality and that of effective control. All contractors and applicants for contracts must secure and maintain the sponsorship of the State or States of which they are nationals. If another State or its nationals exercises effective control, the sponsorship of that State is also necessary. This is provided for in Annex III, article 4, paragraph 3, of the Convention and confirmed in regulation 11, paragraph 2, of the Nodules Regulations and of the Sulphides Regulations.

No provision of the Convention imposes an obligation on a State Party to sponsor an entity that holds its nationality or is controlled by it or by its nationals. As the Convention does not consider the links of nationality and effective control sufficient to obtain the result that the contractor conforms with the Convention and related instruments, it requires a specific act emanating from the will of the State or States of nationality and of effective control. Such act consists in the decision to sponsor."[1]

3.2 Parallels with other effective control concepts and provisions in UNCLOS and other international instruments have been made by the Legal and Technical Commission (see below) and more recently in a discussion paper issued by the ISA Secretariat.[2] Of relevance is the parallel with articles 91(1) and 94(1), UNCLOS.[3]

3.3 In the M/V "Virginia G" case, the ITLOS considered the issue of the existence of a genuine link between a flag State and its flagged ship under article 91(1).[4] The Tribunal reaffirmed the statement in the M/V "SAIGA" (No. 2) Case:

"the purpose of the provisions of the Convention on the need for a genuine link between a ship and its flag State is to secure more effective implementation of the duties of the flag State, and not to establish criteria by reference to which the validity of the registration of ships in a flag State may be challenged by other States."[5]

3.4 Furthermore, the Tribunal was of the view that:

"once a ship is registered, the flag State is required, under article 94 of the Convention, to exercise effective jurisdiction and control over that ship in order to ensure that it operates in accordance with generally accepted international regulations, procedures and practices. This is the meaning of "genuine link"."[6]

3.5 Similarly, the essence of effective control in a sponsoring State context derives from the right of a State to sponsor a domestic entity to conduct activities in the Area and to exercise effective control and jurisdiction over that entity to fulfil the State's international due diligence obligation to take all necessary and appropriate measures set out in its national legal and administrative framework in accordance with article 139(2), UNCLOS.

3.6 It is the certificate of sponsorship, and the statements contained in that certificate, as required by the regulations (a statement that the applicant for a plan of work for exploration is: (i) a national of the sponsoring State; or (ii) subject to the effective control of the sponsoring State or its nationals) which provides the necessary evidence of sponsorship. That is, effective control is to be determined by and exercised under national law. It is the right of all member States to sponsor contractors and it is not part of the role

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[1] Case No 17, Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area (Request for Advisory Opinion submitted to the Seabed Disputes Chamber), 1 February 2011 (SDC Advisory Opinion) at paras. 76 and 77.

[2] Discussion Paper, Effective Control, 01/2023.

[3] Article 91(1): Every State shall fix the conditions for the grant of its nationality to ships, for the registration of ships in its territory, and for the right to fly its flag. Ships have the nationality of the State whose flag they are entitled to fly. There must exist a genuine link between the State and the ship. Article 94(1): Every State shall effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag.

[4] Case No 19, The M/V "Virginia G" Case, Judgement of 14 April 2014, paras. 108 to 118.

[5] Ibid at para. 112.

[6] Ibid at para. 113.

of the Commission or the Council to call into question the exercise of the sovereign rights of a member State.

4 ISA and State context

4.1 There is lengthy history of effective control being considered by the Authority. The issue of effective control can be traced back to 2011 where the matter was referred to the Legal and Technical Commission (Commission) for its consideration.[7]

4.2 During its 2014 meetings, the Commission considered an analysis prepared by the ISA Secretariat on regulation 11.2 of the nodule and sulphide exploration regulations and the meaning of the term effective control.[8]

4.3 In its summary report to the Council, the Commission made the following observations and conclusions:[9]

- The onus is on the sponsoring State to ensure that the sponsorship criteria (the two-fold test, namely nationality and effective control) are satisfied before taking the decision to sponsor an entity which otherwise possesses the necessary qualifications.
- The certificate of sponsorship is evidence of the decision to sponsor by the State or States of nationality and of effective control (see also the SDC Advisory Opinion).
- Conditions and standards defining effective control fall under the competence of the State that exercises it. These conditions are a matter for the sponsoring State within its domestic legal system (see also SDC Advisory Opinion).
- Other legal contexts (such as the flagging of vessels and civil aviation) use the same critical criteria of incorporation, registration and granting of nationality (i.e. regulatory control) to determine effective control. The act of incorporation, or the conferring of nationality, combined with the undertakings given as a sponsoring State, would seem to be sufficient to establish "effective control" for the purposes of satisfying the sponsorship conditions.
- Information relating to the certificate of registration and the identification of the principal place of business and domicile of an applicant, together with the certificate of sponsorship, were critical for the Commission to satisfy itself that an applicant met the sponsorship requirements.
- It would not be necessary or advisable to further develop the current regulation 11.2.

4.4 In 2015, the Secretariat prepared a further paper summarising the position adopted by the Commission at its 2014 meetings.[10] Further analysis was requested by the Commission, particularly in light of the so-called "new ways of doing business" the Commission identified during its assessment of applications.[11]

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[7] The Council requested the Commission "to analyse regulation 11.2 of the Nodules Regulations and regulation 11.2 of the Sulphides Regulations, and to report thereon to the Council for its consideration". Decision of the Council of the International Seabed Authority, ISBA/17/C/20, 21 July 2011.

[8] Analysis of regulation 11.2 of the Regulations on Prospecting and Exploration for Polymetallic Nodules and Polymetallic Sulphides in the Area, Note by the Secretariat, ISBA/20/LTC/10, 5 June 2014. Regulation 11.2: "Where the applicant has the nationality of one State but is effectively controlled by another State or its nationals, each State involved shall issue a certificate of sponsorship".

[9] Summary report of the Chair of the Legal and Technical Commission on the work of the Commission during the twentieth session of the International Seabed Authority, ISBA/20/C/20, 16 July 2014.

[10] Issues related to the sponsorship by States of contracts for exploration in the Area and related matters, Note by the secretariat, ISBA/21/LTC/12, 9 June 2015.

[11] Report of the Chair of the Legal and Technical Commission on the work of the Commission during the twenty-first session of the International Seabed Authority, ISBA/21/C/16, 15 July 2015.

4.5 In 2016, the Secretariat issued a further note on issues related to the sponsorship of contracts for exploration in the Area, monopolization, effective control and related matters.[12] That note outlined certain "new models of business arrangements"[13] that had been highlighted by the Commission. These involved the existence of close associations or collaborations between developing States and their sponsored entities, with the business interests of entities registered in, or owned by nationals of, developed States.

4.6 During discussions in 2017 relating to setting up a legal working group to advance the development of a liability regime in the Area, the Commission recommended that the group also explore the concept of effective control in a liability context. This was reported to the Council.[14]

4.7 At its 2018 / 2019 meetings the Commission took note of a report submitted by the legal working group on liability for environmental harm[15], and following an informal workshop (March 2019) decided to explore the matter at its next sessions.[16]

4.8 No further discussion has taken place in the Commission on the issues raised above, likely due to time constraints as during this period the Commission focused on the development of draft standards and guidelines. Though the Commission remains seized of the matter as a rolling agenda item.

4.9 Thirty-one exploration contracts have been issued by the ISA to date. There is a discernible pattern of sponsoring State practice and understanding in the interpretation of effective control from the applications for the approval of plans of work for exploration examined by the Commission, and subsequently approved by the Council. In these, the Commission has acknowledged that the certificate of sponsorship is in its due and proper form when it states that applicant was duly incorporated and registered under the laws of the particular sponsoring State and was a national subject to the effective control or jurisdiction of the sponsoring State.[17]

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[12] Issues related to the sponsorship of contracts for exploration in the Area, monopolization, effective control and related matters, Note by the secretariat, ISBA/22/LTC/13, 21 June 2016.

[13] Distinguished from "new ways of doing business" relating to the take up of an equity option under the sulphide or crust regulations (thus reducing the contribution of reserved areas and potential impact on the Enterprise) as well as the selective use of reserved areas (non-contiguous applications).

[14] Report of the Chair of the Legal and Technical Commission on the work of the Commission at its session in 2017, ISBA/23/C/13, 9 August 2017. The legal working group was set up to advance the Commission's priority deliverables in the development of the draft exploitation code; priority deliverables No. 7 related to responsibility and liability (see Annex III Report of the Chair of the Legal and Technical Commission on the work of the Commission during the twenty-first session of the International Seabed Authority, ISBA/21/C/16, 15 July 2015).

[15] See https://www.cigionline.org/publications/legal-working-group-liability-environmental-harm-activities-area/.

[16] Report of the Chair of the Legal and Technical Commission on the work of the Commission at the second part of its twenty-fourth session, ISBA/24/C/9/Add.1, 15 July 2018 and Report of the Chair of the Legal and Technical Commission on the work of the Commission at the first part of its twenty-fifth session, ISBA/25/C/19, 25 March 2019.

[17] Report and recommendations to the Council of the International Seabed Authority relating to an application for the approval of a plan of work for exploration for polymetallic nodules by Tonga Offshore Mining Limited, ISBA/17/C/10, 8 July 2011; Report and recommendations to the Council of the International Seabed Authority relating to an application for the approval of a plan of work for exploration by Nauru Ocean Resources Inc., ISBA/17/C/9, 11 July 2011; Report and recommendations to the Council of the International Seabed Authority relating to an application for the approval of a plan of work for exploration by Ocean Mineral Singapore Pte Ltd, ISBA/20/C/7, 25 February 2014; Report and recommendations of the Legal and Technical Commission to the Council of the International Seabed Authority relating to an application for the approval of a plan of work for exploration for

4.10 To date, sponsorship has only been considered at the point of application for exploration contracts by ISA organs. Sponsoring States and sponsored contractors have relied upon the ISA's current practice at that point and throughout the terms of the corresponding ISA exploration contracts. They have premised their making applications for the approval of plans of work for exploitation based on effective regulatory control.

5 Avoiding presumptions regarding regulatory capacity

5.1 In its Advisory Opinion the SDC highlighted that the responsibility and liability of sponsoring States apply equally to all sponsoring States, whether developing or developed and that:

> "Equality of treatment between developing and developed sponsoring States is consistent with the need to prevent commercial enterprises based in developed States from setting up companies in developing States, acquiring their nationality and obtaining their sponsorship in the hope of being subjected to less burdensome regulations and controls. The spread of sponsoring States "of convenience" would jeopardize uniform application of the highest standards of protection of the marine environment, the safe development of activities in the Area and protection of the common heritage of mankind."[18]

5.2 While the situation envisaged by the SDC – of a regulatory race to the bottom – must be avoided, the implied presumption that sponsoring developed States – or developing States with larger economies – have or will put in place more appropriate regulatory mechanisms and controls should be questioned. Indeed, most of the developed States are yet to adopt dedicated legislation regarding deep seabed mining, while other developing States are at the forefront of considering and implementing domestic sponsorship regimes.

5.3 It cannot just be assumed that developing States are less regulated jurisdictions in these matters through the application of outdated and offensive stereotypes. In this regard, we highlight again that an effective economic control test would further privilege developed State regulatory regimes (and indeed could provide developed States with a hidden veto over most deep seabed mining by developing States) given their already dominant position in terms of capital and expertise.

6 National legislative context (Republic of Nauru)

6.1 Several member States have put in place national legislative and regulatory regimes for sponsoring deep seabed mining based on the effective regulatory control test. Nauru's implementation is a representative example of what this has entailed.

6.2 Nauru's International Seabed Minerals Act of 2015 (Act) was enacted to govern Nauru's engagement in seabed mineral activities in the Area and put in place the associated administrative functions. This includes instituting a clear requirement for effective control in a regulatory context. To this end, the Act set up a dedicated seabed minerals authority

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polymetallic nodules by UK Seabed Resources Ltd, ISBA/20/C/5/Rev.1, 9 September 2014, and Application for approval of a plan of work for exploration for polymetallic nodules by Blue Minerals Jamaica Limited, ISBA/26/LTC/4, 17 June 2020.

[18] At para. 159.

(the Nauru Seabed Minerals Authority or NSMA) to regulate sponsored entities and thus maintain effective control over them.

6.3 The Act references effective control in six provisions, as follows:

- **The objectives of the Act**, which include:
  - To establish a legal framework for the sponsorship, **and for the effective control**, by Nauru of contractors to undertake Seabed Mineral Activities in the Area (section 5(1)(a)).
  - To provide that Seabed Mineral Activities under Nauru's sponsorship in the Area must **be carried out under Nauru's effective control** in accordance with best international practice, and in a manner that is consistent with internationally accepted rules, standards, principles and practices, including Nauru's responsibilities under the UNCLOS and specifically Nauru's duty to protect and preserve the Marine Environment (section 5(1)(b)).
- **Jurisdiction**
  - By the enactment of the Act, Nauru recognises, *inter alia*, that where Nauru is a Sponsoring State, **the State's duty includes the effective control of any person** engaged in activities in the Area under its sponsorship, to ensure conformity of those activities with the UNCLOS and the Rules of the ISA (section 6(g)).
- **Objectives of the NSMA**
  - The NSMA must, *inter alia*, **maintain effective control** of Seabed Mineral Activities undertaken under this Act and the protection and preservation of the Marine Environment (section 10(b)).
- **Terms of the Sponsorship Certificate**
  - A Sponsorship Certificate will contain, *inter alia*, a statement that the Sponsored Party is: (i) a national of Nauru; or (ii) **subject to the effective control of Nauru** or its nationals (section 25(b)).
- **State responsibilities**
  - Nauru is responsible for taking all appropriate means **to exercise its effective control over Sponsored Parties** or any relevant sub-contractors engaged by the State, seeking to ensure that any Seabed Mineral Activities are carried out in conformity with the UNCLOS, the Rules of the ISA and other requirements and standards established by general principles of international law (section 30(b)).

6.4 Similar provisions relating to sponsorship and effective control, including maintaining effective control by a competent authority can be found in dedicated seabed minerals legislation for the Cook Islands, Fiji, Kiribati, Micronesia (Federated States of), and Tonga.[19]

7 Obstacles to the implementation of effective economic control

7.1 A change in the interpretation of effective control would require consideration of the impacts on existing exploration contracts. There are also several other related considerations – as well as potentially obtuse outcomes that need to be properly thought through that could result from such a change. These include:

[19] See ISA Comparative Study of the Existing National Legislation on Deep Seabed Mining https://isa.org.jm/files/files/documents/Comparative_Study_NL.pdf.

7.1.1 Moving to effective economic control would privilege developed and larger States given that they have access to more capital and technology for investment into activities in the Area. Given that for many developing States, participating in activities in the Area will rely upon obtaining foreign investment, linking sponsorship to effective economic control will provide the sources of that investment with an effective veto over developing States participation and indeed the industry. This would perpetuate longstanding inequalities, contrary to the intention in Part XI to benefit developing States and ensure their effective participation in activities in the Area (article 148, UNCLOS).

7.1.2 What would be the specific implications in connection with applications for reserved areas requiring an applicant to be a State Party which is a developing State, or any natural or juridical person sponsored by it and effectively controlled by it or by other developing State? If the applicant is effectively controlled by a developed State under a new interpretation, the sponsoring developing State would be denied access to the Area. It is difficult to imagine that this is an intended consequence.

7.1.3 Such a change would radically impact upon applications by current exploration contractors for exploitation plans of work. For example, a current exploration contractor – properly sponsored by one State – may be required to obtain the sponsorship of a second State, or even multiple sponsoring States, to apply for an exploitation plan of work. If such State or States refused to provide sponsorship, assumedly the application would be refused as the new sponsorship requirements would not be met. This would produce an unacceptable result. It would involve both sunk exploration costs and loss of profits and may expose the ISA to legal action in relation to those costs.

7.1.4 If a second, or multiple, sponsoring States are required to provide sponsorship based on an effective economic control test, this would likely create inconsistencies between the application of multiple regulatory regimes and legal systems to a contractor. This may give rise to disputes between sponsoring States and conflicts between their approaches to compliance and enforcement. This could be detrimental to the stability of the regulatory regime envisaged by UNCLOS and the sponsored entity. The position would be further exacerbated where there is a requirement for multiple "effective controlling" States.

7.1.5 If a second, or multiple, sponsoring States are required to provide sponsorship, this would likely reduce the economic benefits to the first sponsoring State as the regulatory risk / reward would need to be shared. For an existing developing sponsoring State, this would undermine the principles fostered in the Part XI regime.

7.1.6 If there are two or more sponsoring States and international due diligence obligations are breached, how will it be determined objectively which State is liable under international law, or if both States are liable, how will any monetary or other consequences be apportioned between them?

7.1.7 If one sponsoring State terminates the sponsorship arrangement e.g., the State deemed to have effective economic control, for cause or otherwise, the ISA's requirements regarding the termination of sponsorship would apply and the ISA contract may be terminated. Given the sponsoring State terminating sponsorship is one deemed having effective economic control, finding another sponsoring State may prove impracticable if not impossible unless the sponsored entity was to undertake a corporate re-organisation and move to another State. What rights would the contractor or the surviving sponsoring State have in such a scenario?

7.1.8 What would be the rules for determining the State of effective economic control in a multinational structure or in the case of public companies with shifting shareholdings. Options could include:

- Simply the main parent holding company?
- Intermediate holding companies (who may exert some degree of control or influence)?
- Economic ownership traced through to ultimate beneficial ownership? In which case, would a new certificate of sponsorship be required each time there is a change in a controlling shareholder involving a different nationality?

7.1.9 At what point or points in time would the test be applied? Solely at the point of application or throughout the term of the contract? What if there is a change in the location of a company's management and beneficial ownership during the term of the contract? What would be the legal status of the second sponsoring State or States identified at the point of application? What if the newly identified sponsoring State or States refused to provide sponsorship?

7.1.10 Testing for and auditing "effective economic control" would require more detailed consideration and evaluation of corporate structures, ownership, and contractual relations to determine precisely where such control ultimately sits and would also require the Council to intervene in the domestic regulatory affairs of States. This presents more of a challenge where an ultimate parent company is listed on a recognised stock exchange with multiple shareholders.

7.1.11 An alternative interpretative approach could drive less transparent structures. For example, a developing State establishes a SOE (for which there is automatic presumption of effective control) that either enters a joint venture arrangement with a commercial investor or engages such investor as a sub-contractor.

7.1.12 A change would disrupt existing State practice and domestic law provisions which have relied on and implemented an interpretation of effective control being one of effective regulatory control for over a decade.

7.2 As the above highlights, while alternative effective control considerations may be palatable to some stakeholders and have noble intentions behind them, there are many practical considerations and obstacles involved with such a change. There are also challenges in setting clear parameters that would provide the necessary certainty and stability to the regime. Some of these implications also have the potential to fundamentally undermine existing arrangements long relied on by sponsoring States and contractors, which also have enforceable legal rights that may be threatened by such a change.

7.3 Nauru's International Seabed Minerals Act of 2015 governs the sponsorship of activities in the Area. It was drawn up by international experts considering the Seabed Disputes Chamber's Advisory Opinion. Its provisions recognise and emphasise maintaining effective control over a sponsored entity by Nauru's dedicated seabed minerals regulator, the Nauru Seabed Minerals Authority. Other domestic legislation in the Pacific also contains similar provisions.

8 Effective control and liability

8.1 Several delegations and academic papers have linked the issue of effective control and the alternative viewpoint of effective economic control to the need for an effective liability mechanism for activities in the Area. Nauru agrees, as a member State to the ISA, that the development of an effective liability mechanism must be given priority attention. However, Nauru does not consider that a change in the interpretation of effective control is needed to achieve this nor would it necessarily guarantee a desired liability objective. These issues are distinct and need to be dealt with separately to ensure they are properly resolved.

8.2 Merely including additional sponsoring States in applications for a plan of work would do nothing to guarantee access to financial or other resources to meet potential liabilities. Regardless of the sponsoring States on an application, the Authority will always need to consider and ensure that the applicant (that is, the sponsored entity) has demonstrated how it will comply with the conventions under UNCLOS and the regulations, including in relation to financial capabilities.

8.3 In relation to liability, it would be preferable for the ISA in conjunction with sponsoring States to spend time reviewing the financial and market-related tools available to ensure access to future financial or other economic resources regarding compensation measures. This includes the ISA's environmental compensation fund, environmental performance guarantee and insurance requirements.

8.4 Mechanisms for consideration at the sponsoring State level should include the execution of instruments with parent companies (where relevant) to indemnify sponsoring States and guarantee the financial obligations of sponsored subsidiary entities, as well as the provision of security deposits under national law. This is the approach being taken by Nauru and should not be subject to regulation by the Council.

9 Summary points

9.1 The effective regulation of activities in the Area by the ISA and sponsoring States is in the interest of humankind.

9.2 Accordingly, small island developing sponsoring States such as Nauru have geared their domestic legislation around their international due diligence obligations reflected in UNCLOS, including the requirement to maintain effective control over sponsored entities to provide for such effective regulation in conjunction with the ISA. While still evolving from an administrative perspective, Nauru's legal framework is designed to secure compliance by its sponsored entities with the rules of the ISA and thus ensure Nauru has effective (regulatory) control under Nauru's International Seabed Minerals Act. To this extent, Nauru has followed and relied upon the guidance provide by the SDC in its Advisory Opinion to elaborate on the conditions of sponsorship through its domestic law.

9.3 The ISA has an established precedent of using effective regulatory control as the test for State sponsorship. In this context, Nauru agrees that effective control is more than simply establishing a legal entity in the sponsoring State. It entails incorporation or registration of a substantive entity within a jurisdiction, combined with undertakings from the sponsoring State and its active and dynamic control or ability to exercise such control over a sponsored entity.

9.4 Moving from this to an effective economic control test mid-stream would undermine the predictability and certainty of the existing exploration regime. It would also present legal risks for the ISA given the potential impact on sponsored contractors which would be affected by such a change.

9.5 There is a real danger that the issue of effective control, and its interpretation is overengineered to the point that developing States wishing to sponsor commercial entities to conduct seabed mineral activities may be disadvantaged or even prejudiced given their general lack of access to technology and capital to conduct such activities which is realistically only available through the sponsorship of entities backed by commercial investors often located in developed States. Nauru considers that the adoption of an effective economic control interpretation would undermine the effective participation of developing States in activities in the Area, contrary to the Convention (article 148, UNCLOS).

9.6 The issue of liability and access to funds to remedy environmental damage should not be confused with the primary issue of what does "effective control" require in the context of UNCLOS's sponsorship requirements. Nauru recognises the importance of ensuring there is an effective liability mechanism in place for exploitation activities and that further development of the liability regime for activities in the Area is required. However, even if effective control was interpreted as effective economic control, this would not necessarily ensure there are sufficient funds available to remedy potential environmental damage. A discussion of the appropriate tools and instruments to be put in place would have greater merit than a discussion over effective control. Such discussion would also ensure an even-handed approach across all ISA contractors and applicable sponsoring States.

9.7 Finally, a degree of international common sense needs to be applied to the interpretation of effective control considering the above discussion. Keeping the basis for effective control as one of regulatory control has clear merit. Any other approach to the concept of effective control must be carefully considered in terms of its practical application and result. Setting parameters for effective economic control may be more challenging and could lead to an inherent bias in the application of the regime towards developed and richer States. The fundamentals of regulation need to be addressed across all ISA and State regulatory bodies, this should form a key focus of the Authority's discussions.

ENDS.