



GUIDELINES

NEGOTIATIONS AND CONTRACTUAL
DEALINGS WITH POTENTIAL OR
EXISTING SPONSORED ENTITIES





GUIDELINES FOR NEGOTIATIONS AND CONTRACTUAL DEALINGS WITH SPONSORED ENTITIES

These Guidelines incorporate guidance to officials of current or potential Sponsoring States with responsibility for negotiations and contractual dealings with potential or existing sponsored entities relating to the sponsorship of exploration in the Area.

Prepared under the
ISA-UNDESA-NORAD Abyssal Initiative for Blue Growth

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Foreword

The responsible governance of mineral resources in the international seabed Area sits at the intersection of international law, environmental stewardship and long-term economic opportunity. As States assume responsibilities as sponsors of exploration and exploitation activities under the United Nations Convention on the Law of the Sea, the decisions they make, and the quality of governance depend significantly on how well they negotiate and manage their contractual arrangements. These Guidelines for Sponsoring States on Negotiations and Contractual Dealings with Sponsored Entities provide States with the practical tools to navigate this multifaceted landscape and meet those responsibilities by ensuring agreements are robust, transparent and aligned with international obligations.

The timing of these Guidelines reflects where the international community currently stands. The finalization of the regulatory framework, the “Mining Code,” marks a pivotal inflection point in international seabed governance. The regulatory framework demands that Sponsoring States actively engage in translating international requirements into effective oversight, balancing operational, environmental and commercial considerations throughout the negotiation and implementation of contracts, and act as informed principals who understand the full scope of their rights, responsibilities and liabilities. Having a clear understanding of what to negotiate, how to structure an agreement and how to manage the relationship over the long term is essential groundwork that States should undertake well in advance. These Guidelines represent the Authority’s commitment to Sponsoring States in commanding the knowledge and capacity to exercise effective oversight.

For many Member States, particularly Pacific Small Island Developing States and other emerging Sponsoring States, entering sponsorship arrangements represents a strategic step towards sustainable blue growth. Successfully negotiating agreements require careful planning, interdisciplinary expertise and a clear understanding of the regulatory, technical and environmental dimensions of exploration and exploitation activities. These Guidelines offer direction on forming negotiation teams, identifying capacity gaps and structuring contracts with robust monitoring and performance evaluation mechanisms to ensure durability over the lifespan of the contract. In my tenure as Secretary-General, I have witnessed firsthand the urgency with which Sponsoring States seek guidance on these complex arrangements, and the significant capacity gaps that can leave smaller economies at a disadvantage at the negotiating table. This resource addresses precisely that challenge.



These Guidelines highlight practical approaches for States to maintain high standards of transparency and corporate responsibility while achieving legal and operational certainty. By emphasizing careful preparation, risk management and adherence to international best practices, it equips negotiating teams with a structured, principled framework for engagement.

As the ISA's 171 Member States and the European Union continue to make progress on the Mining Code, the relationship between Sponsoring States and their Contractors demands greater rigor and transparency. These Guidelines equip Sponsoring States to negotiate with foresight and authority, contributing meaningfully to sustainable development, environmental protection and the long-term integrity of the deep ocean.

These Guidelines were developed under the “Abyssal Initiative for Blue Growth,” a capacity development project jointly announced as a Voluntary Commitment by the United Nations Department of Economic and Social Affairs (DESA) and the International Seabed Authority (ISA) at the first United Nations Ocean Conference (UNOC1) in 2017, under the project “Bridging capacity gaps in the implementation of the 2030 Agenda, with a particular focus on SDG 14,” with additional support from the Norwegian Agency for Development Cooperation (NORAD). The Authority expresses its sincere appreciation to DESA and NORAD for their partnership and support.

The ISA now assumes full responsibility for the continued development and dissemination of the Guidelines under the Deep Seabed Sustainable Blue Growth Initiative, as part of its mandate to strengthen the institutional capacity of Sponsoring States across all regions. Their application will support States in establishing robust and balanced agreements, enhancing effective participation, and strengthening their capacity to ensure responsible resource management and the effective governance of activities in the Area. This is a moment that calls for both ambition and pragmatism, and I believe Sponsoring States are ready to meet it.

Let us advance with prudence, strategic foresight and a shared commitment to safeguarding the deep seabed for future generations.

Leticia Carvalho

Secretary-General
International Seabed Authority

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The Small Print

These Guidelines have been developed to support the work of Sponsoring State officials in their negotiations and contractual dealings with sponsored entities or entities seeking sponsorship of activities in the Area.

They contain general advice only and should not be relied upon as a substitute for appropriate legal and technical advice in such dealings. It is distributed without warranty of any kind, either express or implied.

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About These Guidelines



About These Guidelines

Nature of the Guidance Provided

These Guidelines have been developed as a part of the *Abyssal Initiative for Blue Growth Project* to provide States currently Sponsoring activities in the Area or considering such sponsorship with practical guidance in their dealings with potential or existing sponsored entities.

They should be read in conjunction with the *Toolkit on Role and Responsibilities of States Sponsoring Activities in the Area (the Toolkit)*, also prepared under the *Abyssal Initiative for Blue Growth Project*.

The Guidelines do not provide comprehensive content for each and every aspect of a negotiation process but provide an overview of the main points that should be considered by State officials in preparing for negotiations and developing processes for the administration and management of a sponsorship relationship. This will also help identify the necessary skills and expertise required to execute these activities at a national level.

The guidance presented under each content heading is short and concise and is intended to provide some structure for pre-negotiation preparation, and the negotiation and post negotiation processes.

Who Should Use These Guidelines

These Guidelines are targeted principally at government officials and their advisers who will be involved in negotiating the terms of any sponsorship arrangement and ongoing contractual dealings with a potential or existing sponsored entity.

These Guidelines may also be considered by potential or existing sponsored entities in developing their approach and interest positions in any discussions with a Sponsoring State or potential Sponsoring State in a fair, transparent and responsible manner.

While these Guidelines have been prepared for the benefit of Pacific Small Island Developing States (**P-SIDS**) Sponsoring States, potential or existing, they may be considered by other Sponsoring States or potential Sponsoring States.

When and How to Use These Guidelines

The Guidelines are divided into three sections.

The first section (Pre-Negotiation) provides matters for States to consider prior to any formal negotiation process with a potential or existing sponsored entity. While titled Pre-Negotiation, the section also includes points for consideration by a State which are relevant to a policy decision whether to sponsor activities in the Area, as well as for any pre-application discussions between a potential applicant for a certificate of sponsorship and a State.

The second section (Negotiation) provides matters to consider in relation to a negotiation process on matters relating to the sponsorship arrangement (see comments on “sponsorship agreement” below). The timing for such negotiation will be a matter for the parties, and likely prior to the issue of a certificate of sponsorship.

The third section (Contractual Dealings Post Sponsorship) deals with matters relating to the ongoing management of the sponsorship arrangement.

The annex to the Guidelines contains headings for the possible content of a

sponsorship agreement for consideration by Sponsoring States and potential ones.

The Role of a Sponsoring State

The specifics relating to the international legal obligations placed on States sponsoring activities in the Area are set out in the Toolkit.

While any State, in the context of activities in the Area, is not the owner of the mineral resources of the Area, many of the best practices and principles relating to the negotiation of terms and maintenance of ongoing contractual relationships in extractive industries can be applied to a Sponsoring State – sponsored entity scenario. After all, the activities underlying any contract concluded with the International Seabed Authority (ISA) – with which a Sponsoring State must ensure compliance by its sponsored entity – relates to the exploration which involves recovery of the mineral resources as samples for the purpose of testing.

Equally, negotiating parties should be mindful of commitments made by States toward the delivery of the UN Sustainable Development Goals.

Existing Sponsorship Arrangements

Sponsorship arrangements are already in place with four P-SIDS. These Guidelines do not offer any specific advice in connection with the existing terms of any sponsorship arrangement or sponsorship agreements. The specific terms of any sponsorship agreement, and any renegotiation thereof is a matter between the parties. That said, these Guidelines may prompt a re-examination of such arrangements to ensure that mutual objectives remain current and that the terms of any agreement are fair and

reasonable, not least as a result of the passage of time, developments at an international level and increased knowledge and understanding of seabed mineral activities.



Section One: Pre-Negotiation



Section One: Pre-Negotiation

Section Objective

The objective of section one is to provide State officials with a number of points for consideration prior to the conduct of initial discussions (pre-application) or formal negotiations with a potential sponsored entity.

1 Preparing for Negotiation

Making adequate preparation and having prior knowledge of contract negotiations, industry and potential sponsored entity background will give State officials a solid starting point in being ahead of the game in securing added value from a sponsorship arrangement, and in clarifying mutual expectations.

2 Identify a Negotiating Team

Identify the lead agency for negotiations. In the case of P-SIDS, this will likely be the dedicated seabed minerals authority set up under national law. Such authority should consider setting up a negotiating team to conduct negotiations. The team may be comprised of technical experts and officials from other government departments or agencies and may include external and independent expertise where this is considered necessary or appropriate (see below).

Expertise should include legal, economic, financial, and environmental personnel. Aside from ensuring that negotiations and any subsequent agreement are consistent with the legal framework, including financial obligations on a potential sponsored entity, this expertise will assist with any due diligence process, in understanding the risks

and opportunities inherent in the potential sponsorship arrangement, and in managing a smooth negotiation process.

Government departments are also likely to have in place well-established procurement policies and procedures, and procurement officers, or a centralised procurement function. Bringing this expertise into the mix will be beneficial.

Bringing together the negotiating team in a workshop setting to brainstorm and map out the specifics on the conduct and approach of the team will be invaluable, including assigning clear roles and responsibilities for each team member, ensuring that work assignments are coordinated and that there are mechanisms for ongoing and continued dialogue. Such a workshop could be facilitated by an external independent expert with expertise in contract negotiation or extractive industry background.

The extent of the mandate of the negotiating team should also be clear, with government approval mechanisms identified.

3 Identify and Address Technical Capacity Gaps

Initial team meetings should identify any gaps in required technical expertise at a national level. Where such gaps exist, look to fill these with regional or international organisation support or individual expertise in order to assist and guide the negotiation team in making informed decisions on the approaches to be taken in the negotiation process.

Care should be exercised in the selection of experts, not least ensuring there is no conflict of interest. Appropriate terms of reference should be concluded with an external adviser, whose engagement should

be of a sufficient length to build national capacity.

There is also a wide availability of online courses (e.g., through massive open online courses) that could be considered individually or as a team, for example in essential negotiation skills.

4 Understand the Role and Responsibilities of a Sponsoring State

It is important that the role, responsibilities and nature of a Sponsoring State are fully understood prior to a negotiation process. This will help map out the practical interface with, and expectations on any future sponsored entity in terms of administration and management of the sponsorship arrangement, including compliance assurance mechanisms. This should also include the likely interface between the Sponsoring State, sponsored entity and ISA.

5 Have a Working Knowledge of ISA Rules, Regulations and Procedures

Linked to point 4 above, a working knowledge of ISA rules, regulations and procedures is fundamental to the role and responsibilities of a Sponsoring State. ISA rules govern principally the relationship between it and a Contractor, and the Sponsoring State must ensure compliance with those rules and assist ISA in discharging its regulatory functioning. ISA rules also incorporate obligations on a Sponsoring State which must be clearly understood.

6 Adopt a Long-Term Vision and Implementation Strategy

It should be recognised that once a sponsorship arrangement is concluded, it is the starting point of a long-term relationship. It is likely that a potential sponsored entity will seek, and wish to conclude an agreement

that covers sponsorship for both exploration and exploitation activities under an ISA contract. This will also be beneficial to the Sponsoring State as it will seek to, amongst other things, secure financial and other economic benefits arising from the exploitation phase.

Consequently, in the case of the exploration for, and exploitation of polymetallic nodules, sponsorship could last for a period of potentially +-30 years.

Adopting a vision which makes mutually beneficial long-term interests the key factor in negotiations, together with the necessary contract and relationship management process will produce a viable partnership.

Such long-term vision should consider an overall objective to ensure that the relationship between a Sponsoring State and its sponsored entity is structured in a way that promotes long-term sustainable development, both at the international and national levels through and UN Sustainable Development Goals and UN Global Compact.

Including non-government stakeholders in the development of the vision and strategy would be beneficial.

7 Ensure a Workable National Legal Framework is in Place

The principal regulatory role of the Sponsoring State is to ensure its effective control of a sponsored entity through appropriate administrative mechanisms to secure effective compliance by the sponsored entity with the terms of an ISA contract and ISA rules, regulations and procedures, and to assist ISA in exercising control over activities in the Area.

To a large degree the parameters for a national legal framework are established in international law through the United Nations Convention on the Law of the Sea (UNCLOS) and the Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982. Therefore, such a framework must be consistent with them. However, the implementation of the framework rests with the Sponsoring State.

In evaluating regulatory risk, a potential or existing sponsored entity will assess whether a State has a fair, transparent and clear legal framework in place, with institutions that administer and implement the law with transparency and integrity, including appropriate dispute resolution mechanisms. Transparency of a legal framework provides safeguards for all stakeholders. Matters relating to the administration and management of, including rights and obligations under a sponsorship arrangement, should be set out in national laws, rather than a sponsorship agreement or similar instrument.¹

8 Prepare a Model Sponsorship Agreement

As highlighted above, a robust national legal framework should govern and regulate the main components of the relationship between a Sponsoring State and sponsored entity. Aside from transparency safeguards, national laws leave less room for negotiating

the fundamentals of a sponsorship arrangement.

That said, there will be components of the sponsorship arrangement that require individual negotiation and agreement in writing, including additional terms and conditions, for example, relating to the methodology for calculating payments under the sponsorship arrangement or additional reporting or monitoring requirements, or to supplement the content of regulations.

Ideally, a model sponsorship agreement (where required) should be incorporated into the legal framework e.g., regulations. Where this is not the case, a draft agreement should be prepared and be based on the requirements set out in any legislation.

The annex to these Guidelines sets out possible content headings for a sponsorship agreement which may be revised depending on the underlying content of national laws. The items listed may also help structure points for discussion and negotiation.

9 Assess Ease of Doing Business in State

In addition to the dedicated legal framework for sponsorship, consideration should be given to other statutory requirements within the Sponsoring State that will be applicable to a potential sponsored entity, and assess the ease of doing business at the national level in terms of administrative compliance and associated costs.

¹ The Seabed Disputes Chamber of the International Tribunal for the Law of the Sea in its Advisory Opinion of 11 February 2011 highlighted that a mere contractual approach would be

inadequate in satisfying the obligations of a Sponsoring State and would lack transparency (see paras. 223–226).

10 Understand the Industry Sector, Its Main Drivers and Potential Risks and Opportunities

A sponsorship arrangement involves the sponsorship of an entity engaged in an extractive industry. It will be beneficial to research industry background, and its main drivers prior to any assessment of a sponsorship application or negotiation of a sponsorship arrangement. This will aid a better understanding of the sector, development potential, terminology employed and the risks and opportunities presented.

Uncertainty and risk will be present at all stages of the exploration and exploitation life cycle, including uncertainty in data and information. The nature and degree of these risks will vary at different times during the life-cycle; they will be context dependent as well as industry and project-specific. To this end, it is important that State negotiators understand the mining-life cycle (see Toolkit).

Identifying and understanding the main risks, opportunities and likely effects of the proposed activities as part of the application and subsequent negotiation process will be important, as well as discussing proposed mitigation and management measures to address the effects and risks, whether they be environmental or otherwise.

While one goal of any negotiation will be to ensure that a balanced financial and economic deal is struck, promoting the highest standards of environmental protection, labour standards, human rights, health and safety will also be a key consideration – and how the potential sponsored entity intends to deliver on such standards.

11 Consider Options for the Structure of the Sponsorship Arrangement

While a detailed examination of the potential corporate structure of a sponsorship arrangement is outside the scope of these Guidelines, this is an area that should be considered prior to discussions with a potential sponsored entity, and expert advice sought on their individual merits.

Structures could typically include: 1) the sponsorship of a private company (registered in the Sponsoring State); 2) the sponsorship of a joint venture, also registered in the State, in which the State holds an interest or equity stake alongside a technology partner, or; 3) the sponsorship of a State-owned enterprise (which engages a technology partner through a joint venture arrangement or as a sub-contractor).

While a preference may arise within the State for a preferred structure to be adopted, this will also need to align with the preference of the potential sponsored entity.

While the simplicity of any structure in terms of its administration and management by the Sponsoring State, as well as limiting exposure to liability will be influencing factors, the advantages and disadvantages to each option should be explored.

12 Be Well Informed: Carry Out an Initial Due Diligence Exercise

The formal application assessment process will deal with a comprehensive due diligence process on an applicant (assessment of financial resources and technical capability, beneficial ownership and operating record etc.)

Before commencing any discussion, it is worth investing time to undertake an initial due diligence (profiling) by way of a desktop review of the potential sponsored entity, its

leadership team, its ways of doing business, including ethical business practices and its track record on environmental practices. This will help assess whether the entity, and its leadership is one that the State can do business with.

Public searches can be performed through Google or alternative web browsers. Where the potential sponsored entity is part of a multinational group, accessing the group's website and public filings can reveal helpful background information on their operating structures, performance record (record on labour practices, human rights, environmental protection) and commitment to sustainable development principles. Assessing whether the potential applicant or sponsored entity is a member of any industry associations or subscribes to any codes of practice or international initiatives, for example, the United Nations Global Compact, will also be helpful background.

13 Scope the Objectives for Negotiation: What Will Be Negotiated and Why

Be clear on what government's key negotiating objectives are and what will be negotiated and anticipate the needs of the potential sponsoring entity. Be prepared by having a solid understanding of the financial implications of the issues for both parties, including compliance and administrative costs.

As highlighted above, if there is a comprehensive set of rules in place, as well as clear rules at ISA level, it is unlikely there will be a need to negotiate the basic rules. However, be clear on what is negotiable and what is mandatory.

The negotiating team should assess these negotiating objectives, and gather these in a

document, setting out the underlying interests and points for negotiation.

Needless to say, the negotiating team should keep within its mandate and seek appropriate approval for any positions that are developed outside mandate.

14 Assess the Revenue Earning Potential

Aside from other benefits that may arise under a sponsorship arrangement such as capacity development and training, the negotiating team will need to assess, with appropriate expert input, what it seeks to negotiate in terms of financial payments. This will include application and annual administration fees (which should be determined on a cost recovery in national laws) as well as a return on future exploitation. This is provided for by P-SIDS Acts through sponsored entity liability for a seabed mineral or commercial recovery payment (like a royalty or production charge) or income tax on future sponsored entity profits. See additional comments under section two.

As a starting point consider the financial terms for ISA contracts. This will give a solid understanding of the inputs, drivers and principles underlying the financial payment regime and how monies are allocated between the various actors.

15 Assess the Robustness of State Fiscal (Tax) Laws, Revenue Administration and Collection

Depending on how a sponsorship deal is finally structured in fiscal terms, an assessment of the existing fiscal regime and the capacity to administer the regime should be made. Given the nature of exploration and exploitation, there may be a need to adjust a national tax regime e.g., the methodology for deducting costs for tax purposes.

The tax regime must also be responsive to intercompany pricing issues (transfer pricing) where a potential sponsored entity is part of a multinational group and pays for goods and services sourced from other group-controlled entities.

Equally, accounting standards and methodology for the accounting and reporting of revenues and costs should also be considered. This may already be covered under national rules or alternatively discussed with an applicant as to what standards they propose to adopt. Such standards should be consistent with internationally accepted accounting principles. The ISA Legal and Technical Commission have issued guidance in connection with the reporting of actual and direct exploration expenditure.²

Also ensure that a national entity's accounting records are subject to an independent audit – likely through national company law requirements – preferably by a reputable, well-established accounting and auditing firm with international standing.

16 Transparency Mechanisms

As part of the negotiation process, and ongoing contract management, it will be important to identify relevant stakeholders, particularly at the national level. Stakeholders can contribute meaningful dialogue to potential discussions by providing knowledge and perspectives on any proposed sponsorship arrangement. To this end, a stakeholder communication and engagement plan should be put in place.

² Recommendations for the guidance of Contractors for the reporting of actual and direct exploration expenditure, ISBA/21/LTC/t1.

17 Preliminary Discussions with the International Seabed Authority

Sponsoring State officials should hold preliminary discussions with ISA in connection with any potential or proposed sponsorship application and subsequent application to ISA for the approval of a plan of work for exploration or exploitation. This will be of benefit to understanding the timelines for the respective application processes, as well as to clarify information and documentation requirements of ISA – which should form part of an application for a Certificate of Sponsorship and avoid unnecessary duplication in documentation requirements.

18 Maintain a Database of Publications and Useful Materials

Having a database of technical and other publications easily accessible by team members will be valuable, including best practice or other guidance from other national regulators, as well as the technical studies and other publications made available by the ISA. There now exists a plethora of material in connection with seabed mineral activities, and this will continue to grow. The Authority's national legislation database hosts a collection of laws, regulations and measures submitted by its Member States.³

It is also valuable to have access to background information on supply and demand for critical EV metals, and an understanding of the risks and opportunities faced by the mining sector generally.

³ <https://isa.org.jm/national-legislation-database/>

Knowledge and background are keys in negotiations and in the ongoing responsibilities of the Sponsoring State where a sponsorship arrangement is concluded.

19 Identify and Mitigate the Risks of Corruption

Corruption risks can and do arise at any point in the extractive value-chain, with adverse impacts on the public interest and undermining trust in public institutions, and have the potential to reduce the level of revenue collected.

An assessment of the anti-corruption legal and institutional frameworks and processes should be considered, and where applicable improved in the light of best international practice.

From a P-SIDS perspective revenues will be paid into a ring-fenced seabed minerals fund. Appropriate rules should be crafted for the management of these funds.

Section Two: Negotiation

Section Objective

The objective of this section is to provide State officials with a number of points for consideration during the conduct of formal negotiations with a potential sponsored entity.

20 Establish an Agenda for Meetings

Putting together a comprehensive agenda detailing the respective points for discussion will provide for a more structured and effective meeting.

21 Draft the Minutes of All Your Meetings

While common sense, it is important that minutes are prepared for each meeting and are signed by authorized representatives of each party. This way, minutes can be circulated to through the Sponsoring State's chain of command to keep them fully informed as negotiations proceed and advise on any particular interest issues or positions.

22 Recognise the Long-term Nature of the Sponsorship Arrangement

One of the important aspects of a negotiation is to establish trust and rapport during discussions. The sponsored entity-Sponsoring State relationship is potentially long-term in nature; discussions should seek to build mutual trust for a long-term relationship through transparent and constructive dialogue – and to fulfil agreed objectives based on shared and realistic expectations through the life-cycle of the contract.

That said, this does not prevent officials from asking searching and direct questions, particularly when the bargaining power,

experience or expertise of the potential sponsored entity is much stronger, and there may be need to read between the lines on responses and positions between the lines for hidden meaning. Questions should seek to uncover issues at an early stage.

In terms of contractual arrangements, the OECD refers to the concept of durable contracts and has established a set of guiding principles for durable extractive contracts. As highlighted in the opening remarks to these Guidelines, while a Sponsoring State is not the mineral resource owner, the principles are of relevance and interest to both potential or existing Sponsoring State and potential or existing sponsored entity.



OECD GUIDING PRINCIPLES FOR DURABLE EXTRACTIVE CONTRACTS

- I. Durable extractive contracts are aligned with the long-term vision and strategy, defined by the host government on how the extractive sector can fit into and contribute to broader sustainable development objectives.
- II. Durable extractive contracts are anchored in a transparent quality long-term relationship and operational partnership between host governments, investors and communities, to fulfil agreed and understood objectives based on shared and realistic expectations that are managed throughout the lifecycle of the project.
- III. Durable extractive contracts balance the legitimate interests of host governments, investors, and communities, with due account taken, where relevant, of the specific rights of indigenous peoples recognised under applicable international and national law.
- IV. Durable extractive contracts seek to maximise overall value, including economic, social and environmental outcomes to be drawn from the development of the host country's resources. To the extent not covered by the applicable law, durable extractive contracts provide for the identification and management of potential adverse environmental, health, safety and social impacts of the extractive project and establish clear roles and responsibilities for the host government and the investor for the prevention, mitigation and remediation of those impacts, in consultation with affected communities.

V. Durable extractive contracts are negotiated and based on continuing sharing of key financial and technical data to build a common understanding of the performance and of the main risks and opportunities of the project throughout its life-cycle.

VI. Durable extractive contracts operate in a sound investment and business climate and should be underpinned by a fair, transparent and clear legal and regulatory framework.

VII. Durable extractive contracts are consistent with applicable laws, and anticipate that host governments may introduce laws, regulations or policies that: (a) are not arbitrary; (b) reflect internationally recognised standards and/or good practices generally accepted from time to time in the industry; with due regard taken of the consequences of any substantive adverse impact on the performance of the project.

VIII. Durable extractive contracts are underpinned by a fiscal system that provides for a fair sharing of economic rent between the investor and the host government, taking into consideration the risks and potential rewards. A regime with automatic adjustments for the government take to prevailing market conditions (variable with commodity price, production volume, resource quality, or project profitability) reduces the incentives for either party to seek re-negotiations of terms. Due regard should be given to providing assurance of fiscal receipts to the host government for each year of commercial resource production.

A sponsored entity should also be looking to minimise its risk exposure and seek to develop a long-term relationship with a Sponsoring State that is stable in terms of its laws, institutions and regulatory functioning and consequential security in the sponsorship arrangement. This could also extend to the role played by the Sponsoring

State at ISA level, and its active engagement with ISA.

That said, it is important to explore the potential sponsored entity's demonstrated commitment to a long-term investment in the Area from exploration to exploitation. As with land-based extraction, speculators may exist who are looking to sell on an exploration contract with ISA where mineral resources have been appropriately demonstrated. Within a national jurisdiction that houses many exploration or mining tenements, this risk can be absorbed. In a Sponsoring State context, an ISA contract could be assigned to another third party (subject to ISA approval); this third party may have secured sponsorship from a new country with the result that any current sponsorship arrangement is terminated.

23 Avoid Departing from National Laws

As highlighted in section one, having a comprehensive legal framework in place limits the scope of individual negotiations. Unless there is a sound rationale it is not generally good governance to negotiate departures from applicable domestic national law.

First, this would require formal changes to be made in the law itself by Cabinet or Parliament. Second, this practice may encourage corruption or other forms of mischief to occur. Third, it can create mistrust among the stakeholder community.

24 Set the Negotiation Framework for a Mutually Beneficial Relationship

The objective for the Sponsoring State in any negotiation is to reach a fair deal for the State and its citizens, and to seek long-term value from the sponsorship arrangement through financial payments and otherwise.

This will require some flexibility in interest positions and understanding the goals and expectations of the sponsored entity. The alignment of interest positions will produce mutually successful outcomes in the sponsorship arrangement.

25 Content and Issues that May Arise During Negotiation

The following is a non-exhaustive list of potential issues for discussion or negotiation in the context of a sponsorship arrangement, including:

- Proposed timelines for activities, including application to ISA
- Duration of sponsorship arrangement and the phases to be covered, including renewal (may be determined by regulations)
- Financial terms: fees and other payments (see point 26 below)
- National content requirements: hiring, capacity development and training, technology transfer, local procurement (where applicable) and other benefits to the local community
- Sustainable development objectives
- Compliance requirements and performance monitoring: material obligations
- Health, safety and environmental protection
- Labour practices
- Gender equity and equal opportunity issues
- Interface / cooperation with ISA and other actors (e.g., flag States)
- Financing arrangements (see point 27 below)
- Security deposit (see point 28 below)
- Corporate structure
- Use of sub-contractors (see point 29 below)

- Management of revenues
- Stakeholder communication and engagement
- Risk and opportunity (see point 30 below)
- Indemnification (see point 31 below)
- Insurance
- Confidential information
- Renegotiation criteria (see point 32 below)
- Dispute resolution (see point 33 below)
- Press releases
- Accounting standards and reporting
- Auditors
- Costs of compliance

The negotiating team will need to do some homework on each of these points.

26 Financial Terms Under a Sponsorship Arrangement

This is a tricky area, and there exists little in the way of a workable precedent to establish a fair rate of return for a Sponsoring State.

At the time of writing the financial terms under ISA rules has yet to finalised, so it is challenging for any potential sponsored entity to fully assess the impact of an overall financial mechanism. That said, the international regime does have fiscal precedents from a land-based mining context to draw upon.

As a starting point, the financial model prepared for ISA and accompanying reports should be reviewed and the principles underlying the model and how monies are allocated between the various actors

understood. This will also give an insight into the challenges of setting financial terms.

Administrative fees (application, annual fees) should not prove particularly problematic. Fees should not be onerous and seen as a revenue-making opportunity. They should ideally be based on a cost recovery mechanism, the principles for which, and the services and functions provided, clearly set out in national laws.

In addition to fees levied on a sponsored entity, there is also the financial cost of complying with the legal framework, as well as capacity and other development initiatives agreed too.

That's the relatively easy part.

Under the P-SIDS Acts, the following sponsorship payments (in connection with exploitation) are set out:

- A commercial recovery payment (to be prescribed by regulations or set out in a certificate of sponsorship or sponsorship agreement)⁴
- Payment of royalties (as well as taxes and sponsorship fee) with the calculation to be set out in the sponsorship agreement⁵
- A seabed mineral recovery payment specified in a written agreement, taking into account the set-up, exploration, and exploitation costs incurred by the sponsored party, and based on a percentage of the latest market value of the metal content contained in the seabed minerals to be extracted.⁶

⁴ Section 91(2)(b) Seabed Minerals Act 2014 (Tonga).

⁵ Section 91 Seabed Minerals Act 2017 (Kiribati).

⁶ Section 153(4)&(5) Seabed Minerals Act 2019 (Cook Islands), and Section 40(4)&(5) International Seabed Minerals Act 2015 (Nauru).

The concept of a commercial recovery payment recognises that a Sponsoring State is not the resource owner, and it cannot levy a royalty per se. Any payment mechanism that is based on the market value of the metal content will be responsive to commodity prices, though a methodology for its calculation will need to be set out.

Other royalty types in a land-based fiscal environment, include royalties measured by volume (e.g., a fixed amount for say each tonne extracted), and royalties linked to a company's profitability.

National sponsored entities may also be subject to national taxes on profits made, unless the particular investment vehicle set up by a sponsored entity is exempt from taxation or special terms are negotiated. If the State has an equity share in the sponsorship arrangement (e.g., a joint venture) a percentage of any profit (after any taxes) from the arrangement will accrue to the State.

Where the details (rates, method for calculation, frequency of payment and reporting) of any recovery payment or taxes are set out in the law, there is limited room for negotiation. Where this is not the case, payments will need to be negotiated.

The goal for the Sponsoring State is to secure a fair financial return which is commensurate with both the risks borne by State (see point 29 below) and the services it provides to the sponsored entity (outside of any fee arrangement), as well as taking account what other financial benefits have been proposed. The trick for negotiators is to know how much they can get (fairly) without putting any sponsorship deal at risk.

With given tools, having a range of payments in mind will be beneficial for negotiation as a starting point.

Where an offer is put on the table by the potential sponsored entity, understand what that will mean in discounted revenue flows over the period of the sponsorship arrangement. Ask the representatives of the potential sponsored entity to share their financial model to understand their assumptions and the financial impact of payment terms at ISA and Sponsoring State levels. Sense check the assumptions and see if there is further room to negotiate. Just remember that financial models are only prediction tools with a given range of assumptions. Given the current uncertainties as to how the economics of seabed mineral recovery will play out, there may be upsides or downsides in the realistic scenarios. That said, models do tend to factor in contingencies and may be conservative in their predictions.

With a given set of payment terms negotiated, test the waters as to the possibility of their renegotiation at a future date. As highlighted above, sponsorship arrangements and their underlying activities are long-term in nature, and circumstances will change. Again, this is about seeking a fair deal and return by the Sponsoring State. A potential sponsored entity will likely seek stability for the lifetime of the sponsorship arrangement. This is understandable given investment levels but may not factor in the potential for negative socio-economic impact and sentiment at a community level if the deal is seen as one sided.

It is for the government to determine what combination of fiscal instruments and terms are appropriate for their individual country circumstances, including how much a government seeks to raise from sponsorship activity. That said, this should also take account that high fiscal burdens may act as a disincentive to attracting sponsorship.

Beyond this, and risk attitude, a State may have limited administrative capacity and performance in managing variable revenues (such as taxes), which may point to a heavier reliance on royalty-style mechanisms which are easier to administer.

It is not for these Guidelines to offer specific advice on the mix of instruments and monetary range of payments that should be secured from the sponsorship arrangement. This is solely a matter for the State, and for the negotiating team to negotiate, and where necessary approved by Cabinet or Parliament as part of the terms of a sponsorship agreement.

Seeking expert financial and economic advice on this matter is recommended prior to any final agreement of financial terms. Ideally, such terms – or at least the principles for the payment and its calculation – should be established in law, rather than individually negotiated.

27 Financing Arrangements and Structures

Structures to fund extractive industry activities can be very complex. Asking questions about how the operations will be funded – proposed funding arrangements and structures (equity, debt, external, intercompany), sources of investment capital, terms of any arrangement – and how this may impact the financials for the potential sponsored entity or sponsorship arrangement – is important.

The principal asset for an investor is the right to explore or exploit the mineral resources under an ISA contract. Current ISA draft regulations on exploitation of mineral resources in the Area permit the use of an ISA exploitation contract as security for raising finance.⁷ This is subject to the prior consent of both ISA and the Sponsoring State.

Most reputable lending institutions will subscribe to the Equator principles⁸ and the International Finance Corporation Performance Standards.⁹

28 Security Deposit

A security deposit may be required under national law. This is provided for under P-SIDS Acts. The Acts provide generally that such a deposit is used as guarantee of performance of the obligations attaching to the sponsorship arrangement, with the terms and conditions set out in say the sponsorship agreement.

Bearing in mind that under exploitation, ISA rules provide for an environmental performance guarantee at the ISA level, the purpose and quantum of a deposit at the national level needs consideration.

A potential sponsored entity may be hesitant in committing to a security deposit as they will need to finance the guarantee by way of cash deposit or guarantee from a financial institution. However, this does not mean that the issue should not be raised and discussed, including at any point during the sponsorship

⁷ Draft regulation 22, ISBA/31/C/CRP.1/Rev.2.

⁸ The Equator principles is a risk management framework, adopted by financial institutions, for determining, assessing and managing environmental and social risk in projects and is primarily intended to provide a minimum standard for due diligence and

monitoring to support responsible risk decision-making.

⁹ The IFC's Environmental and Social Performance Standards define IFC clients' responsibilities for managing their environmental and social risks.

arrangement where the solvency of the sponsored entity may be called into question.

That said, it is preferable to consider this requirement upfront, its purpose and terms e.g., to cover fees and payments or in connection with rectifying any damage (to the extent that this is not covered by insurance products or guaranteed at ISA level).

29 Use of Sub-Contractors

It is likely that the potential sponsored entity will not have the technology or skills to conduct exploration or exploitation, and that this will be sub-contracted out to third parties or other group-owned companies.

Understand the potential relationships between the national entity and sub-contractors. Sub-contractors and arrangements for their engagement and management should form part of the due diligence profiling exercise (see Toolkit).

During any initial discussions it will be helpful to map out the various relationships, and who will be involved in the value chain.

30 Risk and Opportunity

It is important during negotiations that a common understanding is built and maintained so that risks are recognised and fully appreciated in the sponsorship relationship. Perceptions of risk and opportunity will vary by stakeholders, before such a common understanding is found.

A sponsored entity will carry risk, for example, geological, economic (commodity market price fluctuations), operational

(remote, deep-water) and environmental risk, and will seek to secure a commercial return on its investment commensurate with the risk borne. Additionally, seabed mineral activity is a nascent industry, and some risks remain uncertain and unquantified.

A Sponsoring State also carries risks. An economic risk of potential State liability. A reputational risk of not adequately carrying out its obligations of a Sponsoring State,¹⁰ and a social risk of the benefits expected or arising from the act of sponsorship simply not materialising or not being felt at a national or community level.

It is likely in any discussions, particularly in connection with financial terms that a sponsored entity will assume all the risks.

31 Indemnification

Indemnification clauses appear in nearly all commercial agreements and are a key risk allocation tool between the parties.

P-SIDS Acts provide for a general indemnification by a sponsored entity in favour of the Sponsoring State for actions, proceedings, costs, charges, penalties, claims and demands which may be made or brought by any third party. This is a fairly generic provision and may require further clarification in a sponsorship agreement or separate indemnity agreement to spell out for example, the events covered, the categories of damages recoverable and any exceptions to indemnification.

Assess who the parties should be to any indemnification agreement. This will be important where a sponsored entity is part of a multinational group. A sponsored entity

¹⁰ Sponsoring State of convenience.

may not have sufficient funds to meet a liability for indemnification.

Expert advice should be sought on this matter.

32 Renegotiation: Trigger Events

Ideally, a sponsorship agreement should include a renegotiation provision with clearly defined criteria that triggers its use. This is perhaps of greater significance for the sponsorship of activities in a nascent industry where a good deal of uncertainty is present. Equally, having clearly defined criteria that prompt a renegotiation provides for greater predictability of sponsorship terms, rather than any arbitrary renegotiation. This is inherent in durable extractive contracts which recognise that expectations and requirements evolve over time.

33 Dispute Resolution

Having a robust dispute resolution process should be an integral part of discussions with a potential sponsored entity. While this can be housed in regulations, there may be specific dispute resolution mechanisms, and location, that are favoured by one of the parties. Whatever mechanism is chosen there should be a clear pathway to resolution of the dispute, including the starting point of processes such as mediation, and where necessary escalating to arbitration.

34 Keep Relevant Stakeholders Informed

Share key information and consult with relevant community members and

organisations, and obtain community perspectives on the proposed sponsorship, particularly in connection with capacity or other development opportunities that may arise. Facilitating stakeholder understanding and engagement will help build a trusting relationship with the community and promote the social licence to operate for the Sponsoring State and sponsored entity.¹¹

35 Proofread Every Provision of the Agreement

At the end of the negotiation of the sponsorship arrangement / agreement, make sure that the negotiating team and sponsored entity representatives come together to proofread each of the provisions of the agreement. This assures both parties that the points noted down constitute exactly what transpired during its negotiation.

36 Cabinet or Parliamentary Approval

Once the terms of any sponsorship agreement are concluded it is imperative that the agreement receives Cabinet or Parliamentary approval prior to its signing.

37 Ensure the Agreement is Properly Executed

Following any national approval process, ensure that the agreement is duly executed and signed by the parties. The agreement is an important legal instrument, and together with the national law, governs the relationship of the parties and their respective obligations and admissible

¹¹ While the concept of a social licence to operate has matured in land-based extraction activities, it has yet to be fully articulated for activities in the Area.

evidence in the case of any disputes that may arise.

38 Disclosure of Terms and Payments Under Agreement

Recognise that sponsorship arrangements will come under scrutiny at both international and national levels. Equally, there is a trend towards increased transparency and reporting requirements across extractive industries globally.

It is preferable for any sponsorship agreement to be published, with any commercially sensitive information removed, and future payments under the agreement publicly disclosed. The parties should discuss this during the negotiation process, and ensure that the terms of the sponsorship are robust, fair and can withstand public scrutiny.

39 Timing and Pace of Negotiation

The timing and pace of any negotiation should be reasonable and not rushed, particularly where a long-term arrangement is envisaged. It will also need to factor in internal discussions at both Sponsoring State and sponsored entity levels. Having a schedule or timetable in place for discussions will help manage expectations for the parties on negotiation deliverables.



Section Three: Contractual Dealings Post Sponsorship



Section Three: Contractual Dealings Post Sponsorship

Section Objective

The objective of section three is to provide Sponsoring State officials with a number of points for consideration following the issue of a certificate of sponsorship and granting of an ISA contract.

40 Establish a Technical Working Group or Committee

Consider setting up a working group or committee comprising of experts in all of the different aspects of the project from the various ministries involved, working under the guidance of the dedicated seabed minerals authority.

A technical committee will play an important role in helping an authority review, analyse and monitor (see below) the terms of the sponsorship arrangement and ensuring that key objectives are met.

41 Relationship Management

One of the hallmarks of a successful sponsorship arrangement will be the management of the relationship with the sponsored entity and who will undertake this role at a national level, as well as the main point of contact at the sponsored entity.

Relationship management will be important to the continual building of mutual trust and understanding, reducing risk exposure and providing for transparent and effective communication lines in order that the Sponsoring States regulatory responsibilities are effectively discharged, and a joint approach to managing deliverables such as capacity development is taken.

From a regulatory perspective, it is better that a sponsored entity discloses any breaches of obligations or incidents or events that impact the marine environment or human health and safety so that action through improvement plans can be affected. Building mutual trust will facilitate disclosure.

42 Liaison with the International Seabed Authority

Once a certificate of sponsorship is issued, and an application for the approval of a plan of work for exploration or exploitation submitted to ISA, the Sponsoring State should help facilitate and support such application.

Once the application for the approval of a plan of work is approved by ISA, it is important that the terms and conditions of the ISA contract, and underlying plan of work commitments, are fully understood by Sponsoring State officials in order that compliance with the ISA contract is secured.

Equally, the necessary cooperation, reporting and monitoring arrangements, including remote monitoring of operations, should be clarified with both the sponsored entity and ISA to avoid any unnecessary duplication of administration.

Work alongside the sponsored entity to understand the impact of ISA rules, and whether there needs to be a revision to these

rules in the light of improved knowledge or technology.¹²

43 Set-up a Monitoring and Performance Evaluation Framework

Monitoring the performance of a sponsored entity under an ISA contract and terms of the sponsorship arrangement will be very important.

How such monitoring will be conducted, including data and information flows, and who will conduct such monitoring should be set out in a monitoring and performance evaluation framework and programme for discussion with the sponsored entity, and ISA where necessary.

Compliance assurance mechanisms will also need to be established (see Toolkit).

Technology requirements to deliver regulatory functioning should also be assessed, including access to the ISA DeepData platform and how its use can be optimised for Sponsoring State needs.

44 Independent Verification and Audits

Independent audits should be considered an integral part of the ongoing sponsorship arrangements, from independent audits of books and records to the independent verification of health, safety and environmental management systems. A programme for this should be put in place with the sponsored entity, and details communicated to ISA so there is no duplication of work and costs.

45 Periodic Review Meetings

Performance review meetings with the sponsored entity are an important monitoring and management tool to check progress under the ISA contract and sponsorship arrangement, as well as an opportunity to assess continual improvement in the operations, and to sense check how the relationship is going. It is likely that the frequency for such reviews will be contained in regulations and details set out in applicable Guidelines. Attendance at ISA periodic review meetings conducted by the ISA Secretary-General should also be considered.

It will be important to consider at these meetings any possible amendments or adjustments to an ISA plan of work or programme of activities.

Appropriate technical expertise should be considered for these meetings.

A further consideration will be an assessment of the capacity development initiatives put in place for nationals of the Sponsoring State, their effectiveness, and any requirement for the same to be adjusted.

Attendance at ISA meetings of Contractors and dialogue meetings with Sponsoring States and Contractors with the Secretary-General should also be considered.

Ensure that adequate minutes are prepared during these meetings, and that any actions arising are clearly documented, actioned and followed up on.

¹² Under ISA rules, regulations and procedures (RRPs) an ISA Contractor through its Sponsoring State may request the ISA Council to revise the RRP.

46 Adherence to Sponsorship Qualification Criteria

Whether a Certificate for Sponsorship is issued under P-SIDS Acts is determined by a sponsorship applicant meeting prescribed qualification criteria, including that the applicant has sufficient financial and technical resources and capability. A sponsored applicant must adhere to these criteria during the term of the sponsorship arrangement.

Consideration should be given to putting in place a mechanism to assess and review this, and the frequency of such a review. This will be important in particular to ensure that the sponsored entity remains solvent and can cover its liabilities including payments to ISA and the Sponsoring State.

47 Changing Circumstances or Requirements

Circumstances change, particularly in the case of a nascent industry such as seabed mineral recovery as new knowledge, information and experience across all disciplines become available. As a consequence, ISA rules, regulations and procedures may be revised (see point 41 above).

Equally, at a national level, the regulatory regime may need to evolve, and a need to reassess the terms of a sponsorship arrangement. However, there needs to be a sound basis for this otherwise it can create instability between the parties and impact investment returns with consequential impacts.

Nevertheless, a Sponsoring State should be prepared to renegotiate and engage in good faith discussions with its sponsored entity – including the financial terms of the arrangement. Indeed, one of the principles of

durable contracts is they should recognise that regulatory regimes evolve over time.

48 Continued Stakeholder Engagement

Keeping stakeholders informed should continue as an active practice post conclusion of the sponsorship arrangement and the conducting of activities under an ISA contract.

The Sponsoring State and sponsored entity should cooperate on the necessary mechanisms for this.

49 Termination of Sponsorship

In the event that the sponsorship arrangement is terminated under national law or under a clause of the sponsorship agreement, consider the actions that need to be taken in accordance with national laws and ISA rules.

50 Maintain Adequate Records of the Sponsorship Arrangement

While generally provided for by national law, the lead agency (dedicated seabed minerals authority) should maintain proper records of sponsorship documentation and dealings with the sponsored entity (e.g., minutes of meetings and actions taken).



Annex I. Possible Content of a Sponsorship Agreement



Annex: Possible Content of a Sponsorship Agreement¹³

- 1 Parties
- 2 Recital
- 3 Definitions and Interpretation
- 4 Grant of sponsorship and sponsorship terms
- 5 Term of Agreement and phases (exploration and exploitation) covered
- 6 Obligations on sponsored entity
 - a Compliance with ISA contract for exploration or exploitation
 - b Compliance with national laws
 - c Reporting
- 7 Applications to ISA
- 8 Payments by sponsored entity
 - a Annual administration fee
 - b Seabed mineral recovery payment
 - i Rate
 - ii Methodology
 - iii Payment (frequency)
 - iv Auditing
 - c Taxation
 - d Other taxes or levies
 - e Financial records
- 9 Financing by sponsored entity
 - a Prior approvals (e.g., mortgaging ISA contract)
 - b Debt-equity ratio
 - c Foreign currency remittance
 - d Role of State in financing
- 10 Indemnification
- 11 Insurance
- 12 Security deposit
- 13 Mutual obligations
- 14 Prevention of corruption
- 15 State rights
 - a Placing of observer(s)
 - b Audit of books and records
- 16 State assurances and obligations
- 17 Use of local goods and services
- 18 Local development plan (capacity development and training)
- 19 Applicable standards (labour, health and safety, environment)
- 20 Compliance monitoring programmes
- 21 Closure obligations
- 22 Grievance mechanisms
- 23 Use of sub-contractors
- 24 Parent company obligations
- 25 Assignment of ISA contract
- 26 Information management
 - a Publication of Agreement
 - b Confidential information
 - c Exchange of information (e.g., with ISA)
- 27 Suspension of activities
- 28 Force majeure
- 29 Cooperation, Dispute resolution and arbitration
- 30 Surrender and termination of sponsorship
 - a Surrender of sponsorship
 - b Termination by State
 - c Termination by sponsored entity
 - d Obligations on termination
- 31 Notices
- 32 Applicable law (international and Sponsoring State)
- 33 Review and modification of Agreement
- 34 Other provisions
 - a Entire agreement
 - b Survival of certain provisions
 - c Amendment
 - d Severability
 - e Waiver
 - f Indemnification by sponsored entity

¹³ Subject to content of national laws, including regulations, and measures.

35 Good faith

Annexes

Annex I: Local development plan

Annex II: Specific conditions e.g., monitoring
and reporting

Annex III : Performance evaluation
framework



Useful Reference Materials



Useful Reference Materials

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