

GOVERNMENT OF FIJI

INTERNATIONAL SEABED MINERAL MANAGEMENT DECREE 2013

(Decree No... of 2013)

IN exercise of the powers vested in me as the President of the Republic of Fiji and the Commander in Chief of Fiji Military Forces by virtue of the Executive Authority of Fiji Decree 2009, I hereby make the following Decree –

TO GOVERN THE RIGHTS AND OBLIGATIONS OF PERSONS ENGAGED IN SEABED MINERAL ACTIVITIES IN THE AREA BEYOND NATIONAL JURISDICTION UNDER THE SPONSORSHIP OF FIJI, AND THE ASSOCIATED ADMINISTRATIVE FUNCTIONS OF THE STATE

**PART 1: PRELIMINARY**

*Short Title and Commencement*

1. This Decree may be cited as the International Seabed Mineral Management Decree 2013, and shall come into force on a date appointed by the Minister by notice published in the *Gazette*.

*Interpretation*

2. In this Decree, unless the context otherwise requires –

“**The Area**” – means the seabed and ocean floor and subsoil thereof beyond the limits of national jurisdiction, as defined in Article 1(1) of the UN Convention on the Law of the Sea.

“**Contract Area**” – means any part of the Area in respect of which there is in force a contract between a Sponsored Party and the ISA for the conduct of Seabed Mineral Activities.

“**Exploitation**” – means the recovery within the Area for commercial purposes of Seabed Minerals and the extraction of minerals therefrom, including the construction and operation of all mining, processing and transportation systems for the production and marketing of metals, insofar as these activities take place at-sea.

“**Exploration**” – means the –

- (a) search within the Area for Seabed Mineral deposits with exclusive rights;
- (b) the sampling and analysis of such deposits,
- (c) the testing of systems and equipment, and
- (d) the carrying out of studies,

for the purpose of investigating whether those minerals can be commercially exploited.

“**Fiji**” – means the Republic of Fiji.

“**The Fiji International Seabed Sponsorship Authority**” shall be the Ministry of Foreign Affairs of the Government of Fiji.

An “**Incident**” occurs when –

- (a) any ship or installation or other similar item or structure while engaged in Seabed Mineral Activities is lost, abandoned, capsized or incurs significant damage;
- (b) loss of life or injury requiring hospitalisation occurs on board any ship or installation while engaged in Seabed Mineral Activities, except in the case of a loss of life that is certified by an independent medical practitioner as being the result of natural causes;
- (c) the conduct of Seabed Mineral Activities results in significant adverse impact to or unlawful pollution of the Marine Environment; or
- (d) the ISA issues an emergency order in connection with the Seabed Mineral Activities.

“**The International Seabed Authority**” or “**ISA**” – means the International Seabed Authority established by Part XI Section 4 of the UN Convention on the Law of the Sea as the organisation through which States Parties to the UN Convention on the Law of the Sea shall organise and control Seabed Mineral Activities in the Area.

“**Marine Environment**” – means the environment of the sea, and includes the physical, chemical, geological, biological and genetic components, conditions and factors which interact and determine the productivity, state, condition and quality of the marine ecosystem, the waters of the seas and oceans and the airspace above those waters, as well as the seabed and ocean floor and subsoil thereof.

“**Marine Scientific Research**” – means any lawful study, research or other related scientific activity within the Area, whether fundamental or applied, intended to increase knowledge about the Marine Environment for the benefit of all mankind, and not undertaken directly for industrial or economic purposes, and not significantly altering the surface or subsurface of the deep seabed nor significantly affecting the Marine Environment.

“**The Minister**” and “**the Ministry**” – means the Minister of Foreign Affairs and Ministry of Foreign Affairs within the Government of Fiji.

“**The Official Working Group**” means the official working group on deep sea minerals established by the Government of Fiji’s Cabinet Decision CP(11)316 of 11 October 2011, as further elaborated by Part 2 of this Decree.

“**Person**” – means any natural person or business enterprise and includes, but is not limited to, a corporation, partnership, cooperative, association, the State or any subdivision or agency thereof, and any foreign State, subdivision or agency of such State or other entity.

“**The Precautionary Approach**” – means that, in order to protect the environment, where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.

“**Prescribed**” – means prescribed by Regulations or other subordinate legislation made under this Decree.

“**Public Official**” – means a person in the permanent or temporary employment of the Government of Fiji.

“**The Qualification Criteria**” – means the criteria that must be met before a Sponsorship Certificate can be issued, as stipulated in section 20(2) of this Decree.

“**Rules of the ISA**” – means any rules, regulations, or procedures adopted by the ISA pursuant to powers conferred on the ISA by the UN Convention on the Law of the Sea that are from time to time in force, and any contractual terms contained in a contract between the ISA and a Sponsoring Party relating to Seabed Mineral Activities.

“**Seabed Minerals**” – means the hard mineral resources of any part of the Area, including those in crust, nodule or hydrothermal deposit form, which contain (in quantities greater than trace) metalliferous or non-metalliferous elements.

“**Seabed Mineral Activities**” – means operations for the Exploration or Exploitation of Seabed Minerals within the Area under contract with the ISA, and under Fiji’s sponsorship under this Decree.

“**Sponsored Party**” – means a person who holds a current Sponsorship Certificate validly issued under Part 3 of this Decree, that person’s representatives or officers, and any person or persons to whom the Sponsorship Certificate may lawfully have been assigned.

“**Sponsorship Applicant**” – means a person applying for a Sponsorship Certificate under this Decree.

“**Sponsorship Application**” – means a Sponsorship Application made by a person for a Sponsorship Certificate under this Decree.

“**Sponsorship Certificate**” – means a certificate validly issued by Fiji under Part 3 of this Decree.

“**Sponsoring State**” – means a State Party to the UN Convention on the Law of the Sea, sponsoring a person to carry out exploration or exploitation in the Area in accordance with Article 153(2)(b) of the UN Convention on the Law of the Sea.

“**The UN Convention on the Law of the Sea**” – means the United Nations Convention on the Law of Sea of 10 December 1982 entered into force on 16 November 1994; the 1994 Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982, and any Annexes thereto.

***Scope of this Decree***

3.

(1) The objectives of this Decree are to –

(a) establish a clear and stable legal operating environment for persons sponsored by Fiji to undertake Seabed Mineral Activities in the Area;

(b) ensure that Seabed Mineral Activities are carried out under Fiji's effective control, and in a manner that is consistent with the Rules of the ISA and Fiji's responsibilities under the UN Convention on the Law of the Sea, and other applicable requirements of international law.

(c) implement measures to maximise the benefits of Seabed Mineral Activities for present and future generations of Fijian people.

(2) In order to achieve its objectives, this Decree *inter alia* –

(a) Identifies the responsible regulatory authority within Government to manage Fiji's involvement with Seabed Mineral Activities.

(b) Establishes a system for the Sponsorship Application for, and grant of Sponsorship Certificates under which Sponsored Parties will be authorised to engage in Seabed Mineral Activities under specific and enforceable conditions.

(c) Provides for the payment to Fiji of fees, royalties, and taxes in respect of Seabed Mineral Activities.

(3) This Decree is made on the basis that the Rules of the ISA and the ISA's monitoring and enforcement capacity will be developed in an appropriate and timely manner with for the purpose of securing that Seabed Mineral Activities will comply with relevant standards and obligations of international law.

#### ***Jurisdiction***

4. By the enactment of this Decree, Fiji recognises

(a) The seabed resources of the Area to be the common heritage of mankind;

(b) That the rights to the Area are governed by the UN Convention on the Law of the Sea and the Rules of the ISA;

(c) The ISA's responsibility under the UN Convention on the Law of the Sea to organise and control activities in the Area on behalf of mankind as a whole, including to:

(i) Process Sponsorship Applications for approval of plans of work for exploration and exploitation in the Area;

(ii) Monitor compliance with plans of work, approved in the form of a contract, including through a staff of inspectors;

(iii) Adopt rules, regulations and procedures necessary for the conduct of exploration and exploitation in the Area; and

(iv) Adopt rules, regulations and procedures incorporating applicable standards for:

(a) the protection and preservation of the natural resources of the Area and the prevention of damage to the flora and fauna of marine environment,

Hannah 14/2/13 2:29 PM

**Comment:** This needs to be amended such that the Decree enables Fiji to negotiate financial terms for the conduct of Seabed Mineral Activities on an individual / case-by-case basis, by way of written agreement – rather than a payment regime being established within the Decree.

- (b) the prevention, reduction and control of: pollution and other hazards to, and the interference with the ecological balance of, the marine environment.
- (v) Exercise such control over activities in the Area as is necessary for the purpose of securing compliance with the UN Convention on the Law of the Sea and the Rules of the ISA by contractors carrying out activities in the Area
- (d) The responsibility of States Parties to the UN Convention on the Law of the Sea, including the Republic of Fiji, to assist the ISA in exercising the duty outlined in section 4(c)(v) of this Decree; and
- (e) The duty of a Sponsoring to effectively control any person engaged in activities in the Area under its sponsorship, in order to ensure conformity of those activities with the UN Convention on the Law of the Sea and the Rules of the ISA.

**PART 2 – FIJI’S ADMINISTRATION FOR SPONSORSHIP OF SEABED MINERAL ACTIVITIES**

*The Ministry as Fiji’s International Seabed Mineral Sponsorship Authority*

- 5.
- (1) The Minister (acting through the Ministry) shall be responsible for Fiji’s sponsorship and regulation of Seabed Mineral Activities.
  - (2) In undertaking this role, the Minister shall be known as the Fiji International Seabed Sponsorship Authority (or the ‘FISSA’) and shall have all reasonable powers required for the performance of any of its functions, including a power to appoint such persons qualified for the purpose, to assist in the discharge of the FISSA’s functions.
  - (3) The FISSA shall:
    - (a) solicit and take into account in its decision-making any recommendations from the Official Working Group,
    - (b) Act in a way that is compatible with principles of best regulatory practice, including that regulatory activities should be proportionate, accountable, consistent, transparent and targeted only at cases in which action is needed.

*Consultation*

6. The FISSA may at any time and in any way that it sees fit consult with persons of relevant expertise, interest groups, or the general public before taking a decision or action under this Decree.

*Objectives of the FISSA*

11. The FISSA has the following objectives –
- (a) To provide a stable, transparent and accountable regime within Fiji for the sponsorship of Seabed Mineral Activities;

- (b) To maintain effective control of Seabed Mineral Activities and the protection and preservation of the Marine Environment, by securing compliance by Sponsored Parties with relevant rules and internationally agreed standards;
- (c) To ensure that the conduct of Seabed Mineral Activities maximises benefits to Fiji and its people.

***Functions of the FISSA***

12. The FISSA has the following functions, to –

- (a) Receive and determine Sponsorship Applications, and prepare and issue Certificates of Sponsorship for successful Sponsorship Applicants;
- (b) Liaise with the ISA and any other relevant international organisations to facilitate a Sponsored Party's application to the ISA for a contract, and Fiji's and its Sponsored Parties' understanding of and compliance with relevant international laws, standards and rules;
- (c) Assist the ISA in its work to establish, monitor, implement, and secure compliance with the Rules of the ISA;
- (d) Undertake any advisory, supervisory or enforcement activities in relation to Seabed Mineral Activities or the protection of the Marine Environment, in the event this is required in addition to the ISA's work in order for Fiji to meet its obligations as Sponsoring State;
- (e) Require and review relevant reports and information, and maintain appropriate records, pertaining to Seabed Mineral Activities.

***The Official Working Group***

13.

- (1) The Official Working Group shall, upon the FISSA's request, provide technical and policy advice and recommendations to the FISSA to assist the FISSA in the performance of its functions.
- (2) The Official Working Group shall be composed of officials and other members as shall be determined by the Minister from time to time.

***High Court Jurisdiction***

14. The High Court may conduct –

- (a) judicial review of administrative decisions, determinations or inquiries taken under this Decree, or
- (b) proceedings to establish liability and to provide recourse for compensation from a Sponsored Party in the event of unlawful damage caused by Seabed Mineral Activities, in accordance with Article 235(2) of the UN Convention on the Law of the Sea.

Hannah 14/2/13 2:37 PM

**Comment:** LH would not accept the jurisdiction of the courts of Fiji, in case of dispute. The sub-contract would specify that the parties would be subject to UK law and courts. LH therefore suggest section 14 be deleted to avoid confusion. However UNCLOS Art 235 requires that: "*States shall ensure that recourse is available in accordance with their legal systems for prompt and adequate compensation or other relief in respect of damage caused by pollution of the marine environment by natural or juridical persons under their jurisdiction*". the ITLOS Advisory Opinion summarises this as '*requiring the sponsoring State to establish procedures, and, if necessary, substantive rules governing claims for damages before its domestic courts*'. Whether the proposed Fiji / LH model can navigate this requirement and LH's requirement for UK arbitration remains a point to be explored.

**PART 3 – SPONSORSHIP APPLICATION AND APPLICATION TO THE ISA**

***Invitation for Sponsorship Applications***

15. The FISSA may in any manner it sees fit invite Sponsorship Applications, or entertain discussions with Sponsorship Applicants or potential Sponsorship Applicants.

***Eligibility to Perform Seabed Mineral Activities***

16. To be eligible to perform Seabed Mineral Activities a person must first –

- (a) obtain a valid Sponsorship Certificate from the FISSA, and
  - (b) obtain a valid contract from the ISA,
- pertaining to those Seabed Mineral Activities.

***The processing of Sponsorship Applications***

17. The FISSA –

- (1) Must deal with Sponsorship Applications promptly, and in accordance with this Decree;
- (2) May request further information from a Sponsorship Applicant, or request the Sponsorship Applicant to amend any part of its Sponsorship Application, at any time before making a recommendation under section 21 of this Decree and/or may return an Sponsorship Application without a decision if the Sponsorship Applicant fails to comply with a request under this sub-section.

***Evidence***

18.

- (1) In making a recommendation under section 21 of this Decree, the FISSA may take into account any or all of the information submitted by the Sponsorship Applicant, and any relevant information in the public domain, received from the Official Working Group or other consultation, or otherwise held in the Government of Fiji's records.
- (2) A previous decision by the ISA to grant a Sponsorship Applicant a contract for activities similar to those that are the subject of a Sponsorship Application may be considered by the FISSA as evidence in relation to any of the Qualification Criteria for that Sponsorship Application.

***Content of a Sponsorship Application***

19. A Sponsorship Application must be made in writing to the FISSA and must –

- (1) provide evidence that the Sponsorship Applicant meets the Qualification Criteria, and
- (2) include –
  - (a) the same content that is required by the Rules of the ISA for an application for approval of a plan of work to obtain a contract for the proposed Seabed Mineral Activities,
  - (b) written undertakings that the Sponsorship Applicant –
    - (i) will fully comply with its obligations under the Rules of the ISA and this Decree;

- (ii) warranties that the content of the Sponsorship Application is true and accurate to the best of its belief, and
  - (iii) intends to apply for a contract with the ISA to conduct Exploration or Exploitation in the Area under sponsorship by Fiji;
- (c) Copies or summaries of any studies conducted by the Sponsorship Applicant or other data in relation to the potential of the site or sites within which the proposed Seabed Mineral Activities will be conducted;
- (d) Copies or summaries of any studies conducted by the Sponsorship Applicant or other data in relation to potential impact of the Seabed Mineral Activities on the Marine Environment;
- (e) A financing plan and evidence of actual or intended ownership or lease of vessels and equipment required for the operation of the Seabed Mineral Activities;
- (f) A list of employees required to operate the Seabed Mineral Activities, and an indication if any of these will be recruited from Fiji;
- (g) A capacity-building programme providing for the training of personnel of Fiji;
- (h) Evidence of insurance or contingency funding adequate to cover damage that may be caused by the Seabed Mineral Activities or the costs of responding to an Incident;
- (i) The fee required by section 38(1) of this Decree;
- (j) A statement as to whether the Sponsored Party or any of its Directors has previously been found on reasonable evidence to have:
- (i) breached a material term or condition of the Rules of the ISA,
  - (ii) been convicted of an offence or incurred a civil penalty pertaining to the conduct of Seabed Mineral Activities or similar sea or land based activities in another jurisdiction; or
  - (iii) been convicted of an offence involving fraud or dishonesty;
- (k) Any further matters as may be Prescribed.

Hannah 20/2/13 2:58 PM

**Comment:** It is not realistic to expect accompany to have this evidence (ie to have committed funds to vessel hire) prior to having secured the ISA contract. Suggest to delete, or to reword such that the company is simply asked to give an indication of its plans in this regard?

Hannah 20/2/13 2:58 PM

**Comment:** It is not realistic to expect accompany to have this evidence (ie to have committed funds to insurance) prior to having secured the ISA contract. Suggest to delete, or to reword such that the company is simply asked to give an indication of its plans in this regard?

#### *Qualification Criteria*

20.

- (1) The FISSA may recommend the issue of a Sponsorship Certificate if it is satisfied that the undertakings required by section 19 have been given and the Qualification Criteria are met.
- (2) The Qualification Criteria are that –
- (a) the Sponsorship Applicant:
- (i) is an existing body corporate, registered in Fiji;
  - (ii) has, or will have at the commencement of the proposed Seabed Mineral Activities, sufficient financial and technical resources and capability, to:

Hannah 14/2/13 2:42 PM

**Comment:** Amend to 'shall'

- (a) properly perform the Seabed Mineral Activities in compliance with the Rules of the ISA; and
  - (b) to cover damage that may be caused by the Seabed Mineral Activities or the costs of responding to an Incident
- (iii) has paid any applicable fees;
- (b) That the proposed Seabed Mineral Activities are consistent with the Rules of the ISA in relation to environmental management;
  - (c) Compatibility of the proposed Seabed Mineral Activities with applicable national and international laws, including those relating to safety at sea;
  - (d) That the proposed Seabed Mineral Activities will not unduly affect:
    - (i) the rights of other legitimate sea users, or
    - (ii) international peace and security; and
  - (e) That the Seabed Mineral Activities will not result in irreparable harm to any community, cultural practice or industry in Fiji, and would be generally in the public interest of the country, taking into account the potential for capacity-building and/or local employment and the long-term economic benefit to Fiji.

***Sponsorship Certificate Recommendation***

21. The FISSA must make a recommendation to the Cabinet whether to issue the Sponsorship Applicant with a Sponsorship Certificate or deny the Sponsorship Applicant a Sponsorship Certificate.

***Notice of Sponsorship Certificate Decision***

- 22.
- (1) Within 10 days of a Sponsorship Certificate decision having been taken by the Cabinet the FISSA will inform the Sponsorship Applicant, and where the decision is to deny the Sponsorship Certificate, will at the same time provide a written statement of reasons for that decision.
  - (2) Where a decision is taken by the Cabinet to issue a Sponsorship Certificate, public notice of the decision will be given by the FISSA within 30 days of that decision.

***Terms of the Sponsorship Certificate***

23. A Sponsorship Certificate, signed by the Minister, shall be issued to the Sponsored Party and shall be in a form necessary to satisfy the Rules of the ISA, and shall contain –
- (a) the name of the Sponsored Party;
  - (b) a statement that the Sponsored Party is –
    - (i) a national of Fiji; or
    - (ii) subject to the effective control of Fiji or its nationals;

Hannah 14/2/13 2:45 PM

**Comment:** This would benefit from dividing into two separate criteria. Also consider whether current wording is appropriate: LH are required under s.19(1) to provide evidence that the application meets all Qualification Criteria. But cannot be expected to evidence these two points, which are a matter for Fiji Government. Suggest to remove (e) from 'Qualification Criteria' but retain it as a separate criteria for Fiji to evaluate in its decision.

Hannah 14/2/13 2:46 PM

**Comment:** Need to add express reference between ss.21 and 22 to the fact that Cabinet takes a decision whether to issue or deny the Certificate.

Hannah 14/2/13 2:47 PM

**Comment:** Insert here an option for the Applicant to re-submit an amended version of its claim (without another fee) within a specified time period.

- (c) a statement by the State that it sponsors the Sponsored Party;
- (d) the date of deposit by the State of its instrument of ratification of, or accession or succession to, the UN Convention on the Law of the Sea;
- (e) a declaration that the State assumes responsibility in accordance with article 139, article 153, paragraph 4, and Annex III, article 4, paragraph 4, of the UN Convention on the Law of the Sea;
- (f) the period of time for which the Sponsorship Certificate shall remain in force unless otherwise terminated in accordance with this Decree;
- (g) any other content reasonably required by the ISA or that the FISSA considers fit to include.

***Application by Sponsored Party to ISA***

24.

- (1) A Sponsored Party may, on the basis of the Sponsorship Application, submit an application to the ISA for a contract to Explore or Exploit in the Area under Fiji's sponsorship.
- (2) The FISSA will provide all reasonable cooperation with the Sponsored Party to facilitate the preparation, submission and support of the application to the ISA.
- (3) The costs of presenting that application to the ISA, including any costs incurred by Fiji in supporting the application before the ISA, will be met by the Sponsored Party.

**PART 4 – OBLIGATIONS OF SPONSORED PARTIES**

***Duties pertaining to Seabed Mineral Activities***

25. Any person engaging in Seabed Mineral Activities is required, *inter alia*, to:

- (1) Adhere to the provisions of the Rules of the ISA and this Decree.
- (2) Comply with, and provide sufficient training, supervision and resources to employees, agents or officers so as to ensure compliance with the Rules of the ISA and any other instructions or requests of the ISA.
- (3) Facilitate the ISA's and the FISSA's monitoring of Seabed Mineral Activities in accordance with the Rules of the ISA and this Decree and comply with the reasonable requests, directions or orders of ISA inspectors or FISSA observers.
- (4) Apply the Precautionary Approach, and employ best environmental practice in accordance with prevailing international standards in order to avoid, mitigate, or remedy the adverse effects of Seabed Mineral Activities on the Marine Environment;
- (5) Offering to Fiji opportunities for training in relation to, and participation in, the Seabed Mineral Activities;
- (6) At all material times maintain appropriate insurance policies that provide adequate cover for identified risks and costs of damages that may be caused by the Seabed Mineral

Hannah 20/2/13 2:59 PM

**Comment:** LH consider it unfair both to be charged the admin fee *and* to require the Company to cover its application costs. They suggest it should be one or the other, not both.

Hannah 20/2/13 2:59 PM

**Comment:** LH request to add materiality qualifications (i.e. so the duty is not breached by a trivial or momentary failure to adhere)

Hannah 20/2/13 3:00 PM

**Comment:** LH request this be qualified to state that these must be 'demonstrated' adverse effects, otherwise the requirement is too broad / theoretical.

Hannah 14/2/13 2:52 PM

**Comment:** LH understands that it is obliged to offer capacity-building opportunities via the ISA programme, and if so would like that to be reflected here, rather than this becoming an additional duty for the Company. HL had a notion that if the sponsoring company is a developing company, the sponsored company could make its own arrangements with the sponsor for capacity-building *instead* of using the ISA programme – to check.

Activities, or otherwise satisfy Fiji of its financial and technical capability to respond to potential Incidents;

- (7) Report to the ISA and the FISSA immediately in the event of an Incident occurring or appearing reasonably likely to occur; and respond efficiently and responsibly to the Incident, including by seeking and following the ISA's, and the FISSA's directions where appropriate.
- (8) Submit to the ISA and the FISSA immediately in writing notice of any new information arising or data collected that materially affect:
  - (a) the Qualification Criteria,
  - (b) the programme of work, or
  - (c) the Sponsored Party's ability to adhere to the terms of the Rules of the ISA;
- (9) Not dump mineral materials or waste from any vessel except in accordance with relevant international law or the Rules of the ISA.
- (10) Not proceed or continue with the Seabed Mineral Activities without obtaining prior written consent from the ISA to proceed, if evidence arises that to proceed is likely to cause significant adverse impact to:
  - (a) the Marine Environment that was not anticipated in any environmental impact assessment previously conducted,
  - (b) the safety, health or welfare of any person, or
  - (c) other existing or planned legitimate sea uses including but not limited to Marine Scientific Research, navigation, submarine cables, fisheries or conservation activities.
- (11) Upon submitting data, reports or other information to the ISA in relation to the Seabed Mineral Activities, ensure that the content of these documents are true, accurate and comprehensive, and provide copies of the same to the FISSA;

***Liability of Sponsored Party and indemnity against third party claims***

26.

- (1) A Sponsored Party shall be responsible for the performance of all Seabed Mineral Activities carried out within the Contract Area, and their compliance with the Rules of the ISA; and will be liable for the actual amount of any compensation, damage or penalties arising out of its failure so to comply, or out of any wrongful acts or omissions in the conduct of the Seabed Mineral Activities.
- (2) A Sponsored Party shall at all times keep Fiji indemnified against all actions, proceedings, costs, charges, claims and demands which may be made or brought by any third party in relation to its Seabed Mineral Activities.

**PART 5 – ROLE OF FIJI AS SPONSORING STATE**

***Duties as Sponsoring State***

27. Fiji, via the FISSA, will

Hannah 14/2/13 2:55 PM

**Comment:** Check whether this is a duty not found in the ISA Rules. Query whether it has much use – i.e. how likely is it that one of those circumstances would arise at all (and if it did, that the Company would not notify ISA). Consider deleting. If retaining this section, qualify it more narrowly (e.g. 'reasonably likely...')

- (1) ensure that its conduct in relation to the ISA, the Area and Seabed Mineral Activities adheres to the requirements and standards established by general principles of international law;
- (2) take all appropriate means to exercise its effective control over Sponsored Parties, seeking to ensure that any Seabed Mineral Activities are carried out in conformity with the UN Convention on the Law of the Sea, the Rules of the ISA and other requirements and standards established by general principles of international law;
- (3) do all things reasonably necessary to give effect to its sponsorship of a Sponsored Party, including undertaking any communications with, and providing any assistance, documentation, certificates and undertakings to the ISA or other relevant party required in respect of the Sponsorship;
- (4) avoid imposing unnecessary, disproportionate, or duplicate regulatory burden on Sponsored Parties;
- (5) not impose requirements upon a Sponsored Party under this Decree or Regulations to be made under this Decree except insofar as these are consistent with, and take into account existing requirements imposed by, the UN Convention on the Law of the Sea, the Rules of the ISA and other applicable standards of international law;
- (6) Promote the application of the Precautionary Approach.

Hannah 14/2/13 2:55 PM

**Comment:** This should read 'not impose...' to match sub-para (5)

#### *Monitoring powers*

28. The FISSA reserves the power to make such examinations, inspections and enquiries of Sponsored Parties and the conduct of Seabed Mineral Activities as are necessary to meet its responsibilities under international law as a Sponsoring State, which may include the sending of an observer to the site of the Seabed Mineral Activities and vessel or premises of the Sponsored Party from time to time, upon giving reasonable notice to the Sponsored Party.

Hannah 14/2/13 2:56 PM

**Comment:** Suggest to (re)insert wording clarifying the duties / role of such an observer e.g. that the observer would comply with the directions of the captain, whilst on board the vessel etc.

#### *Administrative action*

- 29.
- (1) In the event of the FISSA determining that a Sponsored Party has materially breached, or is at serious risk of materially breaching, the Rules of the ISA, or this Decree, the FISSA may:
    - (a) issue written warnings, including warnings in relation to possible action the FISSA may take in the event of future material breaches;
    - (b) enter into a written agreement providing for the Sponsored Party to undertake a programme of remedial action and to mitigate the risk of re-occurrence;
    - (c) issue a written notice requiring the Sponsored Party to take specified action, or not take specified action, aimed to stop, remedy or mitigate the risk of occurrence or re-occurrence of material breach;
    - (d) in the case of actual material breach,

Hannah 14/2/13 2:57 PM

**Comment:** Suggest to delete this second limb, as it is hard to see how this circumstance could ever be evidenced.

(i) impose upon the Sponsored Party monetary penalties proportionate to the seriousness of the violation and in any case not exceeding [amount], which amount excludes any compensation payable for damage or harm.

(ii) commence a process under section 34 of this Decree to revoke the Sponsorship Certificate.

(2) Action taken under subsection 29(1) of this Decree must be commensurate with the gravity, frequency and other circumstances of the material breach, including the Sponsored Party's previous conduct under Fiji's Sponsorship.

Hannah 14/2/13 2:58 PM

**Deleted:** or anticipated

## PART 6 – REGISTER, TERMINATION, TRANSFER, EXTENSION OF SPONSORSHIP

### *Records*

30.

(1) The FISSA must retain up-to-date and accurate records of Sponsorship Applications received, Sponsorship Certificates issued, and all ensuing communication, reports or other information created or received.

(2) The FISSA shall ensure that all such records shall be held with appropriate confidentiality, and will not disclose commercially sensitive information unless agreed otherwise with the Sponsoring Party.

Hannah 14/2/13 2:59 PM

**Comment:** LH would expect a standalone non-disclosure agreement to cover Fiji's handling of their commercial data.

### *Security of Tenure*

31. A Sponsorship Certificate shall remain in force unless and until it is terminated in accordance with section 32 of this Decree

### *Termination*

32. A Sponsorship Certificate terminates if, pursuant to this Decree –

(a) It is made for a specified term and that term expires without renewal in accordance with section 36,

(b) It is surrendered by the Sponsored Party in accordance with section 33 of this Decree,

(c) It is revoked by the FISSA in accordance with section 34 of this Decree,

and upon termination all rights granted by Fiji shall cease and determine,

### *Surrender of Sponsorship*

33. A Sponsored Party may at any time surrender a Sponsorship Certificate without penalty by giving to the FISSA not less than six months' previous notice in writing to that effect.

Hannah 14/2/13 3:01 PM

**Comment:** Query whether there is a reason Fiji would like this notice period to be so lengthy? LH would prefer this to be shorter, or if that is not possible to clarify that they would not be penalised for failure to conduct activities during that 6-month notice period.

### *Revocation of Sponsorship*

34. The FISSA may revoke its Sponsorship Certificate under this section—

(1) in any case, with the consent of the Sponsored Party;

(2) upon consultation with the Sponsored Party, where the Sponsored Party is prevented for a continuous period exceeding two years from the date of signing the contract with the ISA from undertaking the Seabed Mineral Activities despite taking all reasonable measures to do so, because of events outside of the Sponsored Party's control;

Hannah 20/2/13 3:01 PM

**Comment:** LH request to delete, otherwise Fiji could unilaterally revoke the licence after 2 years' inaction, which creates too great an uncertainty for the company.

- (3) where no material efforts have been made by the Sponsored Party to undertake the Seabed Mineral Activities for a period exceeding five years from the date of signing the contract with the ISA;
- (4) where there has been a serious, persistent or wilful breach by the Sponsored Party of the Rules of the ISA, the requirements of this Decree, or a final binding decision of a dispute settlement body applicable to it; and such breach either cannot be remedied or has not been remedied upon the giving of reasonable notice by the FISSA;
- (5) where the Sponsored Party knowingly or recklessly provides the ISA or the FISSA with information which is false or misleading in a material particular, or fails to retain or wilfully alters, suppresses, conceals or destroys any document which is required to be produced to the ISA or the FISSA; or
- (6) where, following at least two written reminders from FISSA, any payment or deposit required under section 38 or 42 of this Decree is in arrears or unpaid for six months following the day on which it ought to have been paid.

Hannah 20/2/13 3:01 PM

**Comment:** LH similarly concerned with this provision, and suggest the wording needs tightening (to clarify that the trigger circumstance is where a company shows no intention to perform the work) and/or tying into ISA rules, as ISA already require that the plan of work (with certain expenditure / performance targets) is adhered to (but permits some variation, if circumstances change – e.g. market conditions, which is quite likely)

Hannah 14/2/13 3:07 PM

**Comment:** A section needs to be added to establish the procedures for giving notice.

#### *Notice of revocation*

35. Before making a decision under section 34 of this Decree the FISSA must –

- (1) give to the Sponsored Party at least 30 days' written notice of the FISSA's intention to make the decision, setting out details of that proposed decision and the reasons for it, and inviting the Sponsored Party to make a written submission to the FISSA about the proposed decision within a specified timeframe, if there are any objections,
- (2) take into account in the decision any submissions received, and
- (3) where the decision taken in pursuance with section 35(2) is to revoke the Sponsorship Certificate, give the Sponsored Party no fewer than 6 months' notice before that revocation takes effect.

#### *Renewal*

36.

- (1) A Sponsored Party can apply to the FISSA for a Sponsorship Certificate or Seabed Minerals Agreement to be renewed for a period of up to five years, provided the application for renewal is received at least 9 months before the expiry date of any initial term.
- (2) The FISSA will inform the Sponsored Company of whether the renewal has been granted or refused within 3 months of the receipt of the application for renewal, and until that decision is communicated the Sponsorship Certificate shall be deemed to continue in force.
- (3) Where the renewal is to be refused, the FISSA will follow the processes contained in sections 3635(1)-(3) of this Decree.

Hannah 14/2/13 3:08 PM

**Comment:** A section also needs adding to express that a holder of a Sponsorship Certificate / Agreement for Exploration will have a presumptive right to obtain a Sponsorship Certificate / Agreement for Exploitation.

Hannah 20/2/13 3:02 PM

**Comment:** Should be clarified that multiple (indefinite) renewals can be granted e.g. 'may be renewed for successive periods of 5 years each'

#### *Ongoing liability after termination*

37. A Sponsoring Party shall remain –

- (1) subject to any ongoing obligations, including requirements to submit reports and to make payments to the FISSA; and
- (2) responsible for any damage from its wrongful acts or otherwise arising from its Seabed Minerals Activities in accordance with this Decree, notwithstanding that its Sponsorship Certificate has terminated.

## PART 7 - FISCAL ARRANGEMENTS

### *Payments by Sponsored Parties*

38.

- (1) **Sponsorship Application fee** - A Sponsorship Applicant shall pay to the FISSA upon submission of a Sponsorship Application, a non-refundable fee of US\$100,000.
- (2) **Administration fees** –
  - (a) The holder of a Sponsorship Certificate shall pay to the FISSA an administration fee of US\$150,000:
    - (i) within six months from the date of the issue of the Sponsorship Certificate, and
    - (ii) every year after that, on the anniversary each year of the date of the issue of the Sponsorship Certificate.
  - (b) During the fifth year of the Sponsorship Certificate term, the FISSA may review the amount of the administration fee required each year for the remainder of the term of the Sponsorship Certificate.
- (3) **Seabed Minerals royalties**
  - (a) The holder of a contract for Exploitation under Fiji's sponsorship shall pay to the FISSA such sums by way of royalty for the commercial extraction of Seabed Minerals as shall be agreed and specified in a written agreement between Fiji and the Sponsored Party at least one year prior to the commencement of Exploitation by the Sponsored Party.
  - (b) The royalty amount will be based on a percentage of the latest market value of the metal content contained in the Seabed Minerals extracted by the Sponsored Party through the Seabed Minerals Activities.

Hannah 20/2/13 3:03 PM

**Comment:** LH request that these specific figures are removed from the Decree and replaced with a provision permitting the Government to negotiate financial terms in a Sponsorship Agreement. NB The suggested fees are too high for LH. The UK rates (GBP 10k for application, 15k for first year, 25k after 6 years, 25k on each extension), which use an actual cost recovery mechanism would be more feasible for LH - perhaps with some small room for negotiation, given that this is a developing country.

### *Tax Exemption*

39. [A Sponsored Party will be exempt from the payment of corporate tax within Fiji in relation to its profit from Seabed Mineral Activities – *this provision to be confirmed*].

### *Financial payments to the ISA*

40. A Sponsored Party will be responsible to make prompt and full payment of any sums due to the ISA, under the Rules of the ISA.

### *Recovery of payments owed by Sponsored Parties*

Hannah 20/2/13 3:04 PM

**Comment:** LH request to that the royalty requirement is removed from the Law and replaced with a provision permitting Government to negotiate financial terms with each company as appropriate in a Sponsorship Agreement. It is agreed that the intention is not to charge a royalty on production before LH has recovered its set-up, exploration and mining costs, but rather to take a share of profits ('recovery fee') once / if those are realised – similar in effect to the LH / UK co. profit taxation set-up. LH also request the financial terms to specify that the arrangement must be within the range of rates prevailing in respect of land-based mining of similar minerals (as per 1994 Agreement provision re ISA royalties) – NB this needs to be negotiated as may leave Fiji at risk of little or no income. The parties could agree to an objective expert / method of determining what these 'prevailing rates' for land-based mining are.

41. A sum of money payable pursuant to section 38 of this Decree, is a debt due to the State, and may be recovered in a court of competent jurisdiction; and
- (1) in any such proceedings a certificate of the FISSA certifying that a specified sum of money is so payable, shall be received as evidence of that fact;
  - (2) any royalty unpaid by the Sponsored Party may at the court's discretion be recovered from any security deposited by the same Sponsored Party under section 42 of this Decree; and
  - (3) interest on the amount outstanding may additionally be charged at a Prescribed or otherwise reasonable rate.

**Security**

- 42.
- (1) The FISSA may within one year before Exploitation is due to commence require a Sponsored Party to deposit security as a guarantee of performance of the obligations attaching to the Seabed Minerals Agreement.
  - (2) The form and value of any such security required, and the terms upon which it will be held, will be specified in a written agreement.
  - (3) A security deposited in accordance with this section may be used by the FISSA to take steps towards fulfilling any obligations that the Sponsored Party fails to fulfil under this Decree, or to rectify any damage of loss caused as a result of such failure.

Hannah 20/2/13 3:05 PM

**Comment:** LH request this is amended so Government is empowered to negotiate whether or not to have such a security (and if so its amount, how it is held, when it is released etc) on an individual basis taking into account the characteristics of that contractor.

**PART 8 – MISCELLANEOUS**

***Inquiries into Incidents***

43. The FISSA may hold or may commission inquiries into Incidents.

***Nothing to authorise unlawful interference with other sea users***

44. Nothing in this Decree authorises the unlawful interference with the freedom of the high seas or the conduct of Marine Scientific Research by other persons or nation under the general principles of international law.

***Rights of other States***

45. Nothing in this Decree shall in any way affect the rights of coastal States in accordance with Article 142 and other relevant provisions of the UN Convention on the Law of the Sea.

***Interference with Seabed Mineral Activities or the FISSA***

- 46.
- (1) Unless authorised under this Decree or Regulations made under this Decree, any third party who interferes with –
    - (a) Seabed Mineral Activities, or
    - (b) The FISSA or its representative in the performance of duties under this Decree, or incites another person to so behave,

shall commit an offence and shall be liable to a fine not exceeding [Samount] or to a prison term not exceeding [X] years or both.

- (2) For the purposes of section 46(1), “interfere” includes physical interference, intimidation, or the filing of vexatious claims whether in Fiji or any other nation and any other activity designed to harass, or having the effect of harassing, obstructing, putting at risk or delaying any representative of the FISSA or person conducting Seabed Mineral Activities.

***Public Officials prohibited from acquiring Seabed Mineral rights***

47.

- (1) No Public Official shall, directly or indirectly, acquire any right or interest in any contract for Seabed Mineral Activities, and any document or transaction purporting to confer any right or interest on any such officer shall be null and void.
- (2) No Public Official engaged by the FISSA or the FISSA shall directly or indirectly acquire or retain any share in a private company carrying on Seabed Mineral Activities.

***Offence committed by a body corporate***

48. Where an offence under this Decree that has been committed by a body corporate is committed with the consent or connivance, or is attributable to the neglect, of any Director or officer of the body corporate, that officer as well as the body corporate is guilty of that offence.

***Disputes***

49.

- (1) Any dispute arising between Fiji and another State in connection with Seabed Mineral Activities shall be resolved pursuant to the provisions of the UN Convention on the Law of the Sea
- (2) Any dispute between Fiji and the Sponsored Party arising in connection with the administration of this Decree shall be dealt with by:
- (a) the parties attempting to reach settlement by mutual agreement or mediation, and in the event this is not successful then
- (b) by referral to arbitration to be conducted in accordance with the Arbitration Act.

***Regulations***

50. The Minister may under this Decree make (and when made vary, alter, amend, revoke or cancel) Regulations, with the Cabinet’s consent, prescribing anything required or authorised to be Prescribed under this Decree or generally for carrying this Decree into effect, and any such Regulations shall be consistent with the UN Convention on the Law of the Sea, the Rules of the ISA, and other applicable standards of international law.

Hannah 14/2/13 3:27 PM  
**Comment:** LH would require that the contract stipulates the UK as the prevailing law and dispute resolution mechanisms.

Hannah 14/2/13 3:28 PM  
**Comment:** LH request that any regulations should be subject to public notice and consultation procedures.