Mr Michael Lodge  
Secretary-General  
International Seabed Authority  
Kingston, Jamaica

Re: Tonga Offshore Mining Limited

Dear Mr Lodge,

In April 2020, over six months ago, DeepGreen Metals Inc. (DeepGreen) announced its acquisition of Tonga Offshore Mining Limited (TOML). This acquisition gives rise to a number of questions about the International Seabed Authority’s oversight of this change of control and whether TOML’s new ownership has acquired its interest in a manner consistent with the Authority’s regulations and the terms of TOML’s contract.

1. Has TOML notified the Authority of its acquisition? And has Tonga submitted a new certificate of sponsorship as required following a change of control? Section 20 of the Standard Terms and Conditions, as found in Annex IV of the Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area (“the Regulations”), would require:

Section 20 Termination of sponsorship
20.1 If the nationality or control of the Contractor changes or the Contractor’s sponsoring State, as defined in the Regulations, terminates its sponsorship, the Contractor shall promptly notify the Authority forthwith.
20.2 In either such event, if the Contractor does not obtain another sponsor meeting the requirements prescribed in the Regulations which submits to the Authority a certificate of sponsorship for the Contractor in the prescribed form within the time specified in the Regulations, this contract shall terminate forthwith. (emphasis added)

Pursuant to Section 20, TOML should have notified the Authority promptly of any change in control and, to avoid termination of its contract, “obtained a sponsor meeting the requirements prescribed in the Regulations which submits to the Authority a certificate of sponsorship for the Contractor in the prescribed form.” The Regulations appear to specify that the newly acquired Contractor has up to six months to obtain a sponsor and secure the required certificate (Regulation 29). Moreover, Regulation 29(5) prescribes that “[the] Secretary-General shall notify the members of the Authority of the termination or change of sponsorship”. Has this been done?

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1 DeepGreen acquires third seabed contract area, with the potential to solve the supply bottleneck of critical battery metals. At https://deep.green/deepgreen-acquires-third-seabed-contract-area-to-explore-for-polymetallic-nodules/. Undated.
2 The DSIC has requested copies of contracts, but has not received them. Therefore we must assume the Standard Terms and Conditions are indeed incorporated in contracts.
3 ISBA/19/C/17

The Stichting Deep Sea Conservation Coalition is registered with the Netherlands trade register under number 59473460.
2. Moreover, Regulation 11(2) requires that an applicant having the nationality of one State but effectively controlled by another State or its nationals must have a certificate of sponsorship from each State. This pivotal requirement has also been underscored in the 2011 Advisory Opinion on Responsibilities and Obligations of States Sponsoring Persons and Entities with respect to Activities in the Area.4 Given TOML’s acquisition by DeepGreen, a Canadian company, has Canada issued a certificate of sponsorship of TOML?

3. The Legal and Technical Commission recommended approval of TOML’s exploration contract in light of its financial position as a subsidiary of Nautilus Minerals Incorporated (Nautilus). Likewise, the Commission’s examination of TOML’s technical capacity focused on Nautilus’ technical capacity. With its change in control, the Commission’s determinations are no longer relevant. Will a new examination by the Commission of current TOML’s technical and financial capacity be undertaken?

4. This transfer highlights the problems inherent in evaluating contractual control based purely on a corporate structure, rather than beneficial ownership. While relevant rights and obligations remain vested with TOML, economic control of the company - and responsibility for ensuring the disposition of its exploration contract - has clearly shifted. This raises the question of the test of effective control, and specifically whether an economic or regulatory test should be applied. It seems from a Liability Working Group paper that the test properly applied, taking into account the provisions and context of the Convention, must be an economic one.5 How will the Authority develop guidelines and/or procedures to apply this test? Will it be added to the agenda of the Council in the context of the discussion of Standards and Guidelines and the Exploitation Regulations?

It is important that the Convention, regulations and contract be properly applied. This matter highlights the need for close scrutiny of such arrangements and acquisitions.

We look forward to your response.

Yours sincerely,

Ms. Sian Owen
Global Coordinator
Deep Sea Conservation Coalition

Mr. Siotame Drew Havea
Chairman of the Board of Directors
Civil Society Forum of Tonga

Copies to:
Rear Admiral (Retd.) Md. Khurshed Alam, President, Assembly
His Excellency, Ambassador Denys Wibaux, President, Council
Mr Viliami Va’inga Tone, Permanent Representative to the United Nations, The Permanent Mission of the Kingdom of Tonga to the United Nations and to Taaniela Kula, Deputy Secretary for Natural Resources
Mr. Kenneth Wong, Head of Delegation, Canada
Alfonso Ascencio-Herrera, Legal Counsel, Office of Legal Affairs, ISA

4 See paragraph 77 of the Advisory Opinion: “All contractors and applicants for contracts must secure and maintain the sponsorship of the State or States of which they are nationals. If another State or its nationals exercises effective control, the sponsorship of that State is also necessary.”