

Financial institutions
Energy
Infrastructure, mining and commodities
Transport
Technology and innovation
Life sciences and healthcare

 **NORTON ROSE FULBRIGHT**

CIL- ISA Workshop on Mineral Exploitation in the Area Barriers to Commercialisation

Nick Merritt
Global Head of Infrastructure, Mining and Commodities
Norton Rose Fulbright (Asia) LLP

Key bankability issues for investors and lenders (1)

- **Security of tenure and stability** – Lenders need to know the Project will generate returns to repay their debt
 - What rights does the ISA have to terminate or suspend the exploitation contract?
 - What aspects will be considered at each periodic review, and what are the potential consequences?
 - Role of the Sponsoring State and risks of termination of State sponsorship
 - Time periods to remedy defaults and negotiate and implement remedial plans
 - Step-in rights for Sponsoring State and for lenders
 - Will the ISA enter into direct agreements with lenders?

Key bankability issues for investors and lenders (2)

- **Transferability of the contract** – The contractor and its lenders will need to understand their ability to transfer the contract
 - What factors will be taken into account to assess financial and technical capabilities of potential transferees?
 - Is ISA consent required to grant security, and/or to enforce security, over a contract?
 - Will a change of control (at direct shareholder level or higher) trigger a requirement to obtain consent from the ISA for the transfer of a contract?

Key bankability issues for investors and lenders (3)

- **Stability of the legal and financial regime** – The contractor and its lenders may seek comfort that no material changes to the legal or financial regime will adversely impact on the viability of their project
 - What changes will be contemplated following periodic (proposed 5 yearly) reviews?
 - What rights will the ISA seek to unilaterally amend the contracts, or impose more onerous requirements on contractors?
 - What scope will there be for changes to the financial regime?

Key bankability issues for investors and lenders (4)

- **Regulation of commercial activities** – The contractor is likely to require flexibility in its plan to exploit its designated contract area to adapt to new technology, fluctuating commodity prices, etc
 - How much control will the ISA seek over the contractor's financing plan?
 - How much control will the ISA seek over the contractor's mining plan / Plans of Work?
 - What time limits will apply to commencing, ramping-up, completing, and decommissioning, mining operations?
 - Will suspension of mining activities be permitted? Will time frames apply?

Key bankability issues for investors and lenders (5)

- **Development and sharing of IP** – UNCLOS requires the contractor to *'make available to the Enterprise on fair and reasonable commercial terms and conditions, whenever the Authority so requests, the technology which he uses in carrying out activities in the Area under the contract, which the contractor is legally entitled to transfer'*
 - Will this deter contractors from developing their own IP?
 - Will contractors charter vessels rather than own them? Vessels are likely to be the biggest capex spend
 - Will this have implications for how projects are financed? Financiers may want access (via security) to both the contracts and the vessels / equipment

Key legal issue: Applicable legal regime

- A key issue to explore will be what legal regime will apply
 - Governing law of the exploitation contracts – currently exploration contracts provide for *'the terms of this contract, the rules, regulations and procedures of the Authority, Part XI of the Convention, the Agreement and other rules of international law not incompatible with the Convention'*
 - What law will govern security over the contract, the minerals, assets in the Area?
 - How will security be enforced over assets (including vessels) remaining in the Area?
 - To what extent will the ISA seek to regulate ancillary matters such as health & safety, competition law, etc? To what extent should this be left to the regulation of the Sponsoring State, or the flag state of the vessels?
 - Will Equator Principles III be relevant to environmental regulation?

The logo consists of a stylized, upward-pointing chevron shape in a gold or light brown color, positioned above the first letter of the text.

NORTON ROSE FULBRIGHT

Disclaimer

Norton Rose Fulbright US LLP, Norton Rose Fulbright LLP, Norton Rose Fulbright Australia, Norton Rose Fulbright Canada LLP and Norton Rose Fulbright South Africa Inc are separate legal entities and all of them are members of Norton Rose Fulbright Verein, a Swiss verein. Norton Rose Fulbright Verein helps coordinate the activities of the members but does not itself provide legal services to clients.

References to 'Norton Rose Fulbright', 'the law firm' and 'legal practice' are to one or more of the Norton Rose Fulbright members or to one of their respective affiliates (together 'Norton Rose Fulbright entity/entities'). No individual who is a member, partner, shareholder, director, employee or consultant of, in or to any Norton Rose Fulbright entity (whether or not such individual is described as a 'partner') accepts or assumes responsibility, or has any liability, to any person in respect of this communication. Any reference to a partner or director is to a member, employee or consultant with equivalent standing and qualifications of the relevant Norton Rose Fulbright entity.

The purpose of this communication is to provide general information of a legal nature. It does not contain a full analysis of the law nor does it constitute an opinion of any Norton Rose Fulbright entity on the points of law discussed. You must take specific legal advice on any particular matter which concerns you. If you require any advice or further information, please speak to your usual contact at Norton Rose Fulbright.