

TEMPLATE FOR SUBMISSION OF TEXTUAL PROPOSALS DURING THE 27TH SESSION: COUNCIL - PART III

Please fill out one form for each textual proposal which your delegation(s) wish(es) to amend, add or delete and send to council@isa.org.jm.

1. Name of Working Group: Plenary - President's Text

2. Name(s) of Delegation(s) making the proposal:

The Pew Charitable Trusts

3. Please indicate the relevant provision to which the textual proposal refers.

Regulation 18

4. Kindly provide the proposed amendments to the regulation or standard or guideline in the text box below, using the "track changes" function in Microsoft Word. Please only reproduce the parts of the text that are being amended or deleted.

Rights and exclusivity under an exploitation contract

~~Alt. Exclusive rights of a Contractor under an exploitation contract~~

1. An exploitation contract shall confer on a Contractor the exclusive right to:
 - (a) Explore for the specified Resource category in accordance with ~~[paragraph 7 below]~~ ~~[the rules, regulations and procedures of the Authority, where the approved Plan of Work provides for the stage of exploration]~~; and
 - (b) Exploit the specified Resource category in the Contract Area in accordance with the approved Plan of Work ~~and regulation 18bis and 18ter~~, provided that ~~production-mining operations~~ shall only take place in approved Mining Areas ~~[and subject to prerequisite prescribed under regulation 25(6)]~~.
2. The Authority shall not permit any other entity to exploit or explore for the same Resource category in the Contract Area for the entire duration of an exploitation contract.
3. The Authority, in consultation with a Contractor, shall ensure that no other ~~Contractor entity [holding a contract with the Authority]~~ operates in the Contract Area for a different category of resources in a manner which might interfere with the rights granted to the Contractor.
4. An exploitation contract shall provide for security of tenure and shall not be revised, suspended or terminated except ~~[in observance of the applicable rules, regulations and procedures, including Standards as well as]~~ in accordance with the terms ~~[of the exploitation contract]~~ thereof, ~~[and articles 18 and 19 of Annex III of the Convention]~~.

The Regulations should include a provision that specifies all potential circumstances for termination. We suggest the following;

Regulation [103 bis.] Termination of Contract

1. An exploitation contract can only be terminated:

- (a) by all parties to the contract by mutual consent;
- (b) by the termination of State sponsorship, in accordance with regulation 21;
- (c) by the Contractor in accordance with the terms of the contract, as covered by section 10 of the Annex X to these regulations;
- (d) by the Authority in accordance with the terms of the contract, as covered by section 12 of the Annex X to these regulations; or
- (e) by expiry of the term of the contract, without renewal.

2. Any suspension or termination of a contract by the Authority shall be by written notice to the Contractor, through the Secretary-General, which shall include a statement of the reasons for taking such action. The suspension or termination shall be effective 60 Days after such written notice, unless the Contractor within such period disputes the Authority's right to suspend or terminate the contract in accordance with Part XI, Section 5, of the Convention, in which case the contract shall only be suspended or terminated in accordance with a final binding decision in accordance with Part XI, Section 5, of the Convention.

5. An exploitation contract shall not confer any interest or right on a Contractor in or over any other part of the Area or its Resources or any other part of the Marine Environment, other than those rights expressly granted by the terms of the exploitation contract or these regulations [nor limit any (other) freedoms of the high seas].

~~6. The Contractor shall, subject to regulation 20, have the exclusive right to apply for and be granted a renewal of its exploitation contract.~~

7. In relation to Exploration activities in the Contract Area conducted under an Exploitation contract:

a. A Contractor may conduct Exploration activities within the Contract Area, in accordance with the proposed Exploration programme included in the Mining Workplan, and relevant Standards, taking account of Guidelines, ~~the applicable Exploration Regulations shall continue to apply [as set out in the relevant] [Guidelines] [Standards].~~ **In particular, t**

b. The Contractor shall ~~[be expected to] continue to~~ show due diligence in conducting Exploration activities in the Contract Area, ~~together with [the payment of applicable fees and] the~~ and shall reporting of such activities and its the results of any Exploration activities to the Authority in accordance with ~~the applicable Exploration Regulations, including under~~ regulation 38 (2)(k) and relevant Standards, taking account of Guidelines.

c. The Contractor shall also take into account any recommendations issued by the Commission pursuant to regulation 39 of the Exploration Regulations.

d. In order to progress from Exploration to Exploitation of a site within the Contract Area, where such Exploitation activity was not covered by the agreed Plan of Work, the Contractor must submit a new environmental impact statement and revised Plan of Work, in accordance with regulation [47] and which must be approved by the Authority in accordance with regulations [12-16].

8. [The Contractor shall exercise the exclusive rights provided for in this regulation in consistence with articles 87 and 147 of the Convention.]

[Regulation18 bis

Obligations of the Contractors.

1. Contractor shall comply with these Regulations and the Rules of the Authority in a manner consistent with the Convention and the Agreement.

1bis. A Contractor shall carry out the proposed Plan of Work in accordance with these Regulations, Good Industry Practice, Best Available Scientific Evidence and Best Environmental Practices, using appropriately qualified and adequately supervised personnel.

1ter. Contractors shall remain current in their implementation of Best Environmental Practices and Good Industry Practices, and shall continually identify and implement solutions that reflect the most up-to-date Best Available Scientific Evidence and Best Available Techniques.

2. Contractors, their holding, subsidiaries, affiliated and Ultimate Parent companies, agencies, partnerships, and suppliers shall be held liable for the compliance of the Contract. Particularly, they shall be jointly and severally and strictly liable for the obligation of compensating damages arising from Exploitation Activities.

3. Whether Contractors fail to comply with their payment obligations under these Regulations, holdings and Ultimate Parent Companies shall be held responsible to effect such payments to the Authority on behalf of Contractors.

4. Sponsor States shall take all legislative and administrative measures to assure that Contractors have all material, operative, and financial means to comply with the Contract and these Regulations and that no corporate limitation shall prevent Contractors, holding and Ultimate Parent Companies to compensate damages and make the payment required by the Contractors under the Contract and these Regulations.]

5. Please indicate the rationale for the proposal. [150 word limit]

Title: The original Regulation title is more appropriate because some rights contained in DR18 (e.g. right to security of tenure) do not pertain only to exclusivity.

Para 1(a): The wording here risks being both obsolete (i.e. reiterating here that the Contractor is bound by the rules, regulations and procedures of the ISA), and confusing (i.e. it does not state which rules, regulations and procedures of the ISA apply to exploration activities). It is important for the ISA to be clear about which rules apply to exploration activity conducted under an exploitation contract, to give all parties regulatory certainty. We consider more detailed provisions are required in this regard, which we have proposed below (paragraph 7).

Para 1(b): We suggest that DR18 would be a better location for a provision to restrict mining operations to the Mining Area), rather than DR102(1) on 'Remote Monitoring' where it is currently situated.

We suggest deletion of the proposed insertion at the end of the paragraph, which cross-refers to DR25(6). While not an incorrect reference, it is unclear why this Regulation that imposes an obligation on Contractors would be referred to here, rather than any other. All Contractors are required to adhere to all of the Regulations, including DR 25(6), without this needing to be repeated.

Para 3: The proposed insertion seems sensible to cover the fact that the ISA cannot reasonably be expected to control the actions of an entity over whom it does not have jurisdiction via a contractual relationship. Though we suggest replacing 'entity holding a contract with the ISA' with the defined term 'Contractor'.

Regarding para 4: The Regulations should include a provision that specifies all potential circumstances for termination. We have proposed language that could be included elsewhere in the regulations (103bis) or here.

Para 5: ‘The Area or its Resources’ omits any living resources, any resource located above the seafloor, any area of the high seas or within national jurisdiction etc. Hence the suggested addition for completeness.

Para 6: We propose deletion of DR18(6), which reads strangely and does not seem to serve any material function. No party other than an existing Contractor could claim a right to ‘renew’ a contract, and the renewal process is already set out in DR20.

Para 7: Exploration requirements under an exploitation contract may be more complex than is envisaged in paragraph (7), and we suggest significant amendment, taking a different approach and providing some more detailed provisions.

The current paragraph (7) statement that ‘applicable Exploration Regulations shall continue to apply’ is confusing. Many of the Exploration Regulations cannot logically apply to an Exploitation Contractor’s Exploration in their contract area (e.g. how to apply for an Exploration contract, or relinquishment), others would impose an unfair duplicative burden if applied (e.g. annual fees, training programme), and others could cause confusion by overlapping inconsistently with the Exploitation Regulations (e.g. responding to incidents, annual reporting).

Annex II to the Regulations requires applicants for Exploitation to include details of planned Exploration activities in their application for a Plan of Work and contract for Exploitation, so those Exploration activities are already incorporated into the Exploitation contract and subject to the Exploitation Regulations. Paragraph (7), then, appears to make the Exploration activities subject both to the Exploitation Regulations and the Exploitation Regulations, which may lead to confusion or regulatory overlap.

For these reasons, we would recommend instead that the ISA retains the Exploitation Regulations as the primary governing document for all activities conducted under an Exploitation contract, while also incorporating the LTC Recommendations produced in relation to the Exploration regime, on matters such as baseline data collection and reporting of exploration data.

The previous draft of paragraph (7) also did not detail the application process to commence Exploitation in a site located within a Contract Area not covered by the original EIS for Exploitation. We have addressed this point with proposed sub-paragraph (d).

Para 8: This insertion is already covered by DR31 (regarding Article 147 UNCLOS and reasonable regard for other marine activities) and by DR1(4) and proposed addition to DR18(5) (regarding Article 87 and freedoms of the high seas).

Regulation 18bis: We suggest adding to this proposed DR 18 bis. a general duty for Contractors to adhere to Good Industry Practice, Best Environmental Practices etc.. This is important to hold all Contractors to the relevant standard of care. A second paragraph is also proposed to implement the ‘adaptive management’ approach, which strives for continual evaluation and improvement.

We agree that the Regulations should clearly assign liability to the Contractor, as the party both best-placed to control the conduct of the Exploitation activities, and likely to obtain the greatest benefit from them. We would prefer to see this set as a strict liability standard i.e. a Contractor is liable for any claimable damage caused, without a requirement to show intentional wrongdoing, negligence, or serious, wilful or persistent breach of contract. We also agree that the ISA should prevent a situation in which Contractors can be ‘shell’ companies, operating in practice via parents, subsidiaries or other affiliates sufficiently separate in identity from the Contractor to be able to evade ISA or sponsoring State jurisdiction.

So we support this insertion in principle. But we would also welcome Council consideration as to whether proposed 18bis achieves the aim on its own, or whether additional measures may be required e.g. requiring the Contractor to

declare all affiliated parties in their application, and having those parties also sign the ISA contract, or a side agreement acknowledging their liability obligations?

We would also welcome more detail in the Regulations or in Standards about how the liability regime for mining in the Area will operate, as queried back in 2019 by the African Group: https://isa.org.jm/files/files/documents/isba_25_c_25-e_0.pdf, and taking into account the reports of the expert Legal Working Group on Liability Issues for Deep Seabed Mining: <https://www.cigionline.org/series/liability-issues-deep-seabed-mining-series> (2017-2019, co-chaired by ISA Secretariat, Commonwealth Secretariat, and the Centre for International Governance Innovation).

These papers raised the following crucial questions which remain unaddressed in the Regulations:

- Who can make a claim for compensation?
- What types of loss can be claimed?
- How will damages be assessed and quantified?
- What standard of liability will Contractors be held to in the event of environmental harm - strict liability, or will evidence of malfeasance or negligence be required to recover damages from the Contractor?
- What aspects of the liability regime will be covered by national regimes and court procedures?
- In what circumstances is the Environmental Compensation Fund to be used?
- Does the ISA's interpretation of the requirement for 'effective control' between sponsoring State and Contractor support the envisaged liability regime?

As a drafting note, it will help for regulatory certainty if any new terms to be included in the Regulations (e.g. 'Ultimate Parent Companies') can be defined, and added to the Schedule of the Regulations.