

THE PEW CHARITABLE TRUST'S COMMENTARY

***ON THE REVISED CONSOLIDATED TEXT: DRAFT REGULATIONS ON
EXPLOITATION OF MINERAL RESOURCES IN THE AREA,
DATED 29 NOVEMBER 2024 (ISBA/30/C/CRP.1)***

Key

Black font, red font, and grey text-boxes are replicated from the Draft Regulations text.

Blue font represents commentary or edits proposed by The Pew Charitable Trusts.

Annex XI

Parent Company Liability Statement

THIS “STATEMENT” made the ... day of ... by

- A. [insert name of Managing Company], with its statutory seat at [insert address and home State] and registered at [insert Chamber of Commerce or Trade Register details], represented by ..., with the authority to provide this Statement on behalf of [Managing Company]; and
- B. [insert name of Contractor], with its statutory seat at [insert address and home State] and registered at [insert Chamber of Commerce or Trade Register details], represented by ..., with the authority to provide this Statement on behalf of [Contractor]; and irrevocably and unconditionally DECLARE and REPRESENT that:

Obligations of [Managing Company]

- 1. [Managing Company] is jointly and severally liable for any debts and liabilities of [Contractor] arising in relation to:
 - (i) the obligations of [Contractor] that follow from the agreement that is to be concluded between [Contractor] and the International Seabed Authority for the exploitation of Mineral resources in the Area (hereinafter referred to as “the Exploitation Contract”);
 - (ii) the acts performed by [Contractor] in the performance of the Exploitation Contract; and
 - (iii) the omissions that [Contractor] makes in the performance of the Exploitation Contract (hereinafter referred to as “the Joint and Several Liability Obligation”);
- 2. [Managing Company] has the financial capability to comply with the Joint and Several Liability Obligation, or can draw on a parent company or its shareholders in order to do so (hereinafter referred to as “Certainty of Funds”);

3. [Managing Company] confirms that the Contractor is adequately insured to perform the Exploitation Contract in accordance with the applicable regulations and that such insurance will remain in place until such time as the Contractor's insurance should be in place, in accordance with the Regulations on Exploitation of Mineral Resources in the Area (hereinafter referred to as "the Regulations") and the Exploitation Contract (hereinafter referred to as "Certainty of Insurance");
4. [Managing Company] will procure that [Contractor] complies with the terms and conditions of their Exploitation Contract and the rules, regulations and procedures of the International Seabed Authority, in a manner consistent with the Convention and the Agreement, by among others, but not limited to, exercising its voting rights in the shareholder's meeting of [Contractor] and issuing instructions to the directors of [Contractor], when it is competent to do so;

Enforcement of Obligations of [Managing Company]

5. At any given point in time, the International Seabed Authority is authorized to request documentation to support the [Managing Company's] compliance with its obligations of Certainty of Funds and Certainty of Insurance, and that failure to do so within 15 working days or inability to substantiate such Certainty of Funds or Certainty of Insurance has to be remedied by [Managing Company] within a period of 90 days;
6. Should [Managing Company] fail to comply with the obligations in provision 5 above, the International Seabed Authority shall suspend the Exploitation Contract by issuing a written notice to the Managing Company and the Contractor in accordance with the applicable regulations, as a consequence of which the Contractor shall cease its operations in the exercise of the Exploitation Agreement until the International Seabed Authority is satisfied that [Managing Company] has remedied its failure to comply with the obligations in provision 5 above;
7. Notices to [Managing Company] and [Contractor] are to be sent to the following address: [insert contact details of Managing Company and Contractor].

Miscellaneous Provisions

8. If [Contractor] transfers its rights and obligations under an Exploitation Contract in whole, [Contractor] and [Managing Company] shall procure that the party that qualifies as the "Managing Company" under Regulations of the Transferee provides a statement substantially in the same form as Schedule 14 to the Exploitation Contract (Parent Company Liability Statement);
9. If [Contractor] transfers its rights and obligations under an Exploitation Contract in part, this STATEMENT shall remain in full force and effect, unless [Contractor] and

[Managing Company] procure that the party that qualifies as the “Managing Company” under Regulations of the Transferee provides a statement substantially in the same form as Schedule 14 to the Exploitation Contract (Parent Company Liability Statement);

10.If [Managing Company] no longer directly or indirectly owns or controls [Contractor], the party that comes to qualify as the “Managing Company” under the Schedule to the Regulations shall issue a statement substantially in the same form as Schedule 14 to the Exploitation Contract (Parent Company Liability Statement);

11. This STATEMENT or the obligations provided for in this STATEMENT cannot be assigned, transferred or novated;

12. A change in the corporate seat of [Managing Company] does not affect the validity of this STATEMENT;

13. [Managing Company] undertakes not to engage in any contracting or other corporate practice that serves to avoid its liability and responsibility as provided for under this STATEMENT;

14. This STATEMENT shall remain in effect after the termination of the Exploitation Contract and can be invoked for any conduct that is reasonably attributable to the Contractor; and

15. Any disputes arising in relation to this STATEMENT shall be settled in accordance with Part XII of the Regulations. [Managing Party] herewith provides its explicit written consent to being a party to such dispute settlement procedures.

We support the addition of this Annex XI, and are grateful to the Kingdom of the Netherlands for offering **a solution to one of the potential liability gaps in the regime**, namely where a Contractor is unable to pay a debt or liability due to insolvency (but has ring-fenced proceeds from mining or other assets via other companies in a group structure).

The proposal aligns with the previous findings of the Commonwealth/ISA/CIGI Liability Expert Working Group (2019), who noted “*The liability of the parent company comes into play when its subsidiary, the contractor, is unable to pay, although the risk of this may be ameliorated by ensuring the subsidiary company takes out adequate insurance or through the provision of guarantees ... At present, the LOSC, Annexes, Exploration Regulations and Draft Exploitation Regulations do not contemplate such a possibility.*”¹

The CIGI experts even highlighted the attribution of liability to parent companies as an important issue requiring the ISA’s “*specific attention*”. They noted “*In domestic contexts, there may be circumstances that allow for a “lifting of the corporate veil” to allow for recovery from a parent company, as an exception to the general rule of limited shareholder liability*”.² But also, in reviewing sponsorship laws, found that very few (if any) States legislated comprehensively on such matters, leaving a liability loophole or inequality from State-to-State, which

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https://www.cigionline.org/static/documents/documents/deep%20seabed%20mining%20paper%20no%204_2.pdf

² https://www.cigionline.org/static/documents/documents/Deep%20Seabed%20paper%20no.1_3.pdf

the ISA was well-placed to fill in developing its international regime.³ Indeed, we recall that ISA has not only the power but also an obligation to establish in RPPs criteria for a contractor's financial capabilities [Annex III, Art 4]. In this regard, introducing this requirement in ISA regulations seems **protective of sponsoring States**, reducing their due diligence responsibility and exposure to liability, while ensuring a level playing field across sponsoring State.

We would be interested to check a couple of points to ensure we understand fully the parent company liability statement proposal, namely:

- Is the statement intended to cover liability for harm caused to **third parties** (and not just indemnification to ISA for liabilities they may incur)? The broader obligation is preferable, but we are unsure of how this would work in practice.
- Would this requirement apply only to contractors who are **private sector**, and not to e.g. a State-owned enterprise, a Government holding a contract itself, an intergovernmental organisation (like current contractor IOM) or The Enterprise? If so, we note that this is one reason why the regime also needs to retain the other costs and liability cover provided by e.g. the EPG, insurance, ECF etc).
- Is there a need for further wording in Annex IX or Annex XI to specify that the statement constitutes creation of a **contractual relationship** between the Managing Company and the ISA?

Harmonization of Annex XI with other regulations is required, and we are grateful as well to the Netherlands for its proposals in this regard to DRs 7, 18bis, 23, 24, Annex IX and the Schedule. We wonder if an **additional cross-reference should be included in DR103** (on non-compliance) to cover the provisions in 5 and 6 above, which provide for ISA compliance action in the event of failure by the parent company? To support this, it may be necessary also to insert into the Regulations express provision that a failure by the parent company to comply with the terms of its parent company liability statement constitutes a violation of the ISA's RPPs.

Finally, we wish to highlight that this **proposal complements the discussion about 'effective control'** for non-State contractors. Identifying the Managing Company will assist with identifying location of effective control. If a Managing Company is located outside of an applicant's sponsoring State, then in our view the host country of the Managing Company would need to be joined to the application as a co-sponsoring State in order for the application to meet the effective control requirements. Otherwise there could be a Managing Company in a country that does *not* have deep seabed mining laws and administrative measures in place in its domestic legal system, which leads to another regime gap: where the Managing Company admits liability but is outside of any jurisdiction in which that liability can be enforced by a third-party claimant.

³ CIGI paper 'Sponsoring State Approaches to Liability Regimes for Environmental Damage Caused by Seabed Mining' (2018) <https://www.cigionline.org/publications/sponsoring-state-approaches-liability-regimes-environmental-damage-caused-seabed/>