

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.

Regulation 18

Rights and exclusivity under an Exploitation Contract

1. An Exploitation Contract shall confer on a Contractor [or the Enterprise] the exclusive right to:

(a) Explore for the specified Resource category in accordance with these Regulations and the approved Plan of Work; and

(b) Exploit the specified Resource category in the Contract Area in accordance with [these Regulations and] the approved Plan of Work [including Regulations 18 bis and 18 ter, and subject to prerequisites prescribed under Regulation 25(3)].

~~[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. [Notwithstanding the right to conduct marine scientific research in areas beyond national jurisdiction,] The Authority, in consultation with a Contractor, [and with the cooperation of States Parties to the Convention,] shall ensure, that no other [Contractor] [entity] operates in the Contract Area for a different category of Resources [or otherwise] in a manner which might interfere with the rights granted to, [or operations of] the Contractor.]~~

[3. Alt. The Authority, with the cooperation of States Parties to the Convention, shall ensure, to the extent possible, that no other entities operating in the Contract Area interfere with the rights granted to or operations of the Contractor.]

4. An Exploitation Contract shall provide for security of tenure and shall not be ~~[revised, suspended, or]~~ terminated except in accordance with [the terms set out in Articles 18 and 19 of the Annex III of the Convention.]~~[the terms set out in Regulation 18.ter.]~~

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 freedoms of the high seas]~~.

[5 bis. Adverse [Environmental] Impacts from activities in the Area carried out under an Exploitation Contract must be limited to the Contract Area].

6. The Contractor shall, subject to Regulation 20, have the exclusive right to apply for an [extension] ~~[renewal]~~ of its Exploitation Contract.

7. In relation to Exploration activities in the Contract Area conducted under an Exploitation Contract, [the applicable Exploration Regulations shall continue to apply. The Contractor:]

(a) ~~The Contractor m~~[M]ay conduct Exploration activities within the Contract Area, in accordance with the proposed Exploration programme included in the Mining Workplan;

(b) ~~The applicable Exploration Regulations shall continue to apply and the Contractor S~~hall exercise due diligence in conducting Exploration activities in the Contract Area and shall report the results of its Exploration activities to the Authority in accordance with Regulation 38(2)(k) and applicable Standards, taking into consideration the Guidelines; and

(c) ~~The Contractor S~~hall also take into account:

(i) any recommendations issued by the Commission pursuant to the Exploration Regulations; and

(ii) provisions of the Exploration Regulations that relate to the Protection and Preservation of the Marine Environment, and environmental baselines and monitoring.

8. In order to proceed with Exploitation on 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 [48 bis] and which must be approved by the Authority in accordance with regulations [11 to 16].

Comments

- It has been suggested to insert a reference to the Enterprise in paragraph 1. It is reminded, that as the definition of a “Contractor” currently is set out in the Schedule, the Contractor also entail the Enterprise. It is a crosscutting issue that needs to be discussed and resolved.

We agree with the President’s comment about references to ‘Contractor’ and ‘the Enterprise’ requiring consideration as a cross-cutting issue. The February 2024 Consolidated Regulations text for the first time adopted an alternative definition of ‘Contractor’ in the Schedule to the Regulations, to include any ‘*party to an Exploitation Contract (other than the Authority)*’[...] This encompasses the Enterprise. We are not sure that this formulation works without necessitating further amendments in the Regulations. There are uses of ‘Contractor’ in the Regulations that we do not believe are intended to include the Enterprise e.g. references to ‘*Contractors entering into joint ventures with the Enterprise*’; or Regulations pertaining to the payment regime (as we understand from Annex IV of UNCLOS that, “*the Assembly shall determine what portion of the net income of the Enterprise shall be retained as reserves of the Enterprise. The remainder shall be transferred to the Authority*”). This draft Regulations text also (as here) still includes references to ‘*Contractor and the Enterprise*’ or ‘*Contractor or the Enterprise*’. Further consideration needs to be given throughout the Regulations to the issue of which Regulations apply to the Enterprise in the same way they apply to other Contractors, and which do not, and where there may be a need for additional provisions in the Regulations to cover the situation of the Enterprise.

Paragraph (1)(a) gives a right to the Contractor to Explore ‘*in accordance with the [Exploitation] Regulations*’, where DR18(7) applies the Exploration Regulations to the same activities. This is contradictory. We preferred an earlier version that gave the Contractor the right to Explore ‘*in accordance with paragraph 7*’.

In **paragraph (1)(b)** we support the inclusion of ‘these Regulations’ which we believe was omitted in error previously. But we suggest deleting the newly proposed final clause that singles out specific regulations. We see this as unnecessary and incorrectly suggestive of a hierarchy between different regulations and their applicability.

- One delegation has suggested to delete paragraphs 2 and 3 with the rationale that the Authority cannot ensure that other entities will not interfere under an activity in the Contract Area. On the other hand, it has been suggested to

insert an alternative paragraph 3 that underlines that the Authority shall ensure that no other entities operate in the Contract Area in a manner that interferes with the Contractor's rights or operations. Paragraphs 2 and 3 are thus placed in brackets, and an alternative version of paragraph 3 has been inserted. Further discussions will be needed in this respect.

- More delegations have suggested to delete the reference to marine scientific research, as this seems to contradict the original intention of this draft regulation, which were to ensure that there are no mutually conflicting exploration or exploitation activities in a particular Contract Area.
- Several delegations suggested during the first part of the twenty-ninth session to reinsert the reference to “*Contractor*” instead of “*entity*” in paragraph 3. In the same paragraph it has been suggested to delete the reference to “*or otherwise*” as it is unclear what this refers to.

We agree with many of the comments that were previously made about **paragraph (3)**. It needs to be reflected here that the ISA can control only the grant of exploration and exploitation contracts and can regulate only its own organs and ISA contractors. The ISA does not have a legal mandate to control any third parties or any other activities in the Area and should not bind itself to achieve something outside of its legal powers and jurisdiction. Member States can, however, control their nationals.

We think new **paragraph (3 Alt)** is heading in the right direction as drafted. Though we would suggest instead of ‘entities’, using the better established (and UNCLOS) terminology of ‘*activities under their jurisdiction or control*’, and clarifying that the respective duties of the ISA and member States relate to their respective jurisdictions (only).

- In paragraph 4, it has been suggested to delete the reference to “*revised*” and “*suspended*”, to align the with draft regulation 18 ter., that regulates termination, only.
- Several delegations and observers have suggested to reinsert paragraph 5 bis.
- In draft regulation 7(b), several delegations have suggested to delete the reference to the application of the Exploration Regulations, as there might be cases where the Exploration Regulations will not apply, and thus create uncertainty.
- Paragraph 8 is a reinsertion of previous para 7(d), which has been requested by several delegations and observers.

In **paragraph (4)**, we think retaining a reference to paragraph 18 ter may be useful as that paragraph contains procedure for a termination or suspension, which is not provided for in Annex III of UNCLOS.

We can find no rationale for deletion of the wording ‘*or any other part of the Marine Environment*’ from **paragraph (5)**. This wording seems highly pertinent in clarifying the limits of rights conferred by an Exploitation Contract. We suggest retention.

We support re-insertion of **paragraph (5 bis)**. This mirrors the criterion also included at DR13(9)(c)(iv). The proposal to **limit impacts to Contract Areas** would set a clear parameter that can be easily understood and measured. It addresses concerns about transboundary impacts and the need to ensure protection of Areas of Particular Environmental Interest and other designated protected sites. It also avoids the issue of overlap of impact area by multiple Contractors which would make it difficult to assign fault or liability to any one Contractor.

We agree with the comments of others (reflected in the President's comment box, but not in the text) that in **paragraph (7)** the wording ‘*the applicable Exploration Regulations shall continue to apply*’ in the chapeau needs to be deleted (again). The use of ‘applicable’ renders its meaning unclear, and its legal effect potentially unenforceable. Many of the Exploration Regulations cannot logically apply to Exploration under an Exploitation Contract (such as relinquishment); others would impose an unfair duplicative burden if applied (such as annual fees); others could cause confusion by overlapping inconsistently with the Exploitation Regulations (such as responding to incidents, or annual reporting). The issue of which parts of the Exploration Regulations shall apply to Exploration conducted under Exploitation Contract, is now adequately covered by sub-paragraph (7)(c). We suggest the text should revert to the last iteration. Though we also recommend that sub-paragraph (7)(c) would be better phrased as ‘*The Contractor shall also **comply with**...*’ (rather than ‘*take into account*’).