

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 bis**

**Obligations of the Contractors**

1. Contractors shall comply with the terms and conditions of their Exploitation Contract and the rules, regulations and procedures of the Authority, [as well as the applicable Regional Environmental Management Plans,] [as amended from time to time] in a manner consistent with the Convention and the Agreement.

1. bis A Contractor shall carry out activities under a Plan of Work in accordance with Good Industry Practice, Best Available Scientific Information and Best Environmental Practices, using appropriately qualified and adequately supervised personnel and shall continually identify and implement solutions that reflect the most up-to-date Best Available Scientific Information [Best Environmental Practices] and Best Available Techniques.

[1. ter Contractors shall comply with the national laws, Regulations and administrative measures of the Sponsoring State or States made pursuant to Articles 139 and 153(4) of the Convention and Article 4(4) of Annex III to the Convention.]

[1. quat Contractors shall throughout the term of their Exploitation Contract, for the purposes of activities in the Area and ancillary activities, only use vessels flagged to registries of States that are States Parties to the Authority, and only use ports located in States that are States Parties to the Authority. In cases where the Contractor seeks to use flags or ports of non-member States of the Authority, the prior approval of the Council is required and is conditional upon receiving a written commitment from such nonmember State or States to enforce the rules, regulations and procedures of the Authority against the Contractor and to cooperate with the Authority for the purposes of securing compliance with the rules, regulations and procedures of the Authority, where required.] [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. [In accordance with the Exploitation Contract or the Parent Company Liability Statement, as the case may be,] tThe Contractor [and its Managing Company], [its holding, subsidiaries, affiliated and Ultimate Parent companies, agencies and partnerships] shall have responsibility or liability for any damage arising out of [wrongful acts in the conduct of its] [(a) the Contractor's] operations [or (b), the operations of its subsidiaries or sub-contractors in the performance of the Plan of Work,] [account being taken of contributory acts or omissions by the Authority,] and shall be held liable for the actual amount of damage.

3. In the event that Contractors fail to comply with their payment obligations under these Regulations, ~~[holdings and Ultimate Parent Companies]~~ [their Managing Company] shall be held responsible to effect such payments to the Authority on behalf of Contractors.

4. The Contractor shall allocate sufficient resources and assign roles and responsibilities to implement ~~ation of~~ their obligations under these Regulations.]

[5. Sponsoring State shall take all legislative and administrative measures to assure that Contractors have all material, operative, and financial means to comply with the Exploitation Contract and these Regulations and that no corporate limitation shall present Contractors, holding and Ultimate Parent Companies to compensate damages and make the payment required by the Contractors under the Exploitation Contract and these Regulations.]

#### Comments

- It has been suggested by some delegation to include a reference to Regional Environmental Management Plans in paragraph 1. Other delegations have suggested to delete the reference here, as Regional Environmental Management Plans should not be considered legally binding documents for the Contractor to abide by. It has thus been placed in square brackets for further consideration.

**Reference to REMPs** throughout the Regulations is a cross-cutting issue. Council members need to reach a shared agreement on the status of REMPs, and how REMPs will interact with the ISA's RRP. The issue will not be settled if it continues to be treated as a drafting point, Regulation-by-Regulation.

In brief, our view is that REMPs are not binding in themselves; REMPs are not 'rules, regulations or procedures' of the ISA, they are a 'plan' and a policy document. We reach this conclusion partly by looking at the content of REMPs – which includes a range of information not phrased or designed to operate in binding terms (e.g. maps and scientific assessments). But REMPs do also contain essential elements to support the ISA's duty to ensure effective protection of the marine environment from harmful effects of activities in the Area. As such, relevant elements of REMPs should be binding on ISA decision-making and on contractors (e.g. protected areas and other management tools, regional goals and objectives, thresholds relating to carrying capacity on a regional scale). In our view, these specific elements need to be (i) clearly identified in each REMP, and (ii) given binding effect by the Regulations.

If this is done, (as we have suggested in our comments under Regulation 1), the reference in **paragraph (1)** to the RRP would be sufficient to ensure that relevant elements of a REMP are binding, with no need separately to refer to REMPs. In paragraph (1), we also strongly support reinsertion of reference to the RRP 'as may be adopted or amended from time to time'. This is important wording to clarify that Contractors are required to adapt to the evolving regulatory regime of the ISA, noting that the RRP may need amendment as the institution learns over time, and also noting that Contracts may be given out for decadal timeframes and the ISA should not bind itself to continue to apply RRP that may become quickly outdated.

We find **paragraph (1 bis)** reads oddly as it seems to repeat (some) of the standards twice with similar effect. We suggest re-wording to avoid repetition. We also recall that the definition of "**Best Environmental Practices**" in the Schedule contains a requirement for "*Best Environmental Scientific Information*" and "*Best Available Techniques*", in which case repeating these terms alongside "**Best Environmental Practices**" here may be redundant and confusing. We also note that DR13 contains an assessment criterion for an application that is not reflected elsewhere in the regulations as a general obligation for Contractors. Taking this all into account, we would suggest a re-drafted (1 bis) to read as follows:

"1. bis A Contractor shall carry out activities under a Plan of Work and shall seek continuous improvement in its operations, in accordance with Good Industry Practice; ~~Best Available Scientific Information~~ and Best Environmental Practices, at all times using appropriately qualified and adequately supervised personnel, and maintaining and adhering to internationally-recognised quality control and management standards, including on the assessment of the equipment, operational procedures and processes used in Exploitation activities in accordance with applicable Standards and taking into

~~consideration Guidelines and shall continually identify and implement solutions that reflect the most up to date Best Available Scientific Information [Best Environmental Practices] and Best Available Techniques.~~

Alternatively, the wording “*maintaining and adhering to internationally-recognised quality control and management standards, including on the assessment of the equipment, operational procedures and processes used in Exploitation activities in accordance with applicable Standards and taking into consideration Guidelines*” could be added into the defined term “*Good Industry Practices*” and then it would not need repeating here.

Finally in relation to (1 bis) we are unclear whether the references to Good Industry Practice and Best Environmental Practices are sufficient to implement UNCLOS Article 150’s requirement that Exploitation shall be orderly, safe and rationally managed, efficient, and avoiding unnecessary waste? These points were previously included in paragraphs in DR29 that have now been deleted, and we are unsure if the points are captured elsewhere in the Regulations now.

- One delegation have suggested to insert language in paragraph 1 quat to ensure Contractors use of best available techniques. On the other hand, it has also been suggested by several delegations to delete paragraphs 1.ter and 1. quat, as it could be considered too restrictive and contain jurisdictional difficulties. Further considerations should be given to this paragraph and whether it should be omitted.

We support retention of paragraph (1)(ter) (though note the word ‘Regulations’ has been capitalised in error here). We understand that this provision is not aiming to duplicate or interfere with national jurisdiction, but rather by its inclusion in the ISA’s Regulations, it helpfully makes a notification to the ISA (e.g. by the sponsoring State) of a Contractor’s **non-compliance with national laws** a legitimate trigger for the ISA to take its own regulatory action.

We also support paragraph (1)(quat), which goes hand in hand with DR5(3)(e) also. These additions recognise that the **ISA’s Regulations have no binding effect upon a State that is not a member State of the ISA**. This could cause an issue for inspections, information-gathering, or enforcement, given the ISA’s lack of jurisdiction over a vessel on the high seas, or in a port. This new insertion helps to ensure cooperative States thus avoiding such a loophole, with the aim to deliver a smooth and holistic compliance regime before the grant of a contract. We do think the drafting could be finessed, so that the second sentence does not directly contradict the first, and to reflect that there are ‘*member States*’ not ‘*States Parties to the Authority*’. We also wonder if the new sentence proposed for addition at the end of (1)(quat) is misplaced, and is supposed to be an alternative to, or part of, paragraph (1 bis)?

- One delegation have provided suggestions for paragraph 2 to ensure that parent companies of Contractors are jointly and severally liable towards the Authority for damage caused by a Contractor. A “*Parent Company Liability Statement*” is introduced, including a new Annex XI, which will form a compulsory schedule to the Exploitation Contract.

In other industries there is unfortunately well-established history of **indirect company ownership arrangements** set up specifically for individuals to shield themselves from liability (while reaping benefits). For this reason, we support the intention behind **paragraphs (2) and (3)** to seek to place obligations on parties related to the Contractor. We would however like to see paragraph (2) tweaked to deal with ‘responsibility’ and ‘liability’ separately, rather than conflating them. Contractors and related parties should be responsible to comply with all aspects of the contract, and liability should attach to damage caused. The current drafting gives companies ‘*responsibility for any damage*’. ‘Responsibility’ is a term used to impose an active obligation (and we presume the intention here is not to oblige companies to cause damage).

The current drafting ‘*shall have liability*’ raises questions that are not answered E.g. **liability** to whom? In what forum? To what standard? For what type of loss? Leading to what remedy? Again, we recommend that liability aspects of the draft Regulations be given significantly increased attention by the Council, as requested in a submission to Council by the African Group of countries, in 2019.<sup>1</sup> The Council may find it helpful to reengage its previous expert working

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<sup>1</sup> ISBA/25/C/25, 25 June 2019 ‘Recommendations on Liability’ submitted by the African Group, accessible here: [https://www.isa.org.jm/wp-content/uploads/2022/06/isba\\_25\\_c\\_25-e\\_0.pdf](https://www.isa.org.jm/wp-content/uploads/2022/06/isba_25_c_25-e_0.pdf)

group on liability issues, to evaluate the draft regulations against the numerous recommendations the working group made, and to report on remaining liability gaps in the draft Regulations.<sup>2</sup>

We support the thinking of the Netherlands as stated in its non-Paper on Parent Liability: *“In general commercial practice, one would expect companies that desire to enjoy the upside of their business to also be prepared to bear the risks thereof. Moreover, if businesses are free to conduct their activities without any risk, they will have insufficient incentive to adopt appropriate damage mitigation measures.”*

- Several delegations have asked for the deleted paragraph 4 to be reinserted. Given the updated numbering, the para is inserted as a new paragraph 5. There seems to not be agreement as to the placement of the paragraph, and considerations are needed in relation of the most appropriate placement hereof.

Whilst it makes sense to move this **paragraph (5)** out of DR18bis, whose subject is Contractor obligations not State obligations, we support its retention in the Regulations. This is an important provision that clarifies at the international level **what is expected from Sponsoring States** and is consistent with UNCLOS Annex III Art 4, which states: *'The criteria and procedures for implementation of the sponsorship requirements shall be set forth in the rules, regulations and procedures of the Authority.'* It is worth noting here as well that a provision such as this aligns with a recommendation from the ISA's former expert working group on liability, to provide more leadership from the ISA in terms of delivery and harmonisation of sponsoring State responsibilities.<sup>3</sup> Drafting errors have crept into this text though e.g. we think it should be 'States' (not 'State'), 'Managing Companies' (not 'Ultimate Parent Companies'), 'prevent' (not 'present'), 'from compensating' (not 'to compensate'), 'making the payments' not 'make the payment', and 'required from Contractors' not 'required by the Contractors'.

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<sup>2</sup> <https://www.cigionline.org/series/liability-issues-deep-seabed-mining-series/>.

<sup>3</sup> <https://www.cigionline.org/publications/sponsoring-state-approaches-liability-regimes-environmental-damage-caused-seabed/>.