

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 28

Maintaining Commercial Production

1. Except for circumstances described in Regulation 33, ~~t~~The Contractor shall maintain Commercial Production in accordance with the Exploitation Contract and the Plan of Work annexed thereto, ~~and~~ these Regulations, and taking into account market conditions. A Contractor shall, consistent with Good Industry Practice, manage the recovery of the Minerals removed from the Mining Area at rates ~~contemplated~~ included in the Mining Workplan~~Feasibility Study~~.
2. The Contractor shall notify the Secretary-General and the Sponsoring State or States if it:
 - (a) Fails to ~~comply with the Plan of Work~~maintain Commercial Production; or
 - (b) Determines that it will not be able to ~~adhere to the Plan of Work~~maintain Commercial Production in future.

2. bis. In accordance with Regulations 29 bis, the Secretary-General shall transmit the notification made under paragraph 2 and any supporting documentation to the [Compliance Committee]/[The Commission] for review and to make a recommendation to the Council.

~~3. Notwithstanding paragraph 1 above, the Contractor shall immediately [reduce or suspend production whenever such reduction or suspension is required to protect the Marine Environment [from Serious Harm or a threat of Serious Harm] or to protect human health and safety. A Contractor shall notify the Secretary-General and the Sponsoring State or States of such a reduction or suspension of production as soon as is practicable and no later than [72] [24] hours after production is reduced or suspended.]~~

4. A Contractor shall notify the Secretary-General [and Sponsoring State] as soon as it recommences any [Commercial Production], and no later than ~~[72]~~ [24] hours after such recommencement, and, where necessary, shall provide to the Secretary-General [and Sponsoring State] such information as is necessary to demonstrate that the issue triggering a reduction or suspension has been addressed. The Secretary-General shall notify the Council that production has recommenced.

Comments

- It has been suggested to clarify the content of paragraph 2. A new paragraph 2. bis. has been provided to clarify what happens if or when a Contractor notifies non-compliance.
- During the first part of the twenty-ninth session, divergent views were presented in relation to the reference to serious harm in paragraph 3. It has been argued that the reference should be kept, cf. Article 165 (2)(k) of the Convention. It has thus been retained but in square brackets and stroked out.

- Furthermore, it has been suggested to delete paragraph 3 as it overlaps with draft regulation 33. A cross reference to draft regulation 33 has been inserted in paragraph 1 to accommodate for that and paragraph 3 has been suggested deleted.

DR28 has improved with the latest round of amendments but needs further revision to work.

Paragraph (1) needs to refer to any suspension that has been required or approved in accordance with these Regulations – for which there are many different grounds - not only DR33. The phrase ‘*and taking into account market conditions*’ does not fit nor serve any purpose in this paragraph and should be deleted. If a Contractor wishes to suspend or reduce production due to market conditions, this should be managed via DR29.

Paragraph (2) should start with the words ‘*During Commercial Production...*’ to place the rest of the paragraph in appropriate context.

We wondered, reading paragraph (2), if the regime **relies solely on self-reporting** from a Contractor as to whether Commercial Production is being maintained? If so, this would seem inadvisable, and we would recommend that the ISA is independently verifying the quantity and rate of minerals recovered by any Contractor.

We support inclusion of **paragraph (2 bis)** but believe the cross-reference to DR29 bis (‘Procedure for Suspensions’) has been made in error. This should read “*Save for a situation covered by regulation 29[...]*” to clarify that the Contractor can either request a temporary suspension or reduction in Commercial Production under DR29, or this DR28 applies.

This DR28 covers failure on the Contractor’s part to maintain Commercial Production, not a suspension situation. DR28 appears to cover only **circumstances of non-compliance** (as DR29 alternatively sets a very permissive procedure for any other circumstance, in which Commercial Production can be temporarily reduced at the Contractor’s instigation). For this reason, the Compliance Committee seems the appropriate body to reference in (2 bis). Though another response to failure to meet Commercial Production may be a request from the Contractor to **amend the Plan of Work** pursuant to DR57 (e.g. to reduce the requisite volume of mineral extracted for Commercial Production). This option should be included in either paragraph (2) or (2 bis).

We support wholesale deletion of paragraph (3) on the basis that this is already, and better, covered by DR33. This renders the ‘**Serious Harm**’ question redundant, though we would have argued to delete ‘Serious Harm’ and retain ‘for the Protection of the Marine Environment’ as the standard required by Articles 192 and 145 of UNCLOS.

In paragraph (4) we suggest replacing the words “*triggering a reduction or suspension*” with the words “*causing the contractor to fail to maintain Commercial Production*” as this is the scope of this DR. A reduction or suspension is the scope of DR29 and other DRs.

We noticed some small typographical errors in this DR28:

- Paragraph (1): “*Except for in circumstances [...]*”
- Paragraph (2)(b): “*[...]in the future*”
- Paragraph (2 bis): “*[...] Regulations 29 [...]*”