

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 29 bis

Procedure for suspensions in Exploitation activities

1. Any time that there is a suspension of Exploitation activities under these Regulations, the Secretary-General shall within 7 Days notify the Council and publish the notice ~~on~~^{at} the Authority's website when activities have been suspended, which shall include the rationale for the suspension, and when the activities have recommenced.
2. Where the Authority requires a suspension of Exploitation activities in accordance with these Regulations, ~~[is required for any reason by the Authority,]~~ the Authority [Council upon a recommendation of the Commission] will provide the Contractor with a suspension notice to specify the reasons for the suspension, what operations under the Plan of Work must cease, and which, if any, may continue, and any other relevant terms and conditions for the suspension.
3. During a suspension of Exploitation activities for any reason:
 - (a) A Contractor shall notify the Secretary-General as soon as it intends to recommence any or all of the suspended activities no later than [72 hours] before such commencement, and, where necessary, shall provide to the Secretary-General such information as is necessary to demonstrate that the issue triggering a suspension has been addressed; or
 - (b) A Contractor shall report to the Secretary-General on at least a monthly basis with regards to the reasons for continuing the suspension, providing such information as is necessary to justify that the issue triggering a suspension continues.
4. The Secretary-General shall supply all information received pursuant to paragraph 3 to the Commission for review and to make a recommendation to the Council. The Council shall determine when the relevant Exploitation activities should recommence, giving the Contractor no less than 60 Days' written notice where resumption of activities is required.
5. In making its review under paragraph 4, the Commission shall take into account the recommendations of the Economic Planning Commission where applicable, and shall examine whether the reasons for the suspension are reasonable, and whether a continued suspension or a commencement of activities, would be in the best interests of humankind in the circumstances.
6. Throughout the duration of any suspension in Exploitation activities, the Contractor shall continue to monitor and manage the Mining Area in accordance with the relevant section of the Closure Plan.

7. Where a suspension in Exploitation activities continues for a period of more than 12 months, the Commission may require the Contractor to submit a Final Closure Plan in accordance with Regulation 60.

8. Where the Council requires recommencement of Exploitation activities after a suspension under this Regulation, and the Contractor does not comply with that requirement, this shall be treated as a serious violation of a fundamental term of the Exploitation Contract and these Regulations, and the Authority shall take appropriate compliance action.

9. In the event that a Contractor elects to suspend all Commercial Production for more than five consecutive years, the Council may after discussion with the Contractor decide that Commercial Production has ceased, and require the Contractor to implement the Final Closure Plan.

10. The procedure under this Regulation shall also apply mutatis mutandis to reductions that result in failure to maintain Commercial Production.

Comments

- Many delegations and observers supported the insertion of draft regulation 29 bis. It was suggested to add a paragraph 10 that would address reduction.
- It has been suggested by one delegation that draft regulation 29 bis. could be divided into two separate regulations, distinguishing between reductions due to the Authority's request contra reduction due to the Contractors decision.

Generally, we support DR29 bis. It is an important provision to enable the **ISA to maintain appropriate control over any period of suspension of Exploitation activities** – both to avoid re-starting of mining too early (e.g. where there are human health or environmental risks) and conversely to avoid suspensions being unduly prolonged (e.g. by a Contractor for the purposes to avoid paying royalty or moving to Closure). The practice of mining ending in practice but mine sites not being properly closed is a serious issue with land-based mining. It is important the governing laws properly empower the regulator to identify a de facto closure (or abandonment) situation, being disguised as reduced or suspended production. We support the inclusion of reduction via new paragraph (10).

We suggest that paragraph (1) or (10) should also expressly state that a **suspension or reduction in production under DR29 falls within the scope of DR29bis**. We are not sure this is clear from the current drafting, but (as per our comments in relation to DR29, above), it is essential that the relevant procedures of DR29bis are applicable to the DR29 circumstances. If a Contractor reduces or suspends production, there are many legitimate reasons for the ISA's oversight to ensure compliance with the terms of the Exploitation Contract.

We wonder if the **timelines** need reconsideration in DR29bis? Paragraph (3)(a) implies that a Contractor wishing to recommence activity after a suspension may request a decision within 72 hours. Yet, paragraph (4) indicates that such decision will require deliberation and recommendation by the LTC, followed by a Council decision, plus 60 days' notice. That seems more likely to take 6 months (at least), not 3 days.

Paragraphs (4) and (5) propose the LTC to make the relevant review and recommendation to Council, taking into consideration the EPC's recommendations. We wonder about the **role of the Compliance Committee** here? A suspension can arise, not only at the Contractor's request, but also as the result of a compliance action from the ISA. In such suspensions, it seems that the Compliance Commission should either make the recommendation about recommencement to the Council -either standalone, or in conjunction with the LTC (which could be covered in paragraph (4) of DR29bis), or at least be involved in the LTC's recommendation (i.e. added as an additional body to paragraph (5)).

Paragraph (4) focuses on the **Council's decision** whether to permit recommencement of Exploitation activities after a suspension. We suggest that this should be broadened to clarify that the Council has three options for its decision under DR29bis, namely: (a) a decision that the suspension continues, (b) a decision that Exploitation activities that have been suspended recommence, (c) a decision that the Contractor must submit a final Closure Plan and move to the Closure phase of its contract. In each case that decision may be at the Contractor's request or may be a direction of the Council. We agree with comments raised during the Council's 29th session that these are very different circumstances, and they should be clearly delineated and differentiated in DR29bis.

If the Council's power to decide to move a suspended project to Closure is clarified in paragraph (4), then paragraph (7) (which has the LTC take such a decision) can be deleted. UNCLOS gives the LTC advisory, recommendatory and supervisory powers (only). It seems **ultra vires to have the LTC taking a decision** unilaterally, effectively, to end an Exploitation project. This is compounded by the paragraph being phrased ('may') to give the LTC complete discretion, without reference to any guidance or parameters. As above, we propose instead giving this decision-making power to the Council, via paragraph (4), and deleting paragraph (7).