

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.

## Section 6

### Insurance obligations

#### Regulation 36

##### Insurance

1. A Contractor shall obtain and thereafter at all times maintain, and cause its subcontractors to obtain and maintain, in full force and effect, insurance with financially sound insurers satisfactory to the Authority, of such types, on such terms and in such amounts in accordance with applicable Standards [and taking into consideration the Guidelines] ~~[and applicable international maritime practice]~~ consistent with Good Industry Practice.

~~1.~~ bis The insurance required under paragraph 1 shall:

(a) Be proposed at the time of applying for approval of a Plan of Work of exploitation to allow the Commission and Council to assess the satisfactoriness of the proposed insurance ~~policy~~ against this Regulation and the [applicable]~~[relevant]~~ Standard, [and taking into account the relevant]~~[and]~~ Guidelines; and

(b) Be in effect from the start date of the Exploitation Contract, until such time as the Environmental Performance Guarantee has been released back to the Contractor in full by the Authority.

~~[(c) cover all [potential] harms to people, property, natural resources, and environment that may occur, wherever located, or howsoever caused, as a result of the Contractor's activities in the Area].~~

2. Contractors shall include the Authority as an additional assured. A Contractor shall [use its best endeavours to] ensure that all insurances required under this Regulation shall be endorsed to provide that the underwriters waive any rights of recourse, including subrogation rights against the Authority in relation to Exploitation.

3. The obligation under an Exploitation Contract to maintain insurance as specified in these Regulations and the applicable Standards [and Guidelines] is a fundamental term of the Exploitation contract. Should a Contractor fail to maintain the insurance required under these Regulations, the [Contractor shall immediately suspend Exploitation activities pursuant to Regulation 29bis. The [Compliance Committee] Secretary-General upon being notified of such a suspension, shall consider what additional compliance action is needed, if any, pursuant to issue a compliance notice order under Regulation 103. ~~[The Contractor must safely suspend Exploitation activities as soon as it no longer fulfils the obligation to maintain insurance]. The Secretary-General shall notify the~~

~~Council immediately [at its next available meeting] of such failure, and the corrective measures taken by the Contractor.]~~

4. A Contractor shall not make any Material Change to or terminate any insurance policy related to its Exploitation activities in the Area without the prior consent of the Council.

5. A Contractor shall notify the ~~{Compliance Committee through the SecretaryGeneral [as soon as practicably possible] [immediately] [without any delay]~~ if the insurer terminates the policy or modifies the terms of insurance, [in which case paragraph 3 shall apply, as relevant].

6. A Contractor shall notify the Secretary-General ~~[as soon as practicably possible] [within 24 hours]~~ upon receipt of claims made under its insurance.

7. A Contractor shall ~~[provide the Secretary-General at least annually with] [include]~~ evidence of the existence of ~~such~~ insurance in accordance with Regulation 38 (2) (i) [to its annual report to the Authority and shall inform the Secretary-General immediately of any change of insurer].

#### Comments

- More delegations have suggested to delete the reference to international maritime practice in paragraph 1, since this is not sufficiently specific.
- Several delegations have suggested to remove the brackets around paragraph 1. bis.
- One delegation suggested to retain paragraph 1. bis. (c) as it describes the scope of insurance required. Other delegations suggest removing such information to the Standard so that it can be more easily amended in response to prevailing trends in insurance products offered in the industry. Other delegations highlight concern over the content as it appears to be contradictory to current industry practice. It has been suggested to reassess the content of the sub-paragraph according to the reality of the coverage of existing insurance products in the industry. It has been put forward that it would appear to cover all consequential loss to the umpteenth degree and that it would not be possible to obtain such type of insurance. Paragraph 1. bis. (c) has therefore been retained in square brackets for further consideration.
- The last sentence of paragraph 3 has been deleted since the notification already is covered by draft regulations 29bis and 103.
- One regional group had suggested to insert a paragraph 8 that would stipulate the minimum coverage requirements and a paragraph 9 that would regulate the review and adjustments. Other delegations have suggested that such information should be included in the applicable Standard. It is thus to be decided where to place such information.

Many member States have noted during negotiations that insurance will be relied upon by the ISA as a crucial part of the liability and compensation scheme for harm arising from Exploitation in the Area. It is therefore essential that the insurance requirements for Exploitation are appropriately comprehensive and clear in the finalised regime. We would suggest that the **composite set of insurance requirements, including all relevant details, be discussed and agreed upon by the Council as a priority**. This will inform whether the regime in the Area is workable and able to provide adequate protections against possible harm. The placement of provisions – whether in the Regulations or Standards – is a secondary matter that can be determined later and should not distract from the fundamental and substantive issues at hand.

We recall many member States (e.g. Bangladesh, Chile, Costa Rica, Germany, Netherlands) in July 2024 highlighting DR36 and insurance requirements as an **area requiring more study, and external expert input**. We agree that the Council would benefit from an informed and general discussion about how insurance may work in practice, and how the Council sees it integrating with other related parts of the regime such as implementation of the polluter pays principle, and the operation of the Environmental Compensation Fund, the Environmental Performance Guarantee, and a Contractor's and a sponsoring State's general liability obligations. Understanding the workability of the regime will include knowing whether insurance will be required to cover 100% of claims and, if not, how the remaining percentage will be paid, particularly in the event of a Contractor alleging insolvency. Agreeing these policy principles may help fill in the aspects to be covered in the regulatory regime, such as scope, thresholds, timing and quantum of insurance policies.

Additional insurance-related issues in need of clarification were raised in the July 2024 session (e.g. by Bangladesh, Chile, Ghana on behalf of the African Group, Mauritius, Panama). These questions, which remain unanswered, include:

- How will the ISA ensure claims can be made directly against an insurer, in a situation where the Contractor ceases to exist (e.g. through insolvency)?
- How will the ISA establish where insurance claims can be brought? Noting that insurance companies will not be subject to the ISA's jurisdiction (nor ITLOS).
- If claims would be brought in domestic adjudication systems, how will the ISA ensure it has legal standing?
- Is self-insurance permitted in the case of State contractors?

In **paragraph (1)**, we support the deletion of 'applicable international maritime practice', as this insurance requirement should cover deep-seabed mining activities, not associated maritime activity. Suggestions by member States, such as the United Kingdom, to *draw upon* international maritime practice in formulating these Regulations, should not in our view be misconstrued as a request to *replicate* requirements already in place for shipping (and enforced via shipping laws of the flag State, not via the ISA), as that would both be redundant and leave a gap for insurance relating to deep seabed mining.

We support retention of **paragraphs (1)(bis)** and **(1)(c)** in the Regulations, and the amendments made to **paragraph (3)**. We recall a proposal made by France to more precisely specify the required scope of the insurance in paragraph (1)(c) and would like to see that reflected in the Consolidated Text for further discussion.

It would seem helpful if **paragraph (6)** were also to describe what the Secretary-General must do in the event of notification of a claim upon the insurance.