

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 9

Miscellaneous

Regulation 40

Prevention of corruption

1. A Contractor shall not offer or promise or make nor attempt to make any gift or reward or personal favour to any officials, agents or employees or ~~Contractors~~ subcontractors of the Authority or other individuals operating under the auspices of the Authority to induce or reward such persons for any acts undertaken in accordance with their duties ~~under these Regulations~~ under the Rules of the Authority.

[1.bis. A Contractor shall not make gifts or rewards directly to the Authority, to procure a benefit that it would not be entitled to under the Exploration Contract or the Exploitation Contract.]

[1.ter. A Contractor shall not encourage, instruct or allow any other person or government to offer, promise or make any such gift or reward or personal favour referred to in paragraph 1.]

[1. quat. Contractors shall prepare and publish an anti-corruption policy setting out how they manage corruption risk, including how they collect and take risk-based steps to use beneficial ownership data of joint venture partners, subcontractors and suppliers in their process.]

2. The Contractor acknowledges and agrees that it is subject to the anti-bribery and anti-corruption provisions of the jurisdictions in which the Contractor is a national or by whose nationals it is effectively controlled and shall conduct its activities under the Exploitation Contract in accordance with its obligations under such anti-bribery and anti-corruption laws, ~~[including in accordance with the OECD Recommendation on Guidelines on Anti-Corruption and Integrity in State-Owned Enterprises].~~

3. Any act in contravention of paragraph 1 shall be deemed a serious and wilful violation of the fundamental tenet of these Regulations and the Exploitation Contract, and the Secretary-General, upon becoming aware of any such act or relevant allegation, shall refer the information immediately to the Compliance Committee for their consideration, including possible action pursuant to Regulation 103, and shall notify the Sponsoring State, safe for the event that the Compliance Committee is implicated in the act or allegation, in which case the Secretary-General shall refer the matter to the Ombudsperson.

4. This regulation shall equally apply to Applicants and prospective Contractors. If the Authority determines that this provision has been contravened, the application for the

approval of a plan of work shall be dismissed, or the approval shall be reversed in instances where approval has already been granted, as the case may be.

Comments

- Several proposals have been received for amending paragraph 1 in relation to its specificity. It has been attempted to incorporate the various intentions.
- It has been suggested to delete the final sentence of paragraph 2 since not all States are parties to the OECD recommendations.
- It has been suggested to insert paragraphs 3 and 4 to handle the consequences of an act of corruption, bribe or attempted bribe. In addition, it has been suggested to introduce an ISA Ombudsperson that can handle cases where the Compliance Committee or its members potentially could be involved in allegations covered by paragraph 1.

We **support this DR40 as amended**. As noted by so many member States in the July 2024 session (e.g. Chile, Costa Rica, Germany, Jamaica, Mexico, Netherlands), this covers an important aspect, and its inclusion and implementation will help improve public confidence in the integrity and institutional accountability of the ISA. The edits in this round of negotiations helpfully strengthen and clarify the scope of the prohibition and implications of its breach. We would like to see a **similar provision added to the Exploration Regulations**.

As a drafting note, **paragraph (1 bis) seems repetitive of paragraph (1)**, and could be deleted. (If it was intended as an alternative, we prefer paragraph (1)'s more inclusive scope – as amended – encompassing attempts to bribe, and any person acting in an ISA role, not only Secretariat staff.)

The first part of **Paragraph 2** “*The contractor acknowledges...*” reads like a term of contract rather than a regulation and may benefit from redrafting accordingly.

The defined term ‘**Rules of the Authority**’ has been re-inserted, but the definition has not been re-inserted into the Schedule. As a side note: we did not agree with the ‘drafting scrub’ in 2024 that wholesale removed this term ‘*Rules of the Authority*’ and replaced it with ‘*rules, regulations and procedures of the Authority*’ throughout the text. Use of the defined term ‘*Rules of the Authority*’ enabled the Council to refer at once to all instruments that are legally binding upon Contractors and to clarify specifically what was included (i.e. the Exploration Regulations, the Exploitation Regulations, the contract, Standards, decisions of the Assembly and the Council). Replacing the defined term with the undefined term ‘*rules, regulations and procedures of the Authority*’ does not achieve the same outcome (e.g. it omits the contract) and gives rise to ambiguity that will impair enforcement (e.g. are Standards ‘*rules, regulations and procedures*’ of the Authority – and how do we know this definitively?)

We understand the reluctance of non-OECD States to include a reference to the **OECD Guidelines**. But we believe these are a very useful precedent. We heard a request in July 2024 to include the reference to the OECD Guidelines in a relevant Standard. As such, we suggest the reference should be added into the Suspense Document so it does not get lost.

We also recall the offer from the Secretariat’s Legal Counsel to provide a full written note to inform the Council on how **corruption within the ISA’s staff** itself is legislated and managed – and wonder if this has been produced?