

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 2

Liability for and determination of royalty

Regulation 64

[Contractor shall pay royalty] [Royalty payment]

A Contractor, from the date of commencement of Commercial Production, shall pay a royalty in respect of the Mineral-bearing ore sold or removed without sale from the Contract Area as determined pursuant to paragraph 1 of Section 8 of the Annex to the Agreement in accordance with the applicable Standard. [This provision is without prejudice to Article 10(3) of Annex III to the Convention.]

We suggest inclusion of the following text immediately after the words Commercial Production: *"including any Mineral bearing ore collected during the time period of a reduction as contemplated by Regulation 29"*.

We support the view that Commercial Production should be defined in the Schedule with more specificity, to avoid a stockpiling or market manipulation scenario.

Comment

In the context of intersessional work, the position of the Enterprise in respect of royalty payments has been considered, and there have been discussions as to whether a separate provision addressing this issue is warranted. Given that Article 10(3) of Annex III to the Convention addresses this matter, delegations are invited to consider whether a separate reference to that provision here is required for the avoidance of doubt. It has also been suggested that certain parts of Article 10(3) of Annex III (such as the reference to a "self-supporting" Enterprise) may require further, more detailed provisions. Delegations are invited to consider whether implementing Standards may be suitable to include such further technical rules.

We consider this is an urgent matter for the Council to discuss and include in the Regulations. UNCLOS appears to provide **payment regime exemptions to the Enterprise**. If the Enterprise is in a joint venture (as it must be in early stages of operationalisation), does the joint venture benefit from the exemptions? Does this depend on different factors? E.g. How the joint venture is structured? Whether this is a mandatory joint venture (over a reserved area), as opposed to a joint venture entered into optionally by the contractor? The specific terms of the joint venture and how much benefit the Enterprise will accrue from the arrangement? Article 9(3) of Annex III empowers the ISA to "prescribe, in its rules, regulations and procedures, substantive and procedural requirements and conditions with respect to such contracts and joint ventures." It seems urgent and necessary for the ISA to do so.

Environmental Externalities: In March 2024, the Council held a discussion (with invited expert presenter, Dr. Luke Brander) about incorporating environmental externalities into the ISA's payment regime. Our notes show general support to the idea in principle, with some delegations expressing caution about how to operationalise in practice, particularly given challenges of valuing ecosystems about which so little is known. The Government of Germany

provided a concept note¹ that proposed language for inclusion in the Regulations, which numerous States accepted as a good starting point. There was a commitment to continue discussion and the President's statement of the work of that session specifically recorded agreement to continue work to refine the text.² In this context, we are disappointed to see that the language proposed by Germany has not been included in this Consolidated text. We suggest it be added, in order to facilitate those important further discussions. Germany's proposed language is copied below, for ease of reference:

“Proposed Draft Regulation 64 bis - Environmental costs

The financial terms of a Contract shall reflect the environmental externalities of the Exploitation activities permitted under the Contract and throughout the value chain. To this end, the Authority shall levy a further royalty reflecting environmental externalities in accordance with Regulation 64 ter. The further royalty shall complement the royalty provided for in Regulation 64.

Proposed Draft Regulation 64 ter - Further royalty reflecting environmental costs

Environmental externalities to be taken into account under Regulation 64 bis shall initially encompass at least the following aspects:

Future value of genetic material for use in pharmaceutical and biotechnological applications;

Existence and bequest values for preservation of remote and largely unknown biodiversity in the Area, and potential monetary values globally;

Carbon emissions and the impact of mining activities on carbon sequestration by benthic and pelagic ecosystems.

Further environmental externalities shall be taken into account in accordance with the relevant Standard.

Environmental externalities shall be calculated using Best Available Scientific Information and natural capital economics in accordance with the relevant Standard.

The Council shall set an applicable further royalty rate which shall reflect the environmental externalities as calculated in accordance with the relevant Standard.”

¹ <https://www.isa.org.jm/wp-content/uploads/2024/03/DSM-Finance.pdf>

² <https://www.isa.org.jm/wp-content/uploads/2024/04/2407292E.pdf>