

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 5

Anti-avoidance measures

Regulation 77

General anti-avoidance rule

1. Where the Secretary-General reasonably considers that a Contractor has entered into any scheme, arrangement or understanding or has undertaken any steps which, directly or indirectly:

- (a) Result in the avoidance, postponement or reduction of a liability for **[any]** payment ~~[of a royalty]~~ under this Part;
- (b) Have not been carried out for bona fide commercial purposes; ~~or~~
- (c) Have been carried out solely or mainly for the purposes of avoiding, postponing or reducing a liability for **[any]** payment ~~[of a royalty]~~; ~~or~~
- (d) The Secretary-General shall determine the liability for a ~~royalty~~ **[payment under this part]** as if the avoidance, postponement or reduction of such liability had not been carried out by the Contractor and in accordance with this Part.

2. The Secretary-General shall provide the Contractor with written notice of any proposed determination under paragraph 1 above. The Contractor may make written representations to the Secretary-General within 60 Days of the date of such written notice. The ~~[Secretary-General]~~ shall consider such representations and shall determine the liability for a royalty for the original or revised amount. [If the Contractor is not satisfied with the Secretary-General's determination, the Contractor may request a review of that decision in writing and provide any further information the Contractor wishes the [Secretary-General/the Council] to consider. The Commission and Finance Committee shall consider any such representations made by the Contractor at their respective next available meetings provided that the representations have been circulated at least 30 Days in advance of the respective meetings. The Commission shall then prepare its report and recommendations to the Council based on consultation with the Finance Committee. The Council shall then re-consider and either affirm, revise, or revoke the decision made by the [Secretary-General].]

[2. Alt. The Secretary-General shall provide the Contractor with written notice of any proposed determination under paragraph 1 above. The Contractor may make written representations to the Secretary-General within 60 Days of the date of such written notice. The [Secretary-General] shall consider such representations and shall determine the liability for a royalty for the original or revised amount. [If the Contractor is not satisfied with the Secretary-General's determination, the Contractor may request a

review of that decision in writing and provide any further information the Contractor wishes the [Secretary-General/the Council] to consider. The Commission and Finance Committee shall consider any such representations made by the Contractor at their respective next available meetings provided that the representations have been circulated at least 30 Days in advance of the respective meetings. The Commission shall then prepare its report and recommendations to the Council based on consultation with the Finance Committee. The Council shall then reconsider and either affirm, revise, or revoke the decision made by the [Secretary-General].

2 bis 2 The Sponsoring State shall be informed at the beginning of any procedure potentially leading to a determination according to this Regulation, and may provide written representations to the Secretary-General, the Council or the Finance Committee.

3. The Contractor shall pay any such liability [under this part] within 30 Days of the date of the determination made by the Secretary-General under paragraph 2.

[4. If the Contractor is in [gross and persistent breach] [serious, persistent and wilful violation] of any payment obligations in accordance with this Part, the Council [shall] [may] suspend or [terminate] the Exploitation Contract pursuant to Regulation 103 of these Regulations and the Contractor's company principals shall be barred from direct or indirect involvement with any Contractor or subcontractor operating in the Area for a period of [10] years].

In **sub-paragraph 1(d)**, we suggest the addition of the words “*propose to*” between shall and determine, in order to align with paragraph (2) where the SG is notifying of a ‘*proposed*’ determination.

We prefer **paragraph (2 Alt.)**. Like Germany, we believe that the additions in paragraph (2 Alt.) helpfully establish roles for other ISA organs, including the LTC and the Finance Committee, in the management of payments. This broadening of the role of ISA organs is important so as to not rely exclusively on the discretion of the SG. Otherwise, in the original paragraph (2), we see the SG making an important decision, being the party who reviews that decision, as well as being the responsible decision-maker for a subsequent appeal against his or her second decision. This seems to us to be too much power, without any oversight.

Again, we consider it important also that any evidence of financial misreporting or other potential breach of contract is reported by the SG to the **Compliance Committee**.

Regarding **paragraph (4)**, the language of ‘gross and persistent’ breach come from Article 185 UNCLOS, and relates to a State Party and their rights and privileges as a member of the Assembly. We consider more appropriate language to use here would be ‘serious, persistent and wilful violation’ in accordance with Article 18 of Annex III, which relates to Contractor compliance with their contract and the rules of the ISA. In relation to the proposal to bar individual company principals, we think this is a good idea, and consistent with best practices in other industries.

As DR103 can be triggered by any breach of the Contract, we suggest that **paragraph (4)** be drafted to separate the two different strands i.e. (a) where there is a breach of contract identified under the operation of DR77, DR103 shall apply; and (b) in the event that this is found to be a ‘serious, persistent and wilful violation’ of the Contract, then the ISA may additionally decide to bar the Contractor’s principals from direct or indirect involvement with any Contractor or subcontractor operating in the Area for a period of [10] years.

We suggest that the term “**Company Principals**” be used consistently each time this point arises in the Regulations, and that this should be defined in the Schedule, to ensure common understanding that this pertains to the persons taking key operational and management decisions.

Like others we would prefer to see this proposal broadened into wider situations of any serious, wilful and persistent non-compliance, rather than only relating to royalty payments. So we agree with Russia’s proposal that this **may be better placed in DR103**. We also consider this point should be included consistently in the Regulations that relate to an application for Exploitation and the applicant’s qualification criteria (namely DR5 on qualified applicants, as well as DR12 and Annex I on content of applications, and DR13 on assessment of applications - which should require relevant track record information to be disclosed). This will also mean the track record of the principals can be considered in other situations, for example transfer of contract rights, covered by DR23.