

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 24**Change of Control**

12. Where there is a Change of Control of the Contractor, or there is a Change of Control in any entity providing an Environmental Performance Guarantee on behalf of a Contractor, the Contractor shall, as soon as reasonably practicable but no later than 24 hours, notify the Secretary-General and the Sponsoring State in advance of such Change of Control. The Contractor shall provide the Secretary-General and the Sponsoring State with such details as he or she shall reasonably request of the Change of Control [including whether or not the Change of Control affects the Contractor's nationality or State of Effective Control]. [On receipt of such notification and any further details pursuant to this paragraph, the Secretary-General shall ~~promptly~~ within 7 Days notify the Commission and the Council.]

23. After considering information and documents and consulting the Contractor or entity providing the Environmental Performance Guarantee, as the case may be, the Commission shall:

(a) Determine whether, following a Change of Control of the Contractor or the entity providing the Environmental Performance Guarantee, the Contractor will continue to be able, to meet its obligations under the Exploitation Contract or Environmental Performance Guarantee, in which case the ~~Exploitation C~~contract shall continue to have full force and effect;

[(b) In the case of a Contractor, treat a Change of Control as a transfer of rights and obligations in accordance with the requirements of these Regulations, in which case Regulation 23 shall apply be it that, further to Regulation 23, the party that will come to qualify as the Contractor's Managing Company shall issue a Parent Company Liability Statement effective as of the Change of Control;]

[(c) In the case of an entity providing an Environmental Performance Guarantee, require the Contractor to lodge a new Environmental Performance Guarantee in accordance with Regulation 26, within such time frame as the ~~Secretary-General~~ Commission shall stipulate];

(d) Confirm with the Sponsoring State, [through the Secretary-General,] whether its sponsorship continues, or require a written notice under Regulation 21 bis. where sponsorship has terminated; and

[(e) Provide a report on any developments pertaining to this paragraph to the Council at its next meeting.]

3. The Contractor, if applicable, shall provide the Secretary-General confirmation of the Sponsoring State that its sponsorship continues. On receipt of such confirmation, the Secretary-General shall promptly notify the Commission and the Council. If the

Sponsoring State decides to terminate its sponsorship, a written notice under Regulation 21 is necessary. A Contractor shall obtain a sponsorship of another Sponsoring State or States in accordance with the requirements of Regulations 6 and 21(3).

4. Where the [Commission] determines that, following a Change of Control, a Contractor may not have the [operational or] financial capability to meet its obligations under its Exploitation Contract [or its Managing Company will not have the capability to meet its obligations under the Parent Company Liability Statement], the Commission shall submit a report of its findings and recommendations to the Council. [The Council shall consider the matter at its next meeting with a view to taking a decision.]

Comments

- The definition of “*Change of Control*” in paragraph 1, has been placed in the Schedule. Delegations and observers supported this replacement during the first part of the twenty-ninth session, and requested that further discussions will be conducted on the definition, once the Schedule will be discussed. In particular it was suggested that the definition be tightened to ensure clarity in situations where there are changes in the identities of majority ownership and not just 50 percent or more of the Contractor.
- It has been suggested by a delegation to introduce a so-called “*Parent Company Liability Statement*”, this to ensure a contractual basis for joint and several liability towards the Authority for damage caused by the Contractor. The impact of such statement has thus been implemented in this draft regulation, paragraphs 2 and 4.
- A new paragraph 3 has been suggested to also regulate cases of possible termination of sponsorship after Change of Control.

DR24 overlaps greatly with, whilst also departing from, DR23. We think the **same process could apply for both a transfer of rights under the Contract and for a Change of Control** in the Contractor. This could be done by including ‘Change of Control’ in DR23. This would also avoid a transfer being effected purposefully using ‘change of control’ mechanisms, to evade transfer tax and more onerous decision-making procedures.

A change of control where the upstream ownership of the Contractor changes is, essentially, just a transfer of the Contract to a new entity in another guise and should be treated as such. For example, in a typical energy merger and acquisition deal, a buyer would usually purchase a holding company with ownership of the project company rather than purchasing directly the individual project company. This is for a variety of local tax, financing, and liability reasons. **DR24 should not be allowed to be an evasion tactic around the transfer provisions in DR23:** just like any other transferee of a Contract, any entity that comes into the ownership structure upstream of the Contractor should be subject to the same scrutiny and requirements as the original applicant in terms of its creditworthiness/ ability to pay for damages, technical experience, etc.

The part of DR24 that addresses a **Change in Control of an EPG provider** could be managed via a requirement for notification and relevant assurance, under DR 26 which deals with the EPG.

To make sense of the change of control provisions of the regulations, the **definition of ‘Change of Control’** (in the Schedule) needs amendment. We are unsure why relevant proposals that have raised this point are not reflected in this text. The current definition’s wording, “*a change resulting in ownership of 50 percent or more of the Contractor [...]*” is incorrect. There will always be ownership of 50% or more of the Contractor (by someone). The point here is to capture that this majority ownership has changed in identity. We suggest inserting the word ‘different’ before ‘ownership’ both times the word is used in the defined term. This should clarify that the point is to capture a change in identity. We also propose to clarify in the defined term that a change in control via the board of directors or voting power would qualify as a Change of Control.

If DR24 is retained, we have some proposed **edits to improve the drafting**:

- **In paragraph (1):**
 - “*he or she*” should be “*they*” as this refers to the SG and the Sponsoring State.
 - we are unsure if the SG would need 7 days to notify the LTC and Council. We suggest “*immediately*” instead.
 - we suggest enumerating some of the information that would be a reasonable request of the SG or the Sponsoring State, e.g. via the following language, “*including, without limitation, all financial*”

information necessary to determine whether the Contractor or other person providing the Environmental Performance Guarantee, as applicable, will have the financial capability to meet its obligations under the Exploitation Contract or Environmental Performance Guarantee. Such information may include, without limitation, updated organizational or ownership structure charts and audited financial statements of any person, entity or group exercising control over the Contractor or Environmental Performance Guarantor as a result of such change of control).”

- We query whether it is appropriate for **sub-paragraph (2)(a)** to give the LTC a decision-making power (rather than a power to make a recommendation to Council, for its decision). We are also unclear whether the sub-paragraphs in paragraph (2) are intended to be alternatives or conjunctive i.e. all apply simultaneously. We believe there should be a provision between (2) and (3) that requires a Council decision, based on the LTC’s recommendation, whether the Contract continues, or whether additional modifications, investigations or compliance action are required.
- Whilst we support the intent behind new **paragraph (3)**, it overlaps and conflicts with paragraph (2)(d). We suggest merging them and having the SG (not LTC) confirm continuing sponsorship with the State (not the Contractor).

As a general comment for the drafting of DR24, we understand that notification by the Contractor is required before the Change of Control (paragraph (1)), and the ISA’s assessment occurs after the Change of Control (paragraph (2)), with no clear timeline prescribed for the ISA’s decision on whether the new ownership arrangement will be able to fulfil the qualification criteria. We suggest DR24 could be worked up to better distinguish between **different types of change of control that can or cannot be notified in advance**. For example, in national and regional rules, such as those in adopted by the United Kingdom and the European Union (and we believe Chile also stated the same, in the March 2024 Council meeting), certain types of ‘change of control’ require the person who is about to acquire control to notify the regulator in advance as soon as they have decided to make the acquisition and then the company itself would notify the regulator after the event. The regulator then has 60 days (with the ability to ‘stop the clock’ if further information is needed) to confirm the change of control. Such regimes usually also identify other types of change of control that do not require advance approval, recognising that prior notification with sufficient time to conduct due diligence would not be possible in all circumstances. With these precedents in mind, we believe further discussion on this DR24 is warranted.