

**TEMPLATE FOR SUBMISSION OF TEXTUAL PROPOSALS DURING THE 31TH SESSION:
COUNCIL - PART I**

Please fill out one form for each textual proposal which your delegation(s) wish(es) to amend, add or delete and send to council@isa.org.jm.

1. Name(s) of Delegation(s) making the proposal:

Germany

2. Please indicate the relevant provision to which the textual proposal refers.

Annex X - Standard Clauses for Exploitation Contract

3. Kindly provide the proposed amendments to the regulation or standard or guideline in the text box below, using the “track changes” function in Microsoft Word. Please only reproduce the parts of the text that are being amended or deleted.

Section 3

Undertakings

3.2 The Contractor shall implement this ~~C~~eontract in good faith and shall in particular implement the Plan of Work in accordance with regulation 18 bis ~~Good Industry Practice [and Best Environmental Practices]~~. For the avoidance of doubt, the Plan of Work includes:

- (a) The Mining Workplan;
- (b) The Financing Plan;
- (c) The Emergency Response and Contingency Plan;
- (d) The Training Plan;
- (e) The Environmental Management and Monitoring Plan;
- (f) The Closure Plan; and
- (g) The Health and Safety Plan and Maritime Security Plan,

that are appended as schedules to this Contract, as the same may be amended from time to time in accordance with the ~~R~~Regulations.

Section 4

Security of tenure and exclusivity

4.1 The Contractor is hereby granted the exclusive right under this Contract to Explore for and Exploit the resource category specified in this Contract and to conduct Exploration and Exploitation activities within the Contract Area in accordance with the terms of this Contract. The Contractor shall have security of tenure, and this Contract shall not be suspended, terminated or revised except in accordance with the terms set out herein and the Regulations. ~~[Any impacts from activities in the Area carried out under an Exploitation Contract must be strictly limited to the Contractor area.]~~ Any impacts from activities in the Area carried out under an Exploitation Contract must be strictly limited to the Contractor area

Section 6

Use of subcontractors and third parties

6.2 The Contractor shall ensure the adequacy of its systems and procedures for the supervision and management of its subcontractors and any work that is further subcontracted, in accordance with Good Industry Practice.

~~[6.2.bis. The Contractor shall apply due diligence in selecting its suppliers, and shall be responsible to ensure the adequacy of goods and services it procures, in accordance with Good Industry Practice].~~ 6.2. bis The Contractor shall apply due diligence in selecting its suppliers, and shall be responsible to ensure the adequacy of goods and services it procures, in accordance with Good Industry Practice.

Section 7

Responsibility and liability

7.1 In accordance with the 'polluter pays' principle, the Contractor shall be strictly liable to the Authority for the actual amount of ~~[all environmental damage caused by Contractor activities that were not foreseen in the Plan of Work or that arise from a breach of any conditions of approval, including arising out of activities of the Contractor] / [any damage, including damage to the Marine Environment, arising out of its wrongful acts or omissions, and those of its employees, subcontractors, agents and all persons engaged in working or acting for them in the conduct of its operations under this Contract arising out of its wrongful acts [or omissions]]~~ any damage, including damage to the Marine Environment, arising out of its wrongful acts or omissions, and those of its employees, subcontractors, agents and all persons engaged in working or acting for them in the conduct of its operations under this Contract ~~[arising out of its wrongful acts [or omissions]]~~, account being taken of any contributory acts or omissions by the Authority or third parties. This clause survives the termination of the Contract and applies to all damage ~~[arising out of the Contractors wrongful acts [or omissions]]~~ ~~[arising out of the Contractors wrongful acts [or omissions]]~~ regardless of whether it is caused or arises before, during or after the completion of the Exploitation activities or Contract term. ~~[For the purpose of clauses 7.1 and 7.2, 'wrongful acts or omissions', means any unlawful act or omission attributable to the Contractor that results in damage not anticipated and approved in the Plan of Work, irrespective of bad intention or negligence].~~ ~~[For the purpose of clauses 7.1 and 7.2, 'wrongful acts or omissions', means any unlawful act or omission attributable to the Contractor that results in damage not anticipated and approved in the Plan of Work, irrespective of bad intention or negligence.]~~ ~~[Recoverable damages under this clause include: costs of reasonable measures to prevent and limit damage to the Marine Environment, lost revenue, reinstatement, pay out in lieu of actual reinstatement, and/or measures to compensate for third party economic loss, as well as pure ecological loss and harm to the living resources of the Area.]~~ For the avoidance of doubt, strict liability in this context applies the polluter pays principle, and means, it is not necessary to prove that a Contractor intended to commit or was reckless as to committing a wrongful act or omission, it is necessary only to demonstrate unpermitted damage or harm arose as a result of a Contractor's wrongful act for the Contractor to be held liable for that damage or harm. Recoverable damages under this clause include: costs of reasonable measures to prevent and limit damage to the Marine Environment, lost revenue, reinstatement, pay-out in lieu of actual reinstatement, and/or measures to compensate for third-party economic loss, as well as pure ecological loss and harm to the living resources

of the Area. For the avoidance of doubt, strict liability in this context applies the polluter pays principle, and means, it is not necessary to prove that a Contractor intended to commit or was reckless as to committing a wrongful act or omission, it is necessary only to demonstrate unpermitted damage or harm arose as a result of a Contractor's wrongful act for the Contractor to be held liable for that damage or harm.

7.2 The Contractor shall indemnify the Authority, its employees, subcontractors and agents against all claims and liabilities of any third party arising out of any ~~wrongful environmental damage caused by Contractor activities that were not foreseen in the Plan of Work or that arise from a breach of any conditions of approval, including arising from activities of the Contractor,~~ wrongful acts or omissions of the Contractor and its employees, agents and subcontractors, and all persons engaged in working or acting for them in the conduct of its operations under this Contract.

7.3 The Authority shall be liable to the Contractor for the actual amount of any damage caused to the Contractor arising out of its wrongful acts in the exercise of its powers and functions, including violations under article 168, paragraph 2 of the Convention, account being taken of contributory acts or omissions by the Contractor, ~~its employees, agents and subcontractors, and all persons engaged in working or acting for them in the conduct of its operations under this Contract,~~ ~~its employees, agents and subcontractors, and all persons engaged in working or acting for them in the conduct of its operations under this Contract~~ or third parties.

7.4 The Authority shall indemnify the Contractor, ~~its employees, subcontractors, agents and all persons engaged in working or acting for them in the conduct of its operations under this Contract,~~ ~~its employees, agents and subcontractors, and all persons engaged in working or acting for them in the conduct of its operations under this Contract~~ against all claims and liabilities of any third party arising out of any wrongful acts or omissions in the exercise of its powers and functions hereunder, including violations under article 168, paragraph 2 of the Convention.

Section 9

ExtensionRenewal

9.1 ~~[Alt. 1 The Contractor may extentrenew this Contract in accordance with regulation 20.] for periods not more than 10 years each, on the following conditions:~~

~~(a) The resource category is recoverable annually in commercial [and profitable] quantities from the Contract Area;~~

~~—(b) The Contractor is in compliance with the terms of this Contract and the Rules of the Authority, including rules, regulations and procedures adopted by the Authority to ensure effective protection for the Marine Environment from harmful effects which may arise from activities in the Area;~~

~~—(c) This Contract has not been terminated earlier; and~~

~~—(d) The Contractor has paid the applicable fee in the amount specified in appendix II to the regulations.~~

~~9.2 To renew this Contract, the Contractor shall notify the Secretary-General no later than one year before the expiration of the initial period or renewal period, as the case may be, of this Contract.~~

~~9.3 The Council shall review the notification, and if the Council determines that the Contractor is in compliance with the conditions set out above, this Contract [shall be] [may be] renewed on the terms and conditions of the standard exploitation contract that are in effect on the date that the Council approves the renewal application.~~

~~[Alt. 2 The Contractor may extend this Contract for periods not more than 10 years each, on the following conditions:~~

~~(a) The resource category is recoverable annually in commercial quantities from the Contract Area;~~

~~(b) The Contractor is in compliance with the terms of this Contract and the Rules of the Authority, including rules, regulations and procedures adopted by the Authority to ensure effective protection for the Marine Environment from harmful effects which may arise from activities in the Area;~~

~~(c) This Contract has not been terminated earlier; and~~

~~(d) The Contractor has paid the applicable fee [in the amount specified in appendix II to the Regulations].~~

~~9.2 To renew this Contract, the Contractor shall notify the Secretary-General no later than one year before the expiration of the initial period or extension period, as the case may be, of this Contract.~~

~~9.3 The Council shall review the notification, and if the Council determines that the Contractor is in compliance with the conditions set out above, this Contract shall be renewed on the terms and conditions of the standard exploitation contract that are in effect on the date that the Council approves the extension application.]~~

Section 11

Termination of sponsorship

[Omitted]

Section 13

Obligations on ~~Suspension or following Expiration, Surrender or~~ Termination of a Contract

13.1 In the event of termination, ~~expiration or surrender~~ of this Contract, the Contractor shall:

(a) comply with the ~~F~~final Closure Plan, and the Environmental Management and Monitoring Plan and continue to perform the required environmental management of the Contract Area as set forth in the ~~F~~final Closure Plan and for the period established in the ~~F~~final Closure Plan;

(b) continue to comply with relevant provisions of the ~~R~~egulations, including:

(i) maintaining and keeping in place all insurance required under the ~~R~~egulations;

(ii) paying any fee, royalty, penalty or other money on any other account owing to the Authority on or before the date of ~~suspension or~~ termination; and

(iii) complying with any obligation to meet any liability under Section 8.

(c) remove all Installations, plant, equipment and materials in the Contract Area; and

(d) make the area safe so as not to constitute a danger to persons, shipping or [to result in adverse impacts, or a reasonable likelihood of such impacts, to] the Marine Environment.

13.2 Where the Contractor fails to undertake the obligations listed in Section 13.1 within a reasonable period, the Authority may take necessary steps to effect such removal and make safe the area at the expense of the Contractor. Such expense, if any, shall be deducted from the Environmental Performance Guarantee held by the Authority.

13.3 Upon termination of this Contract, any rights of the Contractor under the Plan of Work and in respect of the Contract Area also terminate.

Section 14

Transfer of rights and obligations

[Omitted]

4. Please indicate the rationale for the proposal.

We have a number of points on Annex X that are crucial to our delegation which we will present in order of importance.

First, in Sec 4.1 – Germany strongly supports inclusion of the red text about limiting impacts to the contract area. We have offered detailed reasoning for this requirement previously and hence we will not repeat all of the arguments now but only wish to say that limiting impacts to the Contract area protects neighboring contractors from potential harm and therefore protects their monitoring or baseline programmes. We wish to note a small drafting error though: The red text should refer to the *“Contract area”*, which is defined in the Schedule, not to the *Contractor area*. We also suggest clarifying that impacts must be restricted to the Contract area and the water column above the Contract area. Therefore, the last sentence should read: *“Any impacts from activities in the Area carried out under an Exploitation Contract must be strictly limited to the Contract area and superjacent water column above the Contract area”*.

Second, in section 7.1, we see it as crucially important that the provision provides for a “causation-based liability standard”, also known as strict liability, as opposed to a fault-based liability. This has been supported by others in the past and is appropriate for a new industry that carries significant risks of marine pollution. We note that many treaties concerned with marine pollution apply a similar strict liability standard, including the regimes for oil pollution, nuclear damage, and hazardous wastes. Therefore, applying strict liability to seabed mining would be in line with existing obligations in other ocean regimes. A strict liability regime would respond to the liability gap identified by the Seabed Disputes Chamber in its 2011 Advisory Opinion. As the Chamber noted in para 211, the Convention allows for the ISA to impose a strict liability regime to ensure no gaps in liability are left, particularly as the minerals are the common heritage of humankind. In terms of specific drafting suggestions, we request the following:

- We support lifting the brackets in the first line around the text that reads: “In accordance with the polluter pays principle”
- Also in the first line, we strongly request adding the word “strictly” before the word “liable”.
- We request replacing the red text in lines 2-4 with the red text that is currently crossed out, which reads: *“any damage, including damage to the Marine Environment, arising out of its wrongful acts or omissions, and those of its employees, subcontractors, agents and all persons engaged in working or acting for them in the conduct of its operations under this Contract”*. This is to ensure that the Contractor can be held liable for both wrongful acts and omissions of the Contractor and those of any subcontractors. We also note that the text currently in red suggests that a Contractor can only be liable for environmental harm, and not for economic harm. We strongly argue that liability must include any type of harm, as per Article 139 of the Convention as well as Annex III, Art 22 of the Convention.
- In relation to the red text further down, which reads *“[arising out of the Contractors wrongful acts [or omissions]]”*, we suggest this should be either deleted or it needs to be specified that this sentence applies not only to acts or omissions of the Contractor but also those of the employees, subcontractors, agents and all persons engaged in working or acting for the Contractor. The amendments we just suggested would mean this is already specified in the previous sentence - therefore we suggest deleting the red text here.
- We welcome the fact that red text in the second half of section 7.1 has been reinstated, after previously being crossed out. We support inclusion of this text to ensure a contractor can be held fully liable for any type of harm caused.
- In section 7.2, we request reinstating the red text that is currently crossed out, which reads: *“wrongful acts or omissions of the Contractor and its employees, agents and subcontractors, and all persons engaged in working or acting for them in the conduct of its operations under this Contract.”* We prefer this over the text that is currently in red. The reason is that liability should not be limited to environmental harm as the Convention clearly requires both the Contractor and the Authority to be held responsible and liable for *“any damage arising out of wrongful acts”*.
- In both sections 7.3 and 7.4, we support inclusion of the red text. Again, this is to ensure that the Contractor can be held liable for acts by its sub-contractors. Without such inclusion, the Authority may not be able to recover compensation in case of serious harm, including to the common heritage of humankind.

Third, we request to keep section 6.2.bis in the Annex, which ensures any work that is sub-contracted will still be subject to the Regulations. This is important to ensure enforcement and compliance with the rules of the Authority. This requirement has previously been supported by several states and we are pleased to see it re-inserted.

Fourth, in section 3.2, we support the suggested reference to DR 18.bis as this makes it clear that the contractor is contractually required to implement the Plan of Work in accordance with the obligations that have been laid out in the regulations to avoid having to spell out all obligations separately in the standard contract clauses.

Fifth, in section 9, we note that the conditions for extending an exploitation Contract should be set out either in Regulation 20 or in Annex X. At present, there is a risk of it having inconsistent requirements in both provisions.

Sixth, we support the suggested deletions in sections 11 and 14 to avoid overlaps with the corresponding regulations. Similarly, we suggest that section 13 could be better covered by the Regulations instead of the Contract Terms.

Lastly, we do note that we would also be content with including some of the points we mentioned in the regulations, rather than the Standard Contract Clauses. However, because these points are currently located in Annex X, we comment on them here.