Regulation 81

Review of System of payments (markup version)

[1. ~~The System of Payments refers to the set procedures adopted by the Authority under Part VII of these Regulations for the purpose of determining payments owed by a Contractor. Such payments shall include royalties, profit sharing arrangements, and/or any other payment mechanism as may be adopted by the Council under this Part.~~] **(ITA, GBR, BRA, ARG keep para/flexible) (BGD, AUS keep para)**

[1. Alt. ~~The System of Payments means the financial mechanisms the Authority applies pursuant to Part VII of these Regulations to determine the [payments due from a Contractor]~~ **(ZAF/AFR del)** ~~**amount payable from a Contractor**~~ **(ZAF/AFR)** ~~to the Authority, including the required forms of payment (such as a royalty payment and profit sharing).~~] **(RUS keep para/flexible) (NAO, GER keep para) (CHL merge with 1)**

[1 Alt 2. The System of Payments means the framework or methodology established under Part VII of these Regulations for determining the types of payments due from a Contractor, including a royalty system or a combination of a royalty and profit-sharing system. For the purposes of these Regulations, the rates of payments applicable within that framework are governed by regulation 82]

2~~1~~. The S~~s~~ystem of P~~p~~ayments ~~[adopted under these Regulations and pursuant to paragraph 1(c) of Section 8 of the Annex to the Agreement.]~~ shall be reviewed by the Council five years from the first date of commencement of Commercial Production in the Area and at intervals thereafter ~~**with a view to ensuring that it continues to give effects to the objectives and principles of Part XI of the Convention and the 1994 Agreement.**~~ **(MEX, ARG)** in accordance with the applicable Standard~~s~~ [~~as well as all observed Environmental Impacts~~] **(RUS, MEX del) (BHS keep)** ~~**and due regard for all observed environmental impacts**~~ **(GBR, BRA, BHS, BGD, AUS)** ~~and effects (RUS)~~. [~~This shall include a review of the methodologies used to calculate environmental externalities pursuant to regulations 64ter and 64quat.~~] **RUS, MEX, AUS del) (ITA res) (BRA, BGD, GER, CHL keep)**

[2 bis. For the purposes of these Regulations, a review or adjustment of the rates of payments under regulation 82 does not, by itself, constitute a review of, adjustment to, or change in the System of Payments under this regulation.]

[3. A review of the System of Payments shall be carried out in accordance with the applicable Standard.] **(ITA, NAO, GER, AUS, ZAF/AFR, CHL keep para) (MEX keep para/flexible) (BGD del para)**

4~~2~~. The Council, based on the recommendations of the Commission [~~and following a review under paragraph 1~~], may decide to adjust the existing S~~s~~ystem of P~~p~~ayments or introduce a new S~~s~~ystem of P~~p~~ayments~~, taking into account the principle of Article 13 under Annex III of the Convention and Section 8 of the Annex to the~~

Commented [JB1]: Proposal to remove and consider definition proposed under new 1 Alt 2. which merges elements of both definitions.

Commented [JB2]: Proposal to remove and consider definition proposed under new 1 Alt 2. which merges elements of both definitions.

Commented [JB3]: One delegation submitted a proposal for new Alt para. Objective is to define the System of Payments as the overall framework and distinct from the specific parameters under the system (i.e. the rates). Clarity provided on DR 82 governing the review of those rates. I have retained much of the proposed text from Canada and merged elements of definitions in 1 and Alt 1 under this new Alt 2. (as proposed by one delegation).

Commented [JB4]: Proposal to delete as this text restates existing obligations under UNCLOS and the 1994 Agreement

Commented [JB5]: Proposal to remove from this draft regulation and integrated in the applicable draft Standard. Reference to specific considerations - in this case 'observed environmental impacts' - would require listing all relevant considerations in the draft regulation.

This approach is consistent with efforts to ensure the high-level parameters and obligations for the review are reflected in the draft regulatory text while the specific details and methodologies are included in the applicable Standard. I have included the relevant section of the draft Standard in Appendix I below where I have added in this text.

Commented [JB6]: Proposal to remove from this draft regulation. The original insertion was proposed by one delegation, which requested it be maintained until environmental externalities under 64ter and 64 quat were re-inserted into Further Revised Consolidated Text.

Following the last in-person meeting of this group, the delegation noted to the facilitator of this group on the margins that this understanding was correct and that the draft text could be removed.

Moreover, this approach is also consistent with efforts to ensure the high-level parameters and obligations for the review are reflected in the draft regulatory text while the specific details and methodologies are included in the applicable Standard.

Commented [JB7]: Proposal to include new draft paragraph to provide further clarity to definition in 1 Alt2. This draft paragraph serves to make clear that a change to the rates of payments, which fall under DR 82, does not automatically translate into a change in the System of Payments.

Commented [JB8]: Draft paragraph retained to ensure an obligation that the review is conducted in accordance with applicable Standard.

While draft paragraph 2 provides a requirement to conduct review in accordance with applicable Standard, this is in the context of the timing of first review and subsequent interval of reviews, which is narrow.

This draft paragraph provides more general obligation on review being carried out in accordance with Standard. If no redline, proposal is to unbracket this text.

~~**Agreement (MEX)**[, taking into account the level of maturity and development of Exploitation activities in the Area, as well as the principles under article 13 of Annex III to the Convention and Section 8 of the Annex to the Agreement]~~. Any adjustment to an existing System of Payments or introduction of a new System of Payments shall be in accordance with [the results of the most recent review referred to under paragraph 2 of this regulation.] ~~(ZAF/AFR del) the applicable Standards (ZAF/AFR)~~.

~~[3. Without limiting the scope of any review by the Council, a review under this regulation may include an adjustment to an existing system of payments, or an introduction of a new system of payments, and may consider changes to all applicable rules, regulations and procedures of the Authority [including any applicable Standards and taking into consideration the Guidelines].]~~

[5~~4~~. A review of the S~~s~~ystem of P~~p~~ayments shall consider [all R~~r~~esource categories] **(ZAF/AFR del) [all minerals] (ZAF/AFR)** unless otherwise decided by the Council.] **(GER del para)**

[6~~5~~. ~~A change to the System of Payment shall only apply by agreement between the Authority and the Contractor [for Contract Areas that have already commenced Commercial Production]~~ **(ITA, RUS del)** ~~[to existing Contracts]~~ **(RUS, ITA, NAO keep) (BGD del)**.] **(GBR, AUS keep para)**

~~6 alt 1 Changes to the system of payment shall be implemented by existing Contractors. Any such change may provide for a reasonable transition period for implementation by existing Contractors (MEX)~~

~~6 alt 2 Any change to the System of Payment applicable to existing exploitation contracts shall be implemented in accordance with these Regulations and applicable Standards … (BHS to propose)~~

[6 Alt 3. A change to the System of Payments adopted by the Council under paragraph 4 of this regulation shall:

(a) take effect on the date specified in the Council's decision, determined in accordance with the applicable Standard; and

(b) apply to [a Contract Area that has commenced Commercial Production] [an existing Exploitation Contract] only with the written election of the Contractor, failing which the System of Payments applicable to that [Contract Area] [Exploitation Contract] immediately before the change shall continue to apply.]

~~[7. This regulation shall not apply to the Enterprise for a period not exceeding 10 years, in accordance with the decision adopted by the Assembly pursuant to article 10, paragraph 3, of Annex IV to the Convention.]~~ **(RUS keep para)**

Commented [JB9]: Proposed for deletion as this text restates existing obligations under UNCLOS and the 1994 Agreement

Commented [JB10]: No major concerns were expressed with this draft paragraph. Two minor edits are included in track changes. Draft paragraph has been cleaned up and proposal is to unbracket text

Commented [JB11]: This draft paragraph has been proposed for removal for some time. No strong support for retaining has been expressed and objective is captures under draft paragraph 4 above. Proposal to delete

Commented [JB12]: Recalling outstanding question on application of draft exploitation regulations with respect to one or more of the Resource categories, proposal here is to maintain this draft paragraph under brackets.

Proposal to keep 'all Resource categories' instead of 'all minerals'. "Resource Categories is the defined term that reflects how the System of Payments is structured, it is fully comprehensive, and it avoids the ambiguity of an undefined reference to minerals."

The System of Payments is designed around the varying geology, recovery methods, cost structure, and development stage for a given Resource category. As a result, there is a strong rationale to have the review to be tied to that categorization.

In addition, it might improve flow of draft regulatory text if this paragraph were moved up to sit just below draft paragraph 3 or merged together with draft paragraph 3. Proposal to consider modifying placement.

Commented [JB13]: Proposal to remove this draft paragraph and instead consider element reframed under 6 Alt 3. Several delegations noted framing and wording created confusion. This is the central outstanding issue under DR 81 for which a policy decision is still pending

Commented [JB14]: Proposal to remove as no further support expressed for retaining. Furthermore, 6 Alt 2 is incomplete and no additional input was submitted for consideration

Commented [JB15]: New 6 Alt 3 proposed given some members of the group considered the framing unclear.

This draft para covers the major outstanding issue for this draft regulation, namely under which conditions is contractor agreement required for a change/new system of payments to be applied. Two options are covered:

Existing contracts
Contract areas that have commenced commercial production

Proposal to retain 6 Alt 3 and keep bracketed text that covers each of these two options, an unbracket the rest.

Commented [JB16]: Proposal to delete as this text restates existing provision under UNCLOS.

The Interim Director-General of the Enterprise and the United Kingdom of Great Britain and Northern Ireland undertook an analysis of the Draft Regulations to identify instances in the Draft Regulations where differential treatment for the Enterprise is required or may be appropriate. This work also considered the instances where differential treatment for the Enterprise is required or may be appropriate, including regulations addressing royalty payments. The assessment noted that, for the purposes of DR 81, the Enterprise operates as other Contractors do in this respect.

My understanding is that it may be appropriate to reiterate the differential treatment provision from UNCLOS for those draft regulations applicable to the payment obligations themselves (i.e. royalty payment or additional profit share). For the draft regulati…

Regulation 81

Review of System of payments (proposed clean version)

[1 Alt 2. The System of Payments means the framework or methodology established under Part VII of these Regulations for determining the types of payments due from a Contractor, including a royalty system or a combination of a royalty and profit-sharing system. For the purposes of these Regulations, the rates of payments applicable within that framework are governed by regulation 82.]

2. The System of Payments shall be reviewed by the Council five years from the first date of commencement of Commercial Production in the Area and at intervals thereafter in accordance with the applicable Standard.

[2 bis. For the purposes of these Regulations, a review or adjustment of the rates of payments under regulation 82 does not, by itself, constitute a review of, adjustment to, or change in the System of Payments under this regulation.]

[3. A review of the System of Payments shall be carried out in accordance with the applicable Standard.]

4. The Council, based on the recommendations of the Commission, may decide to adjust the existing System of Payments or introduce a new System of Payments. Any adjustment **to an existing System of Payments** or introduction of a new System of Payments shall be in accordance with the results of the most recent review referred to under **paragraph 2** of this regulation.

[5. A review of the System of Payments shall consider all [Resource categories] [all minerals] unless otherwise decided by the Council.]

[6 Alt 3. A change to the System of Payments adopted by the Council under paragraph 4 of this regulation shall:

(a) take effect on the date specified in the Council's decision, determined in accordance with the applicable Standard; and

(b) apply to [a Contract Area that has commenced Commercial Production] [an existing Exploitation Contract] only with the written election of the Contractor, failing which the System of Payments applicable to that [Contract Area] [Exploitation Contract] immediately before the change shall continue to apply.]

DRAFT

SUMMARY (Draft Regulation 81)

From a general standpoint, I note broad agreement on most elements of the draft regulation, including:

- The need for some level of definition for System of Payments. A number of delegations also emphasized the importance of making clear that the rates of payments, although related, are specific elements within broader framework (i.e. the System of Payments) and that a review of those rates does not necessarily translate into an adjustment to the framework.
- The timing of the first review and the need for subsequent reviews to be conducted at some frequency.
- Including an explicit requirement for the review to be carried out in accordance with the applicable standard.
- Ensuring the Council can make changes to the System of Payments based on a review pursuant to draft regulation 81.
- That the any adjustment or change to an existing System of Payments requires the consent of Contractors.

Notwithstanding any wording preferences with respect to those draft paragraphs, I consider the above concepts to be well captured and addressed in the current proposed draft, and the overall architecture to be in solid shape. At this juncture, I will note the two outstanding issues that this group should devote its attention to:

- a decision on the best overall definition for the System of Payments.
- whether the requirement for Contractor consent is for existing contracts or contracts that have commenced commercial production.

With respect to text on "due regard for all observed environmental impacts" under draft paragraph 2, there remained disagreement over its inclusion in the draft regulation. In my view, the most logical solution is to include it as a reference in the applicable draft Standard (included in the Suspense Document) under the section 'Introduction and Guiding Principles'. Please see relevant section in the draft Standard with proposed addition (included in Appendix below). I will be requesting that the Secretariat make the appropriate amendment to the Suspense Document.

I am proposing removing the reference to "the methodologies to calculate environmental externalities pursuant to regulations 64ter and 64quat" given this addition was retained pending inclusion of 64ter and 64quat in the Further Revised Consolidated Text,

Finally, draft paragraph 7 dealing with the treatment of the Enterprise can be deleted from this draft regulation. For one, the text merely restates the existing provision under UNCLOS. Furthermore, the proposed way forward is supported by recent work led by the interim Director General of the Enterprise and the delegation of the United Kingdom of Great Britain and Northern Ireland on the separate treatment of the Enterprise.

Regulation 82

Review of rates of payments (markup version)

[1. The rates of payments under an existing Ssystem of Ppayments shall be reviewed by the Council five years from the first date of commencement of Commercial Production in the Area and at intervals thereafter in accordance with the applicable Standards.]

~~[2. A review of the rates of payments under an existing System of Payments shall be carried out in accordance with the applicable Standards and in conjunction with a review pursuant to regulation 81.] **(NAO, RUS, AUS keep para)**~~

[2 Alt. A review of the rates of payments under this regulation is separate from a review of the System of Payments under regulation 81 and shall be carried out in accordance with the applicable Standard. The Council may conduct the two reviews concurrently, in which case each shall be carried out separately and in accordance with the applicable Standard.]

[2 Alt bis. A review under this regulation shall consider the rates of payments under an existing System of Payments, including the manner and basis of calculating those rates, and whether rates of payments should be established for [new relevant] [additional] Minerals or Metals that are likely to be commercially exploited under that System [during the next review cycle].]

~~3~~2. The Council, based on the recommendations of the Commission, may decide to adjust the rates of payments or establish new rates of payments for [new relevant] [additional] Minerals or Metals. **~~[taking into account the Principles under Article 13 of Annex III to the Convention and Section 8 of the Agreement (MEX, RUS)~~** ~~[taking into account the Resource Category and the level of maturity and development of Exploitation activities in the Area, as well as the principles under article 13 of Annex III to the Convention and Section 8 of the Agreement]~~. [Any adjustment to the rates of payment or establishment of new rates of payments shall be in accordance with the results of the most recent review referred to under paragraph 2 Alt of this regulation.] **(RUS keep)**

~~4~~3. [A review of the rates of payments shall consider all Resource Categories unless otherwise decided by the Council.]

~~5~~4. An adjustment to the rates of payments or the establishment of new rates of payments adopted by the Council under paragraph 3 shall apply to all Contract Areas [provided that the application is deferred until the end of the first five years [of [the] (ITA, AUS del) any given (ITA, AUS) [Exploitation Contract] **(RUS del)**] (AUS keep) [**from the beginning of commercial production (RUS)**].

~~6~~5. ~~Without limiting the scope of any review by the Council, a review under this regulation may include an adjustment to the [rate associated with any payment mechanism adopted under [[this Part]] **(RUS keep)** [[the rules, regulations, and procedures of the Authority, in accordance with any applicable Standards and taking into account the Guidelines]] **(RUS del)**, including the manner and basis of their calculation, as well as the establishment of rates of payments for new relevant Minerals or Metals that are likely to be commercially exploited [during the next review cycle] **(BHS del)**.]~~

Commented [JB17]: No major concerns were expressed with this draft paragraph and proposal is to unbracket text

Commented [JB18]: Proposal to delete and consider 2 Alt is basis for further discussions

Commented [JB19]: Proposal for new 2 Alt to mirror emphasis included in new DR 81 draft paragraph that review of rates of payments is separate from review of System of Payments. Further clarification that these reviews may proceed concurrently, though separately.

Commented [JB20]: Former draft paragraph 6 was reworded and proposal here to move it up to 2 Alt bis. Language largely consistent with former draft paragraph 6, for which no major concerns had been expressed. Slight modifications to ensure consistency with approach to keep reviews across DR 81 and DR 82 separate.

Commented [JB21]: Proposal to delete as this text restates existing obligations under UNCLOS and the 1994 Agreement

Commented [JB22]: No major concerns with this draft paragraph. Some minor edits to bring in line with language elsewhere in draft regulation. Proposal is to clean up and unbracket text

Commented [JB23]: Similar to DR 81, recalling outstanding question on application of draft exploitation regulations with respect to one or more of the Resource categories, proposal here is to maintain this draft paragraph under brackets.

Commented [JB24]: This draft paragraph covers the major outstanding issue for this draft regulation, namely whether a contractor for which first 5 years of commercial production have yet to elapse is afforded a reprieve from changes to rates. Several textual options on framing for this reprieve are proposed.

Proposal is to retain brackets and focus further discussions on this issue. I invite further proposals on textual options

Commented [JB25]: Proposal to move up as revised under 2 Alt bis

Regulation 82

Review of rates of payments (proposed clean version)

1. The rates of payments under an existing System of Payments shall be reviewed by the Council five years from the first date of commencement of Commercial Production in the Area and at intervals thereafter in accordance with the applicable Standard.

[2 Alt. A review of the rates of payments under this Regulation shall be carried out in accordance with the applicable Standard and separately from a review of the System of Payments under Regulation 81. The Council may conduct the two reviews concurrently, provided that each review is conducted, and its conclusions are recorded, separately in accordance with the applicable Standard.]

[2 Alt bis. A review under this regulation shall consider the rates of payments under an existing System of Payments, including the manner and basis of calculating those rates, and whether new rates of payments should be established for [new relevant] [additional] Minerals or Metals that are likely to be commercially exploited under that System [during the next review cycle].]

3. The Council, based on the recommendations of the Commission, may decide to adjust the rates of payments **or establish new rates of payments for [new relevant] [additional] Minerals or Metals**. Any adjustment to the rates of payment **or establishment of new rates of payments** shall be in accordance with the results of the most recent review referred to under **paragraph 1** of this regulation.

[4. A review of the rates of payments shall consider all Resource Categories unless otherwise decided by the Council.]

5. An adjustment to the rates of payments or the establishment of new rates of payments adopted by the Council under paragraph 3 shall apply to all Contract Areas [provided that the application is deferred until the end of the first five years [of [the] any given [Exploitation Contract] [from the beginning of commercial production].

DRAFT

SUMMARY (Draft Regulation 82)

From a general standpoint, I note broad agreement on almost all elements of the draft regulation, including:

- The timing of the first review and the need for subsequent reviews to be conducted at some frequency.
- Including an explicit requirement for the review to be carried out in accordance with the applicable standard.
- Ensuring the Council can make changes to the rates of Payments, the basis of their calculation, or establish new rates for additional minerals/metals based on a review pursuant to draft regulation 82.
- The importance of making clear that the rates of payments, although related, are specific elements within broader framework (i.e. the System of Payments) and that a review of those rates does not necessarily translate into an adjustment to the framework. This aligns with the same framing proposed under draft regulation 81.

Notwithstanding any wording preferences with respect to those draft paragraphs, I consider the concepts above to be well captured and addressed in the current proposed draft and the overall architecture to be in solid shape. At this juncture, I will note one outstanding issue that I observe and that this group should devote its attention to:

- whether a Contractor is afforded a temporary exemption from any adjustment to the rates of payments before its first five years of commercial production have elapsed.

Appendix I

Draft Text for Relevant Standards
Review of the system of payments and the rates of payments (Regulation 81 and 82)

Introduction and Guiding Principles

1. The purpose of the review of the system of payments and the rates of payments is to ensure that the financial needs and objectives of the Authority are being fulfilled. The review of the System of Payments will also give due regard to all observed environmental impacts. The review process shall be governed by the provisions of the Convention, the Agreement, relevant international standards, and Good Industry Practice in extractives sector taxation. Specifically, Section 8 of the Annex to the Agreement sets out the following principles:

   a. 'The system of payments to the Authority shall be fair both to the contractor and to the Authority and shall provide adequate means of determining compliance by the contractor with such system;[*]
   b. 'The rates of payments under the system shall be within the range of those prevailing in respect of land-based mining of the same or similar minerals in order to avoid giving deep seabed miners an artificial competitive advantage or imposing on them a competitive disadvantage;[†]
   c. 'The system should not be complicated and should not impose major administrative costs on the Authority or on a contractor. Consideration should be given to the adoption of a royalty system or a combination of a royalty and profit-sharing system. If alternative systems are decided upon, the contractor has the right to choose the system applicable to its contract. Any subsequent change in choice between alternative systems, however, shall be made by agreement between the Authority and the contractor;'[‡]

Additionally, Article 13 of Annex III to the Convention sets out the following guiding objectives for the Authority:

   a. 'to ensure optimum revenues for the Authority from the proceeds of commercial production,[§]
   b. 'to attract investments and technology to the exploration and exploitation of the Area,[**] and
   c. to ensure equality of financial treatment and comparable financial obligations for contractors'.[††]

Any recommendation to adopt a new or revised system of payment or changes in the rates of payments must clearly demonstrate that the change will result in a payment regime that is significantly better at meeting the principles set forth under Article 13 of Annex III to the Convention and Section 8 of the Agreement.

Commented [JB26]: Included (partially) for the purpose of flagging proposed incorporation of text from DR 81 so that the Secretariat can make the appropriate update to the Suspense Document (see track change text highlighted in yellow in paragraph 1).

My hope is that this group can soon turn its attention to discussing the content of this draft Standard, along with the draft Standard addressing the review of the rates of payments.

[*] Paragraph 1(a), Section 8 of the Annex to the Implementation Agreement
[†] Paragraph 1(b), Section 8 of the Annex to the Implementation Agreement
[‡] Paragraphs 1(c), Section 8 of the Annex to the Implementation Agreement
[§] Convention, Annex III, Article 13.1(a).
[**] Convention, Annex III, Article 13.1(b).
[††] Convention, Annex III, Article 13.1(c).