TEMPLATE FOR COMMENTS

Document reviewed	
Title of the draft being reviewed:	Guideline on the preparation and assessment of an application for the approval of a Plan of Work for exploitation
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General Comments

1. An overarching comment on this guideline document is that it is premature, given that it is premised to be read in conjunction with the Exploitation Regulations - which themselves are in draft form. The information and documents required by the regulations may be amended, rendering this corresponding checklist incomplete.
2. Additionally, the document largely restates elements of Annex I of the draft Exploitation Regulations without providing further detail or context. It is unclear what additional assistance the Guideline provides, that would not be easily discernible to an applicant from Annex I.
3. The Guideline is focused on 'the **approval** of a Plan of Work for exploitation' [emphasis added]. Throughout the document, the possibility that a Plan of Work may be rejected by the ISA does not appear to be countenanced. The possibility of application rejection should be added into the Guideline, so that the process for rejection is also explained and included in the flow-chart.
4. The Guideline fails to address evidential requirements of any key criteria for the LTC and Council's review of any application, including (but not limited to), the applicant's technical capability to perform its requirements, its effective control by a sponsoring State, and the adequacy of its environmental planning documents. The Guideline should explain, for the benefit of all stakeholders, how the LTC and Council will assess the information provided by an applicant and what benchmarks will be applied in determining what is adequate and acceptable. Because this document does not fulfill these vital functions, it is difficult to offer a detailed critique. The following suggestions are for improvements based on the text available.

Specific Comments

Page	**Line**	**Comment**
Guideline on the preparation and assessment of an application for the approval of a Plan of Work for exploitation		
2	8-9	The purpose of an application for the approval of a Plan of Work is for **the ISA** (not the applicant) to determine whether or not the application and the proposed Plan of Work is compliant with the rules of the ISA, and whether or not the application meets the ISA's criteria in order to be approved. Line

		8-9 should be amended to reflect this purpose more accurately.
2	18	It is suggested to delete the words "*may delay the review and consideration of the application*" and to replace them with the words "may cause a delay in the review and consideration of the application, and/or lead to a rejection of the application".
2	26-31	The Exploration Regulations are referenced here as containing '*specific guidance on the preparation of component elements of an application*'. Yet they are not cross-referenced in the check-list, leaving unclear the specific details or citations that an applicant should address. It is recommended that any 'specific guidance' contained in the Exploration Regulations, or other Standards and Guidelines, which is relevant to an application for an exploitation contract be added into the 'Regulations Requirement' column in the flow-chart.
2	33-35	Paragraph 6 is too vague. It is unclear what value is added to the Guidelines by a statement that there may be '*valuable information*' contained in '*existing bodies of practice and international standards from other similar industries*'. It provides no indication as to what is expected of an applicant in this regard. If there are specific existing bodies of practice or international standards that may be considered in assessing an application, these should be specifically elaborated. .
2	37	Paragraph 7 needs further clarification. If the purpose of the document is not to provide regulatory assessment criteria, then its purpose needs to be explicated in a manner consistent with the function of guidelines in the draft Exploitation Regulations, once that function is agreed.
2	42-44	Paragraph 8 requires re-drafting, as it could be interpreted to suggest that (a) approval of a Plan of Work is always a predetermined outcome of an application, and (b) submitting all required information and documents will (alone) ensure approval (rather than a consideration of the content of that information, against specific assessment criteria by the ISA).
Annex I **Checklist for the preparation of an application for the approval of a Plan of Work for exploitation**		
4 and 5	Table, row 2 and 3	Row 2 refers to the requirement that an applicant who is "*a natural or juridical person which possess [sic] the nationality of States"* must be *"effectively controlled by them or their nationals".* The meaning of 'effective control' is not explained. However, row 3 requires such applicants to provide, in additionl to nationality, evidence of the principal place of business or domicile, and the place of registration, of the applicant. This implies that company location is the (only) relevant consideration for determining whether the applicant is 'effectively controlled' by the sponsoring State. The concept of effective control has yet to be comprehensively discussed and clarified at the ISA. It appears that the subject of 'effective control' was on the ISA Legal and Technical Commission's agenda for discussion in their

		July 2020 session (conducted remotely). It is therefore hoped this will lead to a report and/or recommendation to Council on the subject. As such these sections, and the implication that location of domicile / registration is the only relevant criterion for 'effective control', is premature. Indeed, there are potentially different ways of interpreting 'effective control' which lead to quite different outcomes in terms of what kinds of contractor-State relationships are permitted for ISA contracts. UNCLOS does not expressly define 'effective control', though does indicate that 'nationality' and 'effective control' are separate concepts, not to be conflated [Articles 139 and 153(2)]. The draft Standards appears to focus on the location of the registration or residence of a company only (i.e. 'de jure' or regulatory control). There are convincing alternative arguments suggesting that a more logical interpretation of the 'effective control' criterion might look further into other factors more relevant to the control of the applicant *in practice*, for example: the location of the companies' owners and management. This 'de facto' or 'economic' control approach may be preferred on the grounds that it better meets the intentions of UNCLOS, surmounts issues that might otherwise arise with shell companies, and could also help to prevent forum shopping for sponsoring States (similar to the flags of convenience phenomenon that has been observed with shipping). Such issues were well-explained in the 2019 publication by Rojas and Phillips: '*Effective Control and Deep Seabed Mining: Toward a Definition*' – available here: https://www.cigionline.org/sites/default/files/documents/Deep%20Seabed%20Paper%20No.7_0.pdf. This paper proposed the following as potentially relevant criteria in assessing 'effective control': 1. ownership of a majority of the applicant's shares; 2. ownership of a majority of the applicant's capital; 3. holding a majority of the applicant's voting rights; 4. holding the right to elect a majority of the applicant's board of directors or equivalent body; 5. having an influence over the applicant sufficient to determine its decisions. An economic control approach was also taken in the Convention on the Regulation of Antarctic Mineral Resource Activities (CRAMRA). This treaty never came into force, because it was superseded by a moratorium on commercial mining in Antarctica. But it remains of precedent value for the ISA, not least because the subject matter is so apposite, and also because it was signed by 19 ISA Member States (including 9 ISA sponsoring States). CRAMRA requires a '*a substantial and genuine link*' between a Sponsoring State and operator, includes examination of location of a company's

		management for non-State actors, and then defines 'effective control' as '*the ability of the Sponsoring State to ensure the availability of substantial resources of the Operator for purposes connected with the implementation of this Convention, through the location of such resources in the territory of the Sponsoring State or otherwise*.' It is recommended that the above criteria taken from CRAMRA and the 2019 Rojas and Phillips paper be added to this guidance document; and/or that the LTC conducts a study and provides specific recommendations to the Council on how 'effective control' should be defined and assessed, in order for an informed policy decision to be taken on the matter by ISA decision-makers. This can then be reflected in the Guideline and other ISA regulatory instruments, providing welcome certainty for applicants, States and other stakeholders.
5	Table, row 3	It is recommended that the application should include a summary of, and a copy of, the relevant domestic laws under which the sponsoring State will fulfill its obligations under UNCLOS with respect to activities in the Area, including information as to how Article 235 of UNCLOS has been met (with regards the duty to make available recourse in accordance with the national legal system for prompt and adequate compensation or other relief in respect of damage caused by pollution of the marine environment by natural or juridical persons under their jurisdiction).
6	Table row 3	The question: "*If the applicant has the nationality of one State but is effectively controlled by another State or its nationals, has each State issued a certificate of sponsorship?*" will make more sense if the determination of 'effective control' includes examination of the location of a company's owners and management, as is recommended (see comments above). Such an analysis would recognize that a company have can indeed have one nationality, but be registered or domiciled in another country,
6	Table, row 4	In the first bullet-point, 'Standards' should be added to the list of instruments that the applicant must undertake to accept as enforceable, and comply with.
7	Table, row 5	This list of material required to accompany the application should also include the various documents that would be required for the Environmental Performance Guarantee, as set out in the draft Standard on that subject (e.g. an EPG Declaration, and Validation Statement).
7	Table, row 6	It is recommended that the applicant should be required also to submit a map of the area under application. The map can also be marked to show the proposed Mining Area, and the proposed Impact Reference Zones, Preservation Reference Zones and any other relevant and known features of the site.
Annex II - Application and approval process for a plan of work for exploitation		
9	54	The flow-chart should be entitled 'Application and **assessment** process…' rather than 'Application and **approval** process…' Approval should not be presupposed as the outcome of an application. The flow-chart should include processes for the circumstances where (a) the LTC does not recommend

		approval and the Council does not approve the application, and (b) the LTC and/or Council are not satisfied with revisions made to the Plan of Work post-approval. For example, a decision point can be inserted in the fifth box down on the left. It is not a given that the Council will approve every application and therefore that the Secretary General will prepare a contract. A decision point should also be inserted in the ninth box down on the right. It is not a given that the Council will approve a revised Plan of Work and therefore that the Environmental Performance Guarantee may be lodged and the contractor can continue work to progress towards commercial production.
9	54	Third box down on the right - requires contractors to respond and submit any revised plans in accordance with comments received, within 30 days of receiving comments. This seems an insufficient time to enable meaningful response to what could be voluminous comments on an application by relevant stakeholders. It is suggested to remove the timeframe from this step and replace it instead with "Contractor to advise Authority/Commission of time frame it requires to address comments and provide a revised Plan of Work application."
9	54	In the fourth box down on the left - the words "*120 days from the date of completion of the procedure on the Environmental Plans*" need clarification. If this refers to another Guideline/Standard that specifies such a procedure, it would be helpful to make a specific reference. On the seventh box down on the left - same comment as for third box down on the right - there is no guarantee that 30 days will be sufficient to address meaningfully stakeholder comments. It is suggested to remove the timeframe from this step, replacing instead with "Contractor to advise Authority/Commission of time frame it requires to address comments and provide a revised Plan of Work application."