

**TEMPLATE FOR SUBMISSION OF TEXTUAL PROPOSALS DURING THE 27TH SESSION:
COUNCIL - PART I**

Informal Working Group - Institutional Matters

Please fill out one form for each textual proposal which your delegation(s) wish(es) to amend, add or delete.

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

Pew Charitable Trusts

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

DR 5

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.

2(b) In the case of the Enterprise, by its ~~Director-General-competent authority~~; and

3. Each ~~application applicant~~ by a State enterprise or one of referred to in Regulation 5(1)(b) above ~~should~~ shall contain the information required by Regulation 7 and Annex I, sufficient to enable the Authority to determine whether or not the applicant is qualified to apply according to Regulation 5(1).

~~[(a) Sufficient information to determine the nationality of the applicant or the identity of the State or States by which, or by whose nationals, the applicant is effectively controlled; and~~

~~(b) The principal place of business or domicile and, if applicable, the place of registration of the applicant.]~~

Schedule: Use of Terms and Scope

“Effective Control” or “effectively controlled” requires a substantial and genuine link between sponsoring State and Contractor, which includes for non-State actors the location of the company’s management and beneficial ownership, as well as the ability of the sponsoring State to ensure the availability of resources of the Contractor for fulfilment of its contract with the Authority and any liability arising therefrom, through the location of such resources in the territory of the sponsoring State or otherwise.

4. Please indicate the rationale for the proposal. [150 word limit]

Regarding paragraph 1, a definition of ‘effectively controlled’ in the Schedule to the Regulations would help the LTC and other stakeholders understand how the ‘effective control’ criterion should be interpreted and applied. This point has been raised, inter alia, by submissions to the ISA from Costa Rica, Italy, DOSI, IUCN, DORD, IASS, and The Pew Charitable Trusts and in interventions made by numerous delegations during the March 2022 Council Session. We proposed wording for a definition that could be added to Schedule: Use of Terms and Scope.

“Effective control” of a Contractor is required by UNCLOS from the sponsoring state [UNCLOS Articles 139 and 153(2)]. UNCLOS does not expressly define “effective control”, but does indicate that “nationality” and “effective control” are separate concepts, not to be conflated. Many ISA Contractors currently are either States Parties themselves (not requiring sponsorship) or State-owned enterprises, where questions of effective control do not arise. But there have in recent years been an increasing number of contract applicants who are private sector companies, sponsored by States

in which they are incorporated. Indeed, ISA practice in granting Exploration contracts to non-state actors has focused (for the purposes of effective control and identifying the correct State of sponsorship) only on the location of the registration of the Contractor company. A more logical interpretation of the “effective control” criterion might look also at ownership and business management as factors relevant to determine the level of de facto control by the State or its nationals. For example, a de facto approach was taken in the Convention on the Regulation of Antarctic Mineral Resource Activities (CRAMRA), which requires “a substantial and genuine link” between sponsoring State and operator, which includes for non-State actors an examination of the location of the company’s management; 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.” The ISA should adopt a similar approach. Indeed, having a Contractor that is owned and managed by non-state nationals, and/or which has little meaningful presence or resources within the sponsoring State, would not seem to be an optimal arrangement for any sponsoring State, as it would likely reduce the benefits flowing to that State, and also to reduce the Government’s ability to take regulatory action and enforce compliance measures. But does not reduce the State’s legal liability or risk as a sponsoring State. (Additional sources: [Rojas and Phillips \(2019\) “Effective Control and Deep Seabed Mining: Toward a Definition”](#), and [Willaert \(2022\) “Transparency in the field of deep sea mining : filtering the murky waters”](#)..

Regarding paragraph 2, we believed that a specific authorized person should be named for the Enterprise.

Regarding paragraph 3, we note that regulation 7(1) sets out the required contents of an application for a Plan of Work for Exploitation (with reference to Annex I). This Annex includes requirements for the ‘name of applicant, and ‘place of registration’, ‘place of business/domicile’. It is therefore confusing to have these requirements repeated here in DR5 (which is the Regulation about ‘qualified applicants’ not about the content of applications), especially where the requirements are expressed in different terms. It is therefore suggested that sub-paragraphs (a)-(c) be deleted, and that the same content is instead covered (only) by Annex I (and brought into effect by DR7). It might also be useful to migrate the text of this paragraph DR5(3) into DR7.