

**TEMPLATE FOR SUBMISSION OF TEXTUAL PROPOSALS DURING THE 28TH 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.im.

- 1. Name of Working Group:**
Informal Working Group on Institutional Matters

- 2. Name(s) of Delegation(s) making the proposal:**
The Pew Charitable Trusts

- 3. Please indicate the relevant provision to which the textual proposal refers.**
DR 13

- 4. 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.**

Regulation 13

1. The Commission shall determine ~~[under consideration of taking into account the comments made by members of the Authority and Stakeholders, any responses by the applicant and any additional information or comments provided by the Secretary General]~~ if the applicant:

- (a) Is a qualified applicant under regulation 5;
- (b) Has prepared the application in conformity with these regulations, the Standards and ~~[the applicable]~~ taking into account of Guidelines;
- (c) Has given the undertakings and assurances specified in regulation 7 (2);
- (d) ~~Has satisfactorily discharged its obligations to the Authority;~~
- (e) Has ~~[or can demonstrate that it will have]~~ the financial and technical capability ~~[and capacity]~~ to carry out the Plan of Work, ~~[meet or exceed environmental performance obligations]~~ and to meet all obligations under an exploitation contract ~~[according to criteria defined by the Council];~~

~~[(g) Has demonstrated due diligence, in relation to the accommodation of other activities in the Marine Environment, due diligence including to:]~~

~~[(i) identify in-service and planned submarine cables and pipelines in, or adjacent to, the area under application using the publicly-available data and resources as listed in the Guidelines;]~~

[(ii) identify sea lanes in, or adjacent to, the area under application that are essential to international navigation;]

[(iii) identify areas of intense fishing activity in, or adjacent to, the area under application]; and

[(iv) where other marine users are identified in relation to the area under application [whether listed in the Regional Environmental Management Plan or identified by some other means], consult with those users to agree measures the Contractor will take to give reasonable regard to their activities (such as an easement, or a mining exclusion zone within a reasonable radius);]

[(h) Has demonstrated a satisfactory record of past performance both within the Area and in other jurisdictions.]

2. In considering the financial capability of an applicant, the Commission shall determine in accordance with the Standard, and taking into account of Guidelines whether:

(a) The Financing Plan is compatible with proposed Exploitation activities; and

(b) The applicant ~~[will be is]~~ capable of committing or raising sufficient financial resources to cover the estimated costs of the proposed Exploitation activities as set out in the proposed Plan of Work, and all other associated costs of complying with the terms of any exploitation contract, including:

(i) The payment of any applicable fees and other financial payments and charges in accordance with these regulations;

(ii) The estimated costs of implementing the Environmental Management and Monitoring Plan and the Closure Plan ~~[and to restore and remediate the affected Marine Environment in case of a significant Incident];~~

(iii) Sufficient financial resources for the prompt and effective response to an Incident~~execution~~ and implementation of the Emergency Response and Contingency Plan; and

(iv) Necessary access to insurance products that are appropriate to the financing of exposure to risk in accordance with Good Industry Practice and relevant Standards or Guidelines.

~~3.2.~~—In considering the technical capability of an applicant, the Commission shall determine in accordance with the Standard and taking into account of Guidelines whether the applicant ~~[has provided sufficient information to demonstrate it] has [or will have]:~~

[(a) Certification to operate under internationally recognised quality control and management standards;]

[(a) *bis*. The necessary technical and operational capability to carry out the proposed Plan of Work in accordance with Good Industry Practice and Best Environmental Practices using appropriately qualified and adequately supervised personnel;]

(b) The technology [knowledge and] procedures necessary to comply with the terms of the Environmental Management and Monitoring Plan ~~[and]~~ the Closure Plan, [and the

applicable Regional Environmental Management Plan] including the technical capability to [identify and] monitor key environmental parameters [and ecosystem components so as to detect any adverse effects] and to modify management and operating procedures [as required to avoid the potential for Serious Harm] [~~when appropriate~~];

(c) Established the necessary risk assessment and risk management systems to effectively implement the proposed Plan of Work in accordance with Good Industry Practice, Best Available Techniques, [Best Available Scientific Information] and Best Environmental Practices and these regulations, including the technology and procedures to meet health, safety and environmental requirements for the activities proposed in the Plan of Work;

(d) The capability to respond promptly and effectively to Incidents, in accordance with the Emergency Response and Contingency Plan; and

(e) The capability [and capacity] to utilize and apply Best Available Techniques.

(f) A safety management system that meets the requirements of regulation 30 bis.

(g) An Environmental Management System that meets the requirements of Regulation 46.

4. The Commission shall determine if the proposed Plan of Work [foreseeably contributes to realizing the benefits for [hu]mankind as a whole][complies with the fundamental policies and principles contained in regulation 2, and];

~~(a) Is technically achievable and [economically commercially viable];~~

~~(b) Reflects the economic life of the project;~~

(c) Provides for the effective protection of human health and safety of individuals engaged in Exploitation activities [in accordance with the rules, regulations and procedures adopted by the Authority and by any other competent international organizations];

(d) Provides for Exploitation activities to be carried out with reasonable regard for other activities in the Marine Environment, [in line with article 87 and 147 of the Convention] including [*inter alia*] navigation, the laying of submarine cables and pipelines, [the right to maintain and repair existing submarine cables and pipelines], fishing and marine scientific research, [~~as referred to in article 87 of the Convention~~] [in accordance with the relevant Standards and taking account of Guidelines]; and

(e) [~~Provides under~~] [~~Demonstrates that~~] [~~Ensures through~~] the Environmental Plans, [~~will secure~~][~~to secure~~] Provide for the effective protection of the Marine Environment in accordance with the ~~rules, regulations and procedures adopted by the~~ Rules of the Authority, [~~in particular the fundamental principles and the relevant policies under regulation 2~~] [~~in particular the fundamental policies and procedures under regulation 2~~] [as well as the objectives and measures under the applicable Regional Environmental Management Plan] [taking into account the cumulative effects of all relevant activities [and climate change]].

[(e)*bis* The effective protection referred to in sub-paragraph (e) implies that the activity will not cause, *inter alia*:

- i. Significant adverse effect on air and water quality;
- ii. Significant changes in atmospheric, terrestrial or marine environment;
- iii. Significant changes in the distribution, abundance or productivity or species of flora and fauna;
- iv. Further jeopardy to endangered or threatened species or populations of said species
- v. Degradation, or risk of degradation to special biological, scientific, archaeological, or historical significance;
- vi. Significant adverse effect on climate or weather patterns.]

[(f) Provides for the effective protection of the marine environment from harmful effects that may arise from the proposed activities, by assessing whether the proposed Plan of Work:

- [(i) contains adequate environmental baseline data, in accordance with applicable Standards and taking into account Guidelines;]

[(ii) will not cause environmental impacts to any area designated by the Authority or other relevant authority as a protected area in terms that prohibit such impacted;]

(iii) Gives rise to a non-negligible risk of pollution, damage to flora and fauna, or other harmful effects to ecosystem integrity (i.e. ecosystem structure or function) in a manner that:

(A) impairs the ability of affected populations to replace themselves; or

(B) degrades the long-term natural productivity of habitats or ecosystems; or

(C) causes, on more than a temporary basis, significant loss of species richness, habitat or community types.

(iv) Gives rise to a non-negligible risk that it will undermine the protection and conservation of other natural resources of the Area.

~~In conducting this assessment, the Commission shall take into account and shall consider:-]~~

[5. For the purposes of determining effective protection of the Marine Environment under regulation 13 (4) (e) and (f), the Commission must take into account:

- (a) Any Environmental Effects or impact on other activities of allowing the Exploitation activity;
- (b) All proposed mitigation and risk management measures;
- (c) An evaluation of harmful effects individually, in combination, as well as cumulatively, including effects from other activities in the area under application.
- (d) The effects on human health that may arise from Environmental Effects;
- (e) The importance of protecting the biological diversity and integrity of marine species, ecosystems and processes;
- (f) The importance of protecting rare and vulnerable ecosystems and the habitats of threatened species;
- (g) Traditional knowledge or cultural interests relevant to the area under application;
- (h) the matters set out at Regulation 46bis (2) (b);
- (i) The assessment framework for Mining Discharges as set out in the Guidelines;
- (j) Any relevant Standards and Guidelines developed in accordance with regulations 94 and 95.]
- (k) Whether performance of the Plan of Work can be effectively monitored and controlled by the Authority, to minimise Environmental Effects, and ensure compliance with the Rules of the Authority.

[6. When assessing a Plan of Work, the Commission shall apply the principles set out in regulation 44(a)-(c).]

[7. In assessing a Plan of Work, the Commission shall determine whether the applicant is under the effective control of the sponsoring State[, according to applicable Guidelines], and whether the sponsoring State has enacted domestic legislation covering activities in the Area that:

(a) is in force and applicable,

(b) provides available recourse through the domestic legal system in accordance with Article 235(2) of the Convention, and

(c) does not contain provisions that appear to exempt liability of the sponsored entity from a cause of action that may result from its conduct of activities in the Area.]]

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

For paragraph 1, we do not support the proposed amendment as it seems to be duplicative of DR 12. We suggest deleting subparagraph d and support the insertion of subparagraph h which is less open to interpretation. For subparagraph e, we believe the proposed insertions are unnecessary and can be deleted. Regarding subparagraph f, we appreciate that UNCLOS does use the phrase ‘the economic life of the mining project, taking into consideration such factors as [...] commercial viability.’ But this is in assessing how long an exploitation contract term should be, not in assessing whether or not an applicant qualifies to be awarded a contract. To us, it is not clear what ‘commercial viability’ means as an evaluation criterion for a plan of work, nor how the LTC can make such an assessment. It is presumably for the applicant themselves to determine whether a mining project is viable from their perspective. If an applicant wishes to mine at a loss, for their own reasons, should that application automatically be denied as ‘not commercially viable’? That does not seem to be what was intended by UNCLOS. Lastly, we support the insertion of subparagraph (g) with some slight modifications which would indicate that the list of these activities could be contained in the relevant REMP to help assist contractors in fulfilling this duty.

For paragraph 3, we think more description is needed in subparagraph 3 as to what is envisioned to ensure enforceability. If this is to be included as an assessment criterion, then there should be an accompanying requirement in the Regulations for a Contractor to hold such certifications. We are not sure if DR30 relating to class designation for the vessel would cover this, or whether something else is meant by ‘quality control and management standards’. For subparagraph (a)(bis), we suggest amending to include not only Good Industry practice, but also Best Environmental Practices. Our understanding is that ‘Good Industry Practice’ means performance that is within the range of what should reasonably be expected from the industry, whereas Best Environmental Practice requires continuous development and improvement of environmental practices based on ongoing scientific and technological discoveries. For subparagraph (d) we recommend the addition of the word ‘promptly’ to align the wording of this DR13(3)(d) with DR 13(2)(b)(iii) above. At the end of paragraph 3, we propose two new sub-paragraphs (f) and (g) which require respectively a safety management system that meets the requirements of regulation 30 bis, and an environmental management system that meets the requirements of Regulation 46. Without adding these to the LTC’s assessment criteria listed here in DR13, then it is unclear how adequacy of these required systems can be taken into account within the approval process for the Plan of Work. In our view the adequacy of these systems should be an important aspect of the LTC’s evaluation.

For paragraph 4, we agree with the deletions of sub-paragraphs (a) and (b). As noted previously, these aspects are referenced in UNCLOS specifically in relation to the ISA setting rules for the duration of an exploitation contract term. They were not intended to be criteria to take into account with regards to whether or not a contract is awarded at all. While we are still considering para 4(e-f) and para 5, it seems that there is some overlap and they could be merged. In addition, we suggest that the environmental threshold Standards should also be referenced in these provisions. We are generally supportive of their content, as well as the content in new paragraph 13(5), as aiming to give more detail to the ‘effective protection’ obligation of Article 145 of the Convention, though it may be helpful to have further discussions on this topic perhaps within the threshold working groups to ensure they are sufficiently comprehensive. We also query whether assessments conducted pursuant to Article 165(2)(d) should be referenced here. To the best of our knowledge, the LTC has not conducted regional environmental assessments of the implications of activities in the Area, summarizing existing knowledge, possible impacts, and remaining uncertainties. We believe such assessments would complement individual assessments conducted by contractors as part of their EIA and help the ISA ensure individual plans are consistent with regional management objectives.

For paragraph (5), we also query whether the addition of a new sub-paragraph (k), which would require the LTC to assess whether the performance of the Plan of Work can be effectively monitored and controlled by the ISA to ensure compliance with the Rules of the Authority, would be a helpful addition here. This would help

ensure the ISA has the capacity to carry out its mandated role to control exploitation activities [in accordance with UNCLOS Article 153, before allowing them to commence.

We support the inclusion of draft regulation 13, paragraph 7. “Effective control” of a Contractor is required by UNCLOS from the sponsoring state [UNCLOS Articles 139 and 153(2)]. UNCLOS does not define “effective control”, and we have expressed our view elsewhere that the Regulations or subsidiary instruments should provide a definition of ‘effective control’, which does not solely rely upon the State’s say-so, or upon evidence of a company registration in the Sponsoring State, but looks more deeply into where the ownership, management and assets of the company reside. Because if the sponsoring State only has control over a shell company, and no assets or personnel, then it will not be able to enforce any rules against the company, which undermines the legal framework established by UNCLOS (and also exposes that State to risk and liability). We also consider it appropriate that the ISA should require, at contract application stage, a description of the sponsoring State’s domestic law designed to ensure contractor compliance. In our view, the ISA could not be said to be acting in the best interests of humankind if it permitted exploitation under sponsorship of a State that has no such law in place. In addition, UNCLOS Article 235 imposes a direction obligation upon States to have available recourse within national systems for prompt and adequate compensation or other relief in respect of damage caused by pollution of the marine environment by persons under their jurisdiction. Unless the ISA collects information as to these national mechanisms, it may be very hard for an affected party to access compensation measures in practice.