TEMPLATE FOR SUBMISSION OF TEXTUAL PROPOSALS DURING THE 28TH SESSION: COUNCIL - PART III

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 of Working Group:**
   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 5

Red text is in original draft; magenta text indicates Pew's new textual proposals or support for a proposal from a range of options

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.**

3. Each application by an entity referred to in regulation 5(1)(b) shall also 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):

~~together with the necessary documentation as supporting evidence:~~

> ~~(a) The name of the applicant, and all information necessary 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;~~
>
> ~~(b) The principal place of business or domicile and, if applicable, the place of registration of the applicant;~~
>
> ~~(c) All information necessary to demonstrate that the applicant has the necessary financial, technical and operational capability to carry out the proposed Plan of Work in accordance with these Regulations, applicable Standards and Good Industry Practice using appropriately qualified [and adequately supervised] personnel; and~~
>
> ~~(d) All information necessary to demonstrate the technical capability in environmental management pursuant to regulation 13(3)(c) and Section III of Annex I to be able to comply with the requirements of these Regulations and applicable Standards.~~

6. The Authority shall not accept the application if the sponsoring State or States has not enacted ~~a mining law~~ legislation about activities in the Area that complies with the ~~standards~~ requirements referred to in Regulation 105.

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

In para 3, we propose adding at the end of the paragraph that the application shall also contain 'information required by Regulation 7 and Annex 1, sufficient to determine whether or not the applicant is qualified to apply according to

regulation 5 (1)'. And then we would delete the subsequent paragraphs till subpara d to avoid potential overlap and confusion. The reference to Annex 1 and Regulation 7 (pending some further amendments) would capture the required content of the application, including the items listed in the sub-paragraphs.

We do agree that sufficient information to enable identification of the State of nationality or of effective control is an important criterion to include here and we agree with the facilitators' comment that 'Effective Control' should be defined to ensure clarity for all parties of the meaning. In our view this definition should include examination of the location of the Contractor's day-to-day executive management team, its owner(s) and its assets.

Regarding para 6, while the ISA should avoid impugning matters of state sovereignty, we consider this insertion appropriate and important. UNCLOS Annex III specifically mandates the ISA to set out in Regulations the criteria and procedures for implementation of State sponsorship requirements. So it is not over-reaching the ISA mandate for it to provide some stipulations in this regard.

UNCLOS also requires sponsoring States to ensure contractor compliance via domestic laws and administrative matters. However it is apparent from our research that not all sponsoring States have put such laws and measures in place yet. Such absence of domestic law compromises the integrity of the regulatory regime for activities in the Area, and could lead to an inability to enforce contractor compliance, or seek redress for harm suffered.

It is hard, then, to see how the ISA would be meeting its mandate to act on behalf (hu)mankind as a whole if these regulations would allow the permitting of exploitation under the sponsorship of a State that has not taken basic steps necessary to ensure compliance by the contractor. Hence we consider this insertion justified and sensible.

General comment on 'effective control':

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. There are however risks to this approach. A sponsoring State can only use enforcement powers against persons within its jurisdiction. If a locally registered company is a subsidiary of an overseas entity, without significant presence in-country, the sponsoring State's powers are severely curtailed, and the ISA's dual regulatory regime is significantly compromised.

If the ISA does not have full information about the identity of the parent company, then there may also be issues arising around monopolisation, or reserved areas being accessed by developed country nationals.

Taking this into account, a more logical interpretation of the "effective control" criterion might look 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, this should be a priority issue for sponsoring States, as much as for the ISA. 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 exercise control over the contractor's activities - 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”