

THE PEW CHARITABLE TRUST'S COMMENTARY

***ON THE REVISED CONSOLIDATED TEXT: DRAFT REGULATIONS ON
EXPLOITATION OF MINERAL RESOURCES IN THE AREA,
DATED 29 NOVEMBER 2024 (ISBA/30/C/CRP.1)***

Key

Black font, red font, and grey text-boxes are replicated from the Draft Regulations text.

Blue font represents commentary or edits proposed by The Pew Charitable Trusts.

Regulation 10

Preliminary review of application by the Secretary-General

1. The Secretary-General shall preliminarily review an application for approval of a Plan of Work and determine whether the application contains all the information required by Regulations 5 to 8 for further processing.

[1. bis. Where the Secretary-General considers that an application does not contain all the information required by Regulations 5 to 8, the Secretary-General shall submit it to the Legal and Technical Commission.]

2. Where the [Secretary-General]/[Commission] determines that an application does not contain all the information required by Regulations 5 to 8, the Secretary-General shall, within 45 Days of receipt of the application, notify the applicant, specifying the information which the applicant must submit in order to complete the application, and a date by which the application must be completed. Further processing of an application will not begin until the [Secretary-General]/[Commission] determines that the application is complete, which includes all required information ~~that has~~having been submitted by the applicant, including payment of the administrative fee specified in ~~appendix II~~Regulation 86.

3. In case there is a potential applicant who claims preference and priority in the same area and same Resource category under an Exploration ~~Ce~~Contract in accordance with Article 10 of Annex III to the Convention, the Secretary-General shall, before progressing the original application further, request confirmation of the intention of such a potential applicant to apply for approval of a Plan of Work for exploitation within 30 Days of the original applicant's application. The new applicant shall then lodge their application within a further ~~[270]~~ [60] Days; and the Secretary General shall consider the additional application in accordance with Regulation 10(1) and (2).]

~~[3. Alt. In case an application is lodged for the same area for which an operator has preference and priority in accordance with Article 10 of Annex III first sentence, the Secretary General shall, after having made the determinations under paragraphs 1 and 2 of this Regulation, forward the application to the Commission. The Commission shall make a recommendation as to whether the operator's performance has not been satisfactory in accordance with Article 10 of Annex III based on which the Council shall decide whether the operator's preference and priority shall be withdrawn in accordance with Article 10 of Annex III second sentence.]~~

4. Should there be more than one application for the same area and same resource category or a potential applicant has confirmed their intention to apply for approval of a Plan of Work pursuant to paragraph 3, the Commission shall make recommendations to the Council, and the Council shall determine which applicant has preference and priority

in accordance with Article 10 of Annex III to the Convention and section 1, paragraph 13 of the Annex to the Agreement.¹.

5. Where an application concerns a Reserved Area [that is not or has not been subject to an Exploration Contract], the Enterprise shall be given an opportunity to decide whether it intends to carry out activities in the area in accordance with Article 9 of Annex III to the Convention, and Section 2 of the Annex to the Agreement.

Comments

- There has been opposition to the alternative proposed wording for paragraph 3, which is therefore proposed to be removed.
- In respect of the remainder of the Regulation, unopposed proposals concerning the previous text were implemented based on inputs during the first part of the twenty-ninth session. Cross-references are harmonised.

DR10 covers two separate processes the second of which involves not only the SG, but also the LTC, the Council and the Enterprise. For that reason, we think the regulation title should be amended to reflect its content more accurately. In fact, we would suggest that DR10 be broken into two separate regulations, one to cover the SG's **completeness' check**, and the other to cover the **preference and priority** decision.

We understand that the new **paragraph (1 bis)** covers a reference by the SG to the LTC, for the LTC to verify the completeness check, only in cases when the SG finds the application to be incomplete (but not if the SG determines that the application to be complete). This makes sense to us, as a complete application goes to the LTC in any event, which means the LTC has opportunity themselves to ascertain whether they have all the application information they need for their review. But in a case that the SG finds an application incomplete, the LTC is not sighted on the application and cannot verify the SG's finding. So we see the sense in the LTC playing an oversight role for an 'incomplete' decision, but consider the paragraph (1 bis) could be more explicitly worded as to the LTC's specific oversight role in that matter i.e. to confirm the SG's incompleteness finding. Otherwise the drafting is general enough that it could mean the SG forwards an incomplete application to the LTC for them to commence their substantive review – which does not make sense. We note that **paragraphs (2), (3) and (4)** may give rise to a situation where an initial applicant is asked to provide more information on its application, and a second applicant is encouraged to provide an application within 270 days (whilst the first applicant must wait) – both of which processes are likely to entail significant effort, delay, and expense – only then for the ISA to advise one of them that their application does not have preference and priority. We wonder if the de-prioritised applicant in that situation may feel that the initial instruction to submit more information / an application, was neither fair nor reasonable? We recall the comment from France in March 2024 that DR11(3) could cause conflict and gives opportunity for abuse.

In **paragraph (3)**, we are unsure of the validity of the wording '*The new applicant shall then lodge their application within 270 Days*'. In our view the Regulations should not compel any applicant to make an application in this way. We suggest this should be phrased as giving the applicant an opportunity to lodge an application within 270 days (otherwise their preference and priority will be forfeited). Also, 'Exploitation' should be capitalised.

We support the importance of **paragraph (5)** on the role of the Enterprise for an application for a reserved site. We would however suggest this paragraph is re-located to DR8 (on the area covered by the application) rather than this DR10 (on the SG's administrative review of application documents). We do not understand the proposed addition in this draft of paragraph (5). Article 9 of Annex III to UNCLOS states 'The Enterprise shall be given an opportunity to decide whether it intends to carry out activities in each reserved area.' There is no limitation that applies that right to Exploration only. Also, as noted in our comments to DR8, there are other important eligibility requirements under UNCLOS and the 1994 Agreement for access to a reserved area, including that the applicant must be a developing State or sponsored by a developing State, or must have offered the opportunity of a joint venture to the Enterprise.