

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.

Section 3

Consideration of applications by the Commission

Regulation 12

Rules for considering applications

1. Subject to Regulation 10 concerning preference and priority among applicants, the Commission shall examine applications in the order in which they are received by the Secretary-General and shall assess applications in accordance with this Regulation and against the criteria contained in Regulation 13, in order to make a report and ~~submit~~ appropriate recommendations to the Council whether the Plan of Work under application should be approved, or disapproved, pursuant to Regulation 15.

1. bis Subject to paragraph 1 ter. and to Regulation 11(4), ~~the~~ The Commission shall commence the consideration of an application at its next meeting after its receipt of the application ~~{within 30 Days of its receipt of the application}~~ ~~{provided that the notifications and information pursuant to Regulation 11(1)-(2 ter) have been circulated at least [30][90] Days prior to the commencement of that meeting of the Commission.}~~ [The Commission may extend consideration of the application to its next meeting if necessary.]

~~[1. ter The Commission may defer consideration of an application to a subsequent meeting if the complexity of the application so requires.]~~

2. The Commission shall consider applications expeditiously and shall submit its reports and recommendations to the Council no later than 120 Days from the date on which the Secretary-General transmits the applicant's or Contractor's written response with any revised documentation, to the Commission.

[2. Alt. [The Commission] and—shall endeavour to submit its reports and recommendations to the Council no later than ~~[120]/[180]/[270]~~ Days from whichever date occurs later out of:

(a) The close of the [date of the completion of the review of the Environmental Plans, under Regulation 11]~~[comment period, in accordance with Regulation 11(1)(a)]~~;

(b) The date of submission [the completion of the amendments to the proposed Plan of Work under Regulation 14.]~~[of a revised plan, in accordance with Regulation 11(2-bis);~~
~~or~~

(c) ~~The date the Commission receives additional information or amendments to the Plan of Work requested by the Commission under Regulation 14.~~

[2. bis. Alt. The Commission may delay its reports and recommendations under Regulation 12(2) by a further 90 Days, if additional information or consultations with experts are necessary.]

3. The Commission shall, in considering a proposed Plan of Work, apply the Convention, the Agreement, and the rules, regulations and procedures of the Authority in a uniform and non-discriminatory manner, and may not recommend approval of a Plan of Work that does not comply with these requirements.

~~3. Alt. The Commission shall, in considering a proposed Plan of Work, apply the Convention, the Agreement, and the rules, regulations and procedures of the Authority in a uniform and non-discriminatory manner, and [apply the principles, policies and objectives relating to activities in the Area as provided for in the Convention, the Preamble, and Part I of these Regulations, and in particular the manner in which the proposed Plan of Work contributes to realizing benefits for humankind as a whole in accordance with decisions of the Council and Assembly [including in ensuring the fair and equitable sharing of benefits and ensuring the effective Protection of the marine environment], and may not recommend approval of a Plan of Work that does not comply with these requirements].~~

3. bis. In the event the Commission evaluates that there are aspects of the proposed Plan of Work that are not covered entirely by its own internal expertise, the Commission shall nominate at least three competent independent experts selected on the basis of their significant experience or record of publications in a particular deep sea environment or technology sector, to review the application and provide comments to the Commission to inform their consideration of the proposed Plan of Work.

4. In considering the proposed Plan of Work, the Commission shall take into account:

(a) ~~R-Any~~ relevant reports from the Secretary-General;

(a) bis Any consultation submissions received under Regulation 93bis~~Any comments made by Stakeholders, together with any revisions and responses provided by the applicant pursuant to Regulation 11(3);~~

~~(a) ter Any advice or reports received from any competent organ of the United Nations or of its specialized agencies or any international organizations with competence in the subject matter;~~

(a) quat Any information supplied by the Sponsoring State or States.

(b) ~~[Any concern raised by a [relevant] adjacent coastal State [likely to be affected] with respect to the application];~~

~~(b) bis Any advice or reports in respect of the Environmental Plans sought by the Commission from recognized experts in the field of the protection of the marine environment listed by the Council~~Any advice or reports sought by the Commission from competent independent experts in respect of the application;

~~(c)~~ Any previous operating record of the applicant, including in relation to Exploitation activities within other jurisdictions, as well as the applicant's performance during the Exploration stage, including the quality of annual reports and baseline data, and the results of test Exploitation activities;

~~(c) bis The previous operating record of the Sponsoring State(s), and the Sponsoring State(s)' technical resources and enforcement capabilities to monitor and enforce the applicant's compliance with the rules, regulations and procedures of the Authority;~~

Comment

During the first part of the twenty-ninth session, the alternative wording of Article 13 gained wide support, subject to a number of amendments. This alternative wording is now the only iteration appearing in the revised consolidated text, with the proposed amendments highlighted. As per the explanations accompanying these proposals, they are largely driven by the intention to remove elements deemed redundant by several delegations.

In **paragraph (1 bis)**, we question the feasibility of **convening the LTC at 30 days' notice**, which seems to be the implication of the insertion 'within 30 days of its receipt of the application'. We believe deletion of 'within 30 days' was requested during the March 2024 session by several delegations (e.g. United Kingdom, Japan, Chile, Australia, India) and we are not sure why that has been reversed in this new draft. We also prefer to see **paragraph (1 ter)**, which is still cross-referenced in paragraph (1 bis), retained to give sufficient discretion to the LTC to manage their evaluation of an application appropriately. If we are envisioning applications numbering thousands of pages of complex information, it seems highly likely that more than one session would be required for review and discussion within the LTC.

Likewise, we do not support **paragraph (2)**. Paragraph (2 alt) is better, but we prefer both to be deleted (along with paragraph (2 bis)). We do not believe there should be a **time limit** by which the LTC should complete its evaluation of an application and submit a report to the Council. A time limit does not allow flexibility in case of unanticipated complexities or intervening events (e.g. the receipt of two or more applications simultaneously). We recall similar points being made in the March 2024 session (by Costa Rica, Chile, Germany, France, Australia, Jamaica, Netherlands), and a proposal was made to replace the prescriptive timeframe with 'in an efficient manner' or 'expeditiously' (without further elaboration) - it would be good to see this alternative proposal reflected in the negotiating text, to enable discussion of the different approaches.

We do not object to the deletion of **paragraph (3 alt)**, provided those important criteria mentioned therein remain in DR13.

Paragraph 3 bis may overlap or conflict with DR11(1) and (5)'s references to experts. It also seems unduly narrow in its focus only on 'deep sea environment' and 'technology' (this would exclude, for example, experts in geology, law, economics, maritime safety, even experts in pelagic and surface ocean environments etc). As noted in our comments to DR11 (above), the **processes for accessing expertise** should be standardised and may be best situated in an Annex or Standard, which we highly recommend the Council adds to the list of necessary documents to be produced alongside these Regulations, given the number of references to use of experts throughout the document, and the lack of transparent and accountable procedures in place currently at the ISA for procurement of independent experts.

Generally we support **paragraph (4)**, but with caveats. Firstly, it is incorrect for **(4)(b bis)** to refer only to 'Environmental Plans' and only experts 'in the field of the protection of the Marine Environment'. The expertise that the LTC seeks may be much more diverse and it makes no sense if the LTC cannot consider this advice in their application review. We do not understand the reference to a "recognised experts...listed by the Council" - as above, the process for **expert selection** should be standardised, inclusive and transparent. Second, we note that a former subparagraph that referred to reports from the **Finance Committee** has been deleted and we request its reinsertion. Matters under the competence of the Finance Committee that may be relevant to the LTC's assessment, and which follow criteria established by UNCLOS, include:

- (i) assessment of the economic benefits to be derived from the activities proposed in the application;
- (ii) advice as to securing optimum revenue for the ISA;
- (iii) the administrative budget required to manage a contract if awarded, and the proposed annual reporting fee to be levied pursuant to DR84;
- (iv) any recommendation regarding the amount or format of the environmental performance guarantee;
- (v) advice as to whether the applicant would be subsidized so as to be given an artificial competitive advantage with respect to land-based miners;
- (vi) assessment whether the application allows for subsidization of activities in the Area other than may be permitted under the agreements of the World Trade Organisation.

As a drafting note, it may be helpful for **sub-paragraph (4)(c)** to refer specifically to the Contractor's "Company Principals" (which should be defined in the Schedule, to ensure common understanding that this pertains to the persons taking key operational and management decisions). This then clarifies the connection to current DR77(4) (which we suggest should be relocated to DR103), which enables the ISA to bar certain individuals from involvement with ISA Contracts. The LTC should be checking against any such list of disbarred individuals in its review of new applications.

We question deletion of **paragraph (4)(a ter)**. This recalls Article 163(13) of UNCLOS, which provides that the LTC may consult any competent organ of the UN or its specialized agencies or any international organizations with competence in the subject-matter. So we see a rationale in this provision that requires the LTC to give reports due regard, where obtained from UN agencies and so on. This seems fitting, recognizing some of the Council's previous discussions about the need for enhanced coordination between the ISA and other international processes and agencies, and indeed the duty to ensure such cooperation where appropriate. A recent **Legal Opinion on systemic integration and the ISA** provided by Professor Campbell McLachlan KC and lawyers Toby Fisher and Taran Malloy, explains how States have a duty to aim for the "systemic integration" of different rules of international law: <https://tinyurl.com/ISASystemic>