

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.

Part II

Applications for approval of Plans of Work in the form of contracts

Section 1

Applications

Regulation 5

Qualified applicants

1. Subject to the provisions of the Convention, the following may apply to the Authority for approval of Plans of Work:

- (a) The Enterprise, on its own behalf or in a joint arrangement; and
- (b) States parties, State enterprises or natural or juridical persons which possess the nationality of States or are effectively controlled by them or their nationals, when sponsored by such States, or any group of the foregoing which meets the requirements of the Convention and these Regulations.

2. Each application shall be submitted:

- (a) In the case of the Enterprise, by its Director-General;
- (b) In the case of a State, by the authority designated for that purpose by it; and
- (c) In the case of any other qualified applicant, by a Designated Representative, or by the authority designated for that purpose by the Sponsoring State or States.

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 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);]~~

(b) 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;

~~(c)~~ The principal place of business or domicile and, if applicable, the place of registration of the applicant;

~~[(d) bis All information on the Contractor's principals necessary to allow the Authority to determine their track record in accordance with Regulation 77(4) and as~~

~~required under Regulation 83 bis All information necessary on the Contractor's principals to allow the Authority to determine their track record in accordance with Regulation 77(4));~~

(~~ee~~) 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;

(~~fd~~) 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; and

~~[(e) All information necessary to demonstrate that the Contractor will, throughout the term of their contract, for the purposes of Exploitation and ancillary activities, only use vessels flagged to registries of States that are Members of the Authority, and only use ports located in States that are Members of the Authority, except where non Member States accept to be bound by the rules, regulations and procedures of the Authority relating to compliance and enforcement, to ensure the Authority can rely upon and require the cooperation of those States for the purpose of securing compliance with the rules, regulations and procedures of the Authority;~~

4. Each application submitted by a partnership or consortium of entities shall contain the information required by these Regulations in respect of each member of the partnership or consortium.

5. In the case of a consortium or any group, the consortium or group shall specify in its application a lead member of the consortium or group.

6. The Authority shall not accept the application if the Sponsoring State or States has not enacted legislation ~~–~~pertaining to activities in the Area that complies with the requirements referred to in Regulation 105.

Comments

- There is some remaining disagreement on paragraph 3(d). Delegations are invited to consider its necessity.
- There was opposition to paragraph 3(e), which is therefore proposed to be removed.

As a general point, we suggest that **‘Application’ (and ‘Applicant’)** be added to the Schedule as defined terms, so that each time the defined term is used it is clear that the meaning is an application for a plan of work for exploitation in the form of a contract with the Authority (without this needed to be stated each time).

We consider that sub-paragraphs (b)-(e) of paragraph (3) may be better placed in Annex I or DR7, but we support the content in substance. Subject to our wider comment about placement, we have the following comments on the various sub-paragraphs:

- **(b):** For this sub-paragraph to operate effectively, the Regulations need to contain a clear definition of ‘Effective Control’. This requires a definition of the UNCLOS term **‘effective control’**. We wish to record our view that this definition should include examination of the location of the Contractor’s day-to-day executive management team, its owner(s) and its assets; and we ask the Council to clarify in its Regulations that registration of a local company is not in itself sufficient to demonstrate the required relationship of ‘effective control’. We wish to avoid a situation where a locally registered company is a subsidiary of an overseas entity, without significant presence in-country, because in such a circumstance the sponsoring State’s powers are severely curtailed, and the ISA’s dual regulatory regime is significantly compromised. For more discussion on the issue, please see article: *‘Effective control and state sponsorship in deep seabed mining’* (December 2024), accessible here: <https://www.sciencedirect.com/science/article/pii/S0025326X24010968>.
- **(d):** We see sense in the proposed cross-references to DR 83 bis and to DR 77(4). This enables the Council to identify **parent companies** and controlling personnel behind the application, and whether any have previously been in serious, persistent, or wilful violation of any payment obligations to the ISA. We suggest that the term

“Company Principals” be used consistently each time this point arises in the Regulations, and that this should be defined in the Schedule, to ensure common understanding that this pertains to the persons taking key operational and management decisions. We also consider that DR77(4) may be better placed in DR103 (as per comments in relation to those DRs, below). If that change is made, then the cross-reference here also would need amendment.

- (e): Sub-paragraph (e) received support in the March 2024 Council session from Australia, Germany, Italy, France, Costa Rica, Belgium, and the Netherlands, and received objection from India and Russia (and concern regarding port State inclusion being raised by Nauru, Poland, and Indonesia). We suggest its reinsertion, and further discussion. Sub-paragraph (e)’s focus on vessel registries matches the obligation included under DR18 bis (1)(quat). These additions recognise that the ISA’s Regulations have no binding effect upon a State that is not a member State of the ISA. We also support the suggestion from Germany and the Netherlands to consider a requirement for bilateral agreement between the ISA and relevant **flag or port States** being used in the course of activities in the Area. Singapore suggested during the March 2024 Council session to add flexibility into DR5(3)(e), in the sense that the applicant can only provide the information that it knows at the time of then application, which seems a sensible caveat. On this topic, we continue to advocate that Council would benefit more broadly from a thematic discussion on jurisdictional issues, and the intersection between the regime for activities in the Area, and international shipping law. For more discussion on the issue, please see article: *‘Enforcement of Deep-Sea Mining Regulations at Sea: Unpacking the Tangle of Overlapping Jurisdictions in International Waters’* accessible here: <https://www.pewtrusts.org/-/media/assets/2024/03/code-project---jurisdictional-issues---final.pdf>.