

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 8

Area covered by an application

1. Each application for approval of a Plan of Work shall define the boundaries of the area under application, by a list of geographical coordinates in accordance with Annex 1 to these Regulations.

2. The area under application need not be contiguous and shall be defined in the application in the form of blocks comprising one or more cells of a grid, as provided by the Authority.

3. The area under application shall be an area previously subject to an Exploration Contract [for which adequate and satisfactory][and] environmental baseline- [studies carried out according to the Rules, Regulations and Procedures of the Authority.][data is publicly available].

~~4. The area under application must be covered by a relevant Regional Environmental Management Plan pursuant to Regulation 44bis.~~

~~5. In the application, the applicant shall provide an overview of other potential legitimate activities in the marine environment covered by the application, and a statement confirming whether the area under application or any part of it has received attention under any other international organisation or treaty regime.~~

~~5 Alt. For any part of the area under application, to the extent practicable after reasonable investigations, the applicant shall indicate in the application, whether it is designated or managed [or under active consideration] under any international regime or international organization. The applicant will also indicate that it is aware of its obligation of reasonable regard to other activities in the Area in accordance with Article 147.~~

Comments

- There has been opposition to both iterations of paragraph 5, which is now proposed to be removed.
- Drafting changes were implemented with a view to refining the text based on discussions and written proposals received during the first part of the twenty-ninth session.

Our analysis of this regulation 8 underscores that the preparation of this text **does not seem to incorporate oral interventions**. For example, our records show that during the March 2024 session:

- Four Council members supported paragraph (3)'s drafting (including the obligation to have made the baseline data publicly accessible). with the suggestion that additional wording '*collected in accordance with the relevant Standard*' could be added.
- Six State delegations supported retention of paragraph (5) (with amendment to make the terminology consistent with that used in the BBNJ agreement; and one suggesting that movement to regulation 7 would be another option), and two other member States supported paragraph (5 alt) (and two observers proposing

deletion of the final sentence of (5 alt), so as not to mix in a separate issue that is covered in the Regulations elsewhere).

Yet this consolidated text proposes deletion of all these aspects, on the basis (as far as we can ascertain) of one written submission. We would like to see all the different positions reflected in the negotiating text, to enable the discussion.

Our view on paragraph (3) is that adequacy of the **baseline data** is paramount to ensure that future environmental management of Exploitation can be conducted properly, and the data's publication is also essential to enable external scientific scrutiny. If such elements are included in a Standard, then we agree that it can be referenced that way here. (Though we would suggest retaining the wording in brackets as a place-holder until such a time as the content of the baseline Standard can be confirmed).

For paragraph (5) on **other marine designations**, we suggest retention and merging (and use of BBNJ language) as follows: *“(5) For any part of the area under application, to the extent practicable after reasonable investigations, the applicant shall in the application provide an overview of other potential activities in the Marine Environment covered by the application, and indicate whether the area or any part of it is designated or managed or under consideration under any other relevant legal instruments and frameworks and relevant global, regional or sub-regional organizations.”*

We also see a gap, as this DR8 does not currently address the applications for Exploitation that cover **reserved areas**. Article 9 of Annex III to UNCLOS stipulates that a plan of work for a reserved area can only be considered if the Enterprise has taken a prior decision not to carry out activities in that reserved area, and if the applicant is a developing State or sponsored by a developing State. The Annex to the 1994 Agreement (Section 2(5)) adds that an application for a reserved area is also permitted where the applicant is the same contractor who contributed the original reserved area, and if the Enterprise has independently functioned for 15 years without submitting an application for the reserved area; but only where the applicant offers to include the Enterprise as a joint venture partner. We do not see these rules for reserved areas properly reflected in the draft Regulations currently.

- DR10(5) does refer to the right of first refusal for the Enterprise for a reserved area but now with an amendment proposed that seems to contradict UNCLOS Annex III.
- DR19 indicates that a contract ‘may’ be a joint venture with the Enterprise. But does not clarify that such an offer must be made in the case of a proposed application over a reserved area by the original contractor in line with the 1994 Agreement.

We consider it may be helpful to see these points covered properly in DR8 so that there is no ambiguity about who can or cannot apply for a reserved area under the Exploitation regime. This will also assist the LTC in implementing DR15(2)(b)(vi), which requires the LTC to recommend disapproval of an application where the applicant is ineligible for a reserved area (but does not explain the eligibility criteria).