

## TEMPLATE FOR SUBMISSION OF TEXTUAL PROPOSALS DURING THE 29<sup>TH</sup> SESSION: COUNCIL - PART II

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](mailto:council@isa.org.jm).

### 1. Name(s) of Delegation(s) making the proposal:

The Pew Charitable Trusts

### 2. Please indicate the relevant provision to which the textual proposal refers.

DR 93bis

### 3. 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.

### 4. Please indicate the rationale for the proposal. [150-word limit]

Regulation 93 bis

#### Stakeholder Consultation by Contractors

1. Consultation with States and Stakeholders by Contractors and applicants shall be inclusive and transparent, and be conducted in a timely manner [and in accordance with this Regulation, Standards and Regulation 93 ter, taking into consideration Guidelines].

~~1 bis Where these Regulations require consultation with States and Stakeholders by an applicant, or a Contractor, consultation shall be conducted in accordance with this Regulation, applicable Standards, and taking into consideration Guidelines.~~

2. Prior to conducting a consultation required by these regulations, ~~t~~The applicant or Contractor shall provide consult with the Secretary General to agree with a comprehensive list of Stakeholders, including but not limited to, all member States of the Authority, other States, all organisations who are observers to the Authority, any parties identified during the project scoping phase or Environmental Impact Assessment with potential to be affected, or otherwise interested in the activities, including persons who have self-identified as Stakeholders [potentially directly affected] Stakeholders [and States within scope of Regulation 93 ter] in accordance with the applicable Standard and taking into account the Guidelines.

3. At least 2 weeks before the consultation begins, the ~~Secretary General~~ applicant or Contractor shall correspond directly with all States and [potentially directly affected] Stakeholders advising that that the consultation will occur and shall provide a copy of the same advisory note to the Secretary-General who shall publish such advice at it on the Authority’s website.

4. The advisory note under paragraph (3) ~~Secretary General~~ shall specify ~~determine~~ the consultation period for each consultation, which shall begin on the date of the publication of a notice of consultation and may not be less than:

(a) [45]/[60] Days for a consultation relating to a scoping report prepared pursuant to Regulation 47 bis; and

(b) [60]/[90] Days for all other consultations.

5. The applicant or Contractor ~~Secretary General~~ shall prepare a notice of consultation. The notice of consultation shall conform to the applicable Standard and take into account applicable Guidelines, and shall invite States and Stakeholders to make submissions to the consultation, describe the matters on which submissions are sought, include the documentation that is the subject of consultation and other relevant information, and specify the final date for submissions, and the format and media by which comments may be submitted, aiming for an inclusive

~~process that facilitates engagement by States and Stakeholders. The applicant or Contractor shall provide the Secretary General with all information and documentation required to prepare a notice of consultation.~~

6. The applicant or Contractor ~~Secretary General~~ shall publish the notice of consultation on a free-to-view and publicly accessible website at the Authority's website and send written notice of consultation to States and [potentially directly affected] Stakeholders, and to the Secretary-General who shall publish notification on the Authority's website including a web-link to the webpages where the consultation papers are published by the applicant/Contractor.

7. During the consultation period, the applicant or Contractor shall [endeavour to] conduct engagement with States and [potentially directly affected] Stakeholders public engagement, and in accordance with [Regulation 93 ter] applicable Standards, and taking into [consideration] Guidelines. The Secretary General may direct the applicant or Contractor to conduct such meetings, workshops and engagement.

~~8. The Secretary General shall receive all submissions.~~

~~89. The Secretary General shall transmit all submissions to the applicant or Contractor.~~ The applicant or Contractor shall consider all ~~the~~ submissions received and may revise the documentation that was the subject of consultation. The applicant or Contractor shall prepare a written response to ~~the~~ consultation that collates and responds to the ~~[substantive]~~ comments expressed in submissions and includes an explanation of any revisions to the document and how those revisions respond to ~~[substantive]~~ comments expressed in the submissions. ~~Where the applicant or Contractor considers that a specific comment does not necessitate a substantive response, for example where the comment is considered frivolous, vexatious, or duplicate, then the Contractor shall record that reasoning in the response document.~~

9. The applicant or Contractor shall submit copies of all submissions received and the written response, with any revised documentation, to the Secretary-General, ~~for transmission to the Commission.~~

10. The Secretary General shall transmit copies of the documents received under paragraph (9) to the Commissions, and shall maintain the Authority's own a permanent public record of the notice of each consultation conducted under this Regulation, ~~all submissions, and the written response to consultation,~~ by publishing the notice, submissions and response at the Authority's website ~~(except for Confidential Information which shall be redacted from documents before publication).~~ The Secretary General shall ensure that such consultation records relating to a specific contract are included in, or are accessible from, the relevant entry in the Seabed Mining Register, in accordance with Regulation 92.

## **Regulation 93 bis bis**

### **Stakeholder Consultation by the Authority**

The Authority shall conduct Stakeholder consultations and facilitate public access to information and participation in the Authority's decision-making under these regulations in accordance with the Authority's policy and procedures on public consultation and participation and any applicable Standards and taking into account Guidelines.

We do not support DR 93bis as currently drafted. We set out the rationale in detail below, and have attempted to remedy some of the defects as we see them, with the proposed edits above.

**Scope:** This proposal attempts to standardize consultation requirements across the regulations but is only focused on the consultations required on an application for a plan of work. The proposal only covers situations where the Contractor conducts the consultation on a plan of work (not the ISA). We believe that in addition to the consultation carried out by the Contractor on an application, the ISA should conduct its own consultations as well – which the new DR 93bis does not cover. The duty of consultation by applicants and Contractors is important, but not exclusive. That consultation informs the applicant/Contractor's own planning and project design before submission of proposals to the ISA. But the ISA itself must also consult on applications, material changes to a Plan of Work, and other

decisions. That consultation informs the ISA's regulatory decisions, and allows the ISA to hear public and expert opinions on how the ISA should apply their decision-making powers. These are separate processes and separate duties to consult.

DR 93bis also only covers stakeholder consultations on Plans of Work. It excludes provisions where the ISA is conducting consultations itself, e.g. on the review of the Regulations and the Standards and Guidelines, as well as other RRP's and policy documents that dictate the ISA's work. We recommend that these Regulations (or a Standard) should clearly lay out consultation requirements for the ISA. We believe it would be an unnecessary gap in the regulatory framework to only specify conditions of some consultations, and not others, and would ignore the ISA's duties to carry out such consultation under international environmental law. We have proposed a new DR93 *bis bis* as a place-holder to cover this point, noting that it refers to policies and procedures that do not yet exist, but are in our view long overdue. As a body accountable to all of humankind, taking decisions with potential to affect the global environment, formalised processes to ensure appropriate access to information, and public participation in decision-making mechanisms should be paramount for the ISA, but currently appear sorely lacking.

**Role of the SG:** We have an overarching concern with the way DR 93bis as currently drafted conflates the responsibility of the ISA/SG with the Contractor/applicant in conducting stakeholder consultations. While we understand that the intent behind the proposal is for the SG/ISA to act as facilitator of consultations on behalf of an applicant in order to centralize and standardize the process, we are not convinced that the ISA – as the regulatory body – can act on behalf of the applicant, for manifold reasons, including the following:

(1) There are separate actors and duties for the conduct of EIA. The ISA's duty is to meet Part XI (and Article 145). The sponsoring State's duty is to meet Part XII and customary law EIA requirements (and potentially other treaties to which it is party). The Contractor's duty comes from the Regulations and contract (and the 1994 Agreement). It is helpful for the ISA's RRP's to reflect these differing responsibilities accurately. If the SG takes on administrative duties for a Contractor or State's EIA, then he/she is taking on responsibility for other actors' obligations. This may give rise to confusion about roles and responsibilities, enforceability and accountability.

(2) We understand that the role suggested for the SG is not just about sharing information with ISA States Parties and observers, but about wider outreach (on behalf of an individual State or Contractor) to any Stakeholder who may be interested in their proposed activity. In our opinion this goes beyond the Secretariat's mandate to administer **to the ISA and its organs** (not to individual States or Contractors) and is hard to align with UNCLOS Article 168: *"In the performance of their duties the Secretary-General and the staff shall not seek or receive instructions from any government or from other source external to the Authority."* The steps envisaged in DR 93 bis would also be a significant time and resources drain on the ISA, which should be more properly placed on the Contractor. Finally, it sets an unwelcome precedent for Contractors to delegate the performance of their own legal duties to the very body that is supposed to provide arms-length supervision, and to regulate their compliance with those duties.

(3) It is also a practical matter. Is the SG the best means, for example, to reach a sponsoring State's target audience? (Does the proposal risk infringing individual States' domestic EIA laws?) One reason for the different actors having distinct legal obligations to conduct EIAs, is that they may each have different constituencies to consult, and different legal frameworks to follow. As an example, some national EIA laws require specific meetings with traditional leaders or certain communities. The proposed procedure in the non-paper would not appear suitable for that requirement, but for the

Contractor or State to hold such meetings *without* SG involvement could then put them in breach of the Exploitation Regulations if this proposal is implemented.

(4) As noted above, we expect the ISA (via the LTC) to hold its own consultation, once an EIS is submitted. This is distinct from any consultation held by the Contractor or the State. It is unclear from the proposal whether this is envisaged, or whether the SG's role in the Contractor's EIA means there is just one centralised single consultation, aiming to meet the duties of all three separate actors. We would disagree with such an approach. The matters under consideration at the ISA are of the greatest public interest, and relevant to all of humankind. We would like to see the ISA rules aim for maximum consultations, at different times, focused on different groups, with each of the three different actors being proactive to deliver on their own duties for EIA, not relying on one consultation as automatically being sufficient.

We therefore propose amendments throughout DR93 bis to appropriately separate the roles and responsibilities in an applicant or Contractor's consultation, between the applicant/Contractor, and the ISA SG.

**Minimum requirements of Consultations:** We would also like to note that while this proposal to streamline and centralize processes within the Regulations (with a focus on the EIA process), is helpful, we are skeptical whether it will provide sufficient detail as to what should specifically be required in stakeholder consultation processes overall. This includes:

- the objective and principles of public participation that binds all actors,
- steps for how this can be achieved,
- how Stakeholders can or should be identified,
- timeframes,
- methods of information-sharing and dialogue facilitation,
- what the Contractor or ISA's responsibility is to respond to inputs received from the consultation,
- publication of Stakeholder comments and responses to those, etc.

We would welcome these key features of Stakeholder consultation to be established by the ISA, in a Standard. The Regulations could then cross-refer to that instrument. We also supply some proposed amendments to DR93 bis that we consider can assist in establishing standardised minimum requirements for Contractor consultations to some extent.