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Working draft – Exploitation regulations (ISBA/Cons/2016/1)
International Seabed Authority
14-20 Port Royal Street
Kingston
Jamaica
[Submitted via email to consultation@isa.org.jm]

Re: Comments and Key Considerations Regarding Working Draft Regulations and Standard Contract Terms on Exploitation for Mineral Resources in the Area (“Working Draft”)

The Pew Charitable Trusts (“Pew”) is driven by the power of knowledge to solve today’s most challenging problems. We are an independent nonprofit organization with a portfolio that includes public opinion research; arts and culture; and environmental, health, state and consumer policy initiatives. Our mission is to: (1) improve public policy by conducting rigorous analysis, linking diverse interests to pursue common cause and insisting on tangible results; (2) inform the public by providing useful data that illuminate the issues and trends shaping our world; and (3) invigorate civic life by encouraging democratic participation and strong communities. In the global ocean, Pew’s work includes efforts to create marine reserves; end illegal fishing; protect keystone marine species; and establish policies that protect, maintain and restore the health of marine ecosystems.

[Pew’s Seabed Mining Project](#) was launched in 2016 as a worldwide effort to help establish science-based rules to govern the extraction of minerals from the international seabed. At the core of that commitment are two complementary objectives: 1) To secure large, ecologically important no-mining zones; and 2) To help devise a precautionary code that minimizes environmental harm where mining is permitted.

Pew has supported, and will continue to support, scientific workshops that bring together eminent authorities from around the world to exchange information on benthic environments where the International Seabed Authority has granted exploration contracts and to develop proposals for protecting ecosystem integrities within those environments. In July 2016, Pew launched complementary programs to examine issues of ISA transparency and stakeholder involvement and to begin discussions on financial regulations and payment mechanisms.

Pew holds consultative status with the United Nations Economic and Social Council of the United Nations (UNESCO) and in July of this year was granted official Observer status with the ISA.

Express Consent: Pew consents to the Authority making this submission publicly available.

1. GENERAL COMMENTS AND SUGGESTIONS REGARDING THE WORKING DRAFT

- a) *Considered in its entirety, the Working Draft marks a significant and positive achievement. As indicated below, there are portions of the Working Draft that we believe could stand*

improvement. But it bears emphasis that Pew also believes that the Working Draft marks a significant institutional step forward and congratulates the Legal and Technical Commission (LTC) and the Authority Secretariat on its publication and public availability.

- b) *The Working Draft should clearly incorporate the “Environmental Regulations” and “Seabed Mining Directorate Regulations.”* Although these regulations are to be developed at a later stage, it is critical that the Working Draft provide explicit linkages to these other sets of regulations to ensure that the exploitation regime functions as an integrated whole.
- c) *The Working Draft provides for transparency and public participation, but could go further.* The draft already makes significant progress in this regard, as noted below. But a few clarifications can ensure that the regulations are supported by robust participation from stakeholders and that mining activity is thoroughly vetted.
- d) *Contractors should be bound by regulations as they evolve.* It may be inevitable that knowledge about mining impacts will evolve with time and practice. The Working Draft should reflect this by ensuring that contractors are responsible for adhering to the Environmental Regulations as they may be amended over the course of a contract.
- e) *Later iterations of the code should incorporate systematic environmental planning.* Whether through the amended framework of the current Working Draft or through environmental regulations to come, the integrated Mining Code should incorporate, and enable Authority support for, regional environmental planning as prerequisite to exploitation.
- f) *A robust financial mechanism will be needed.* Although it is to be addressed separately, the Draft Regulations illustrate the importance of a funding mechanism capable of imminently expanding the capacity of the Authority and its personnel. This should be considered in future discussions.

2. SPECIFIC SUGGESTIONS

a) CONSIDERATION BY THE LTC OF APPLICATIONS FOR EXPLOITATION CONTRACTS

[See generally Draft Regulations 8 and 9]

- *The LTC’s process for receiving outside expertise and advice should be clarified.* Draft Regulation 7.3 provides that the Commission may receive additional information in its consideration of a plan of work, including from an Appropriately Qualified Expert. Further references to such Experts are made throughout the draft. However, it is not clear how these experts are to be identified or vetted. Although it is desirable for the LTC to engage outside expertise, particularly regarding environmental compliance, this expertise should be a structured, public, and a mandatory component of its consideration.
- *The LTC should incorporate stakeholder engagement into its consideration of plans of work.* Under Draft Regulation 8.6, the LTC is to evaluate applications to “determine whether appropriate public review and consultation has been undertaken, in accordance with the Environmental Regulations, and must take into account relevant submissions received as a result.” For the LTC to determine whether “appropriate” consultation has taken place, the LTC itself should carry out a public consultation, with support from the Secretariat.

- *The Working Draft should anticipate ISA Environmental Regulations.* Since the Working Draft recommends a presumption of the public availability of environmental data presented to the LTC, and since the anticipated Environmental Regulations are expected to provide for stakeholder consultation, the LTC should consider the establishment of an LTC Environmental Sub-Committee to publicly examine the environmental portions of an Exploitation Contract Application and to invite expert testimony thereon.
- *The Working Draft should anticipate ISA Directorate Regulations.* Expertise from the ISA Secretariat should also be available to the LTC under the terms of the anticipated new Directorate Regulations.

b) Confidentiality of Data

[See generally Draft Regulation 46]

- *The Working Draft's stipulation that environmental data should not be deemed confidential should be incorporated into all relevant ISA processes.* Draft Regulation 46.3 provides that "there shall be a presumption that any Information regarding the Exploitation Contract, its schedules and annexes or the activities taken under the Exploitation Contract is public, other than Confidential Information" and 46.4(f) which includes "environmental information" as a category of information that should not be deemed 'confidential'. This excellent language should appear throughout the ISA rulebook.
- *But certain categories of "Confidential Information" remain overbroad.* There are a number of allusions to "Confidential Information" within the Working Draft, but the term is defined by the subcategories listed in Draft Regulation 46.2. Two of these subcategories may be problematic: (i) 46.2(b), which could incorporate overly-broad Confidential Information designations made pursuant to the Exploration Regulations; and (ii) 46.2(d), which could be clarified by combining it with 46.2(a).
- *Stakeholders should be able to discern what information has been designated and withheld as "Confidential Information."* Provisions should be made for a public record describing "Confidential Information" in general terms so that stakeholders may assess and evaluate whether such a designation is appropriate.

c) OTHER CONSIDERATIONS

- *Contractors should be bound by the Exploitation Regulations, particularly the Environmental Regulations, as they evolve.* Although the Working Draft makes provision for periodic review of the Regulations (see Draft Regulation 59), it is not clear that any amendments to those regulations will be binding on contractors once they are adopted. Indeed, Draft Regulations 59.2 and 59.3 suggest the opposite – that contractor consent must be given before any regulatory updates may be incorporated into their contract. If consent is required, contracts should specify that all contractors will be bound by the Environmental Regulations as they may be amended.
- *ISA Authority over Mineral Processing Needs Clarification.* The Working Draft does not establish what authority, if any, the ISA exercises at post-mining stages of the value chain, nor does it distinguish between processing at sea and processing on land. Contractors' waste management and assessment responsibilities under alternative exploitation scenarios should be spelled out in detail.

3. QUESTIONS POSED BY THE LEGAL AND TECHNICAL COMMISSION

At the invitation of the Legal and Technical Commission, we are pleased to offer responses to specific questions about the Working Draft posed by that body during the ISA Annual Session in July 2016.

a) Whether the structure and content is sufficiently adequate and clear for the intended purpose and objectives of the regulations?

As noted above, the Working Draft represents a significant achievement and is an appropriate basis for discussion going forward.

It will remain important to determine how the Environmental and Directorate Regulations, as well as the financial mechanism that will support the Authority, will integrate into the overall framework that the Working Draft establishes. As the Authority's institutional goal is to develop an entire Mining Code composed of a series of regulatory sub-codes, it would be most desirable should terms and definitions have uniform meanings throughout.

In addition, contractors and stakeholders alike are concerned that even the best set of regulations will fall short if they are not overseen and enforced by a highly capable Secretariat. The Authority would be well served by an elaboration of an overall strategy – and the schedule for implementing such a strategy – for capacity-building.

b) Whether stakeholders consider that separate regulations in respect of the environmental matters and a mining directorate are appropriate?

These regulations are not only appropriate; they are necessary and worthy of focused consideration. Respecting the Environmental Regulations, it will be necessary to ensure that these not only provide for the regulation of particular mining operations, but also facilitate the development of regional environmental management plans as a prerequisite to any exploitation. Respecting the Directorate Regulations, these must ensure that the Authority is in a position to provide support and expertise to its subsidiary organs and effective oversight of all contractors.

At present, it remains unclear whether the Authority's forthcoming environmental regulations will consist of a general set of obligations upon any contractor in any area of the international seabed, different rules written to apply to particular geologic zones, or some combination of the two. The Authority should clearly address these unknowns when it presents a Zero Draft of Environmental Protection Regulations in late December 2016 / early January 2017.

c) Given the depth and breadth of the task in developing a regulatory code, what recommendations do stakeholders have for the Authority to ensure its development in a transparent and inclusive manner while at the same time recognizing a need for efficiency?

We commend the Authority on the inclusive and transparent consultation process thus far and hope to see it continue. But we believe that the process could benefit from: (1) additional stakeholder workshops, particularly to elaborate specific elements of the regulations or provide greater clarity with regard to key terms like "substantial harm," and; (2) a reporting process that summarizes comments received and provides the Authority's responses to them. In addition, we look forward to further information regarding the anticipated timing and process for the development of the regulations.

d) Any comments related to the ISA Discussion Papers referred to at paragraph 4 above

We believe that these discussion papers could benefit from a separate consultation, in which we would be eager to engage.

We thank the Authority for this opportunity to comment on the Working Draft and look forward to the opportunity to continue to contribute to the development of the Exploitation Regulations. As always, we are available to discuss these comments or any other aspect of our work at any time.

Sincerely,

A handwritten signature in black ink, appearing to read "Conn Nugent". The signature is stylized with a large, sweeping flourish extending to the right.

Conn Nugent
Director
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