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Draft regulations on exploitation of mineral resources in the Area

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Part I: Regulations 1 to 5

Drafting proposals submitted by delegations as compiled on 31 March 2022

Part I
Introduction

Regulation 1
Use of terms and scope

1. Terms used in these regulations shall have the same meaning as those in the Rules of the Authority.

2. In accordance with the Agreement, the provisions of the Agreement and part XI of the Convention shall be interpreted and applied together as a single instrument. These regulations and references in these regulations to the Convention are to be interpreted and applied accordingly.

3. Terms and phrases used in these regulations are defined for the purposes of these regulations in the schedule.

4. These regulations shall not in any way affect the freedom of scientific research, pursuant to article 87 of the Convention, or the right to conduct marine scientific research in the Area pursuant to articles 143 and 256 of the Convention. Nothing in these regulations shall be construed in such a way as to restrict the exercise by States of the freedom of the high seas as reflected in article 87 of the Convention.

5. These regulations are supplemented by Standards and Guidelines, as referred to in these regulations and the annexes thereto, as well as by further rules, regulations and procedures of the Authority, in particular on the protection and preservation of the Marine Environment.

6. The annexes, appendices and schedule to these regulations form an integral part of the regulations and any reference to the regulations includes the annexes, appendixes and schedule thereto.

7. These regulations are subject to the provisions of the Convention and the Agreement and other rules of international law not incompatible with the Convention.

II - Observers to the International Seabed Authority as referred to in rule 82 of the Rules of Procedure of the Assembly

The Pew Charitable Trusts

**Note: Previously proposed Council amendments are in Red and Pew comments are in Blue.

1alt1. Terms used in the Convention shall have the same meaning in these regulations.

4alt. Nothing in these Regulations shall prejudice the rights, jurisdiction and duties of States under the Convention, including the right to conduct scientific research pursuant to articles 87, 143 and 256 of the Convention, and the exercise by States of the freedom of the high seas, as reflected in article 87 of the Convention**. These Regulations shall be interpreted and applied in the context of and in a manner consistent with the Convention.**

[5. These regulations are ~~[supplemented]~~ **~~[~~accompanied~~]~~** by Standards and Guidelines, as referred to in these regulations and the annexes thereto, as well as by further rules, regulations, ~~and~~ procedures, and Regional Environmental Management Plans, as may be adopted by ~~of~~ the Authority from time to time, in particular on the protection and preservation of the Marine Environment. **Standards form an integral**

part of these regulations and any reference to the regulations includes the Standards that form part of these.]

8. These regulations shall be applied to all members of the Authority and Contractors, as applicable, in a uniform and non-discriminatory manner.

Rationale

Regarding paragraph 1, we believe the original text of DR1(1) should be deleted in favour of DR1(1) alt.1 (proposed by Australia). This, together with DR1(3), refers to the defined terms in the Convention and 1994 Agreement, and in these Regulations, rather than referring to the 'Rules of the Authority', the content of which may evolve over time, providing changing and potentially conflicting interpretations.

Regarding paragraph 4, the alternative paragraph (proposed by Spain) encompasses the points made in DR4 while broadening its application to avoid any potential conflicts with the Regulations. We agree with this proposal and suggest a minor amendment to combine the original and proposed text.

Regarding paragraph 5, We suggest including Regional Environmental Management Plans (REMPs) here. The Council has indicated that these will be a crucial part of the ISA's environmental management regime and should be developed in conjunction with the Regulations. In particular, REMPs are likely to contain important provisions on the protection of the marine environment (e.g. designation of protected areas) and so should be included in this list.

Regarding newly proposed paragraph 8, We propose that a generic and universal provision applying to the whole Regulations would better serve the purpose. UNCLOS Part XI espouses the principle of non-discrimination. Member States have proposed inclusion of 'non-discrimination' wording in specific Regulations (e.g. Japan in DR3(a)alt. and (g)alt.).

Regulation 2
Fundamental policies and principles

In furtherance of and consistent with Part XI of the Convention and the Agreement, the fundamental policies and principles of these regulations are, inter alia, to:

(a) Recognize that the rights in the Resources of the Area are vested in mankind as a whole, on whose behalf the Authority shall act;

(b) Give effect to article 150 of the Convention by ensuring that activities in the Area shall be carried out in such a manner as to foster the healthy development of the world economy and the balanced growth of international trade, and to promote international cooperation for the overall development of all countries, especially developing States, and with a view to ensuring:

(i) The development of the Resources of the Area;

(ii) Orderly, safe and rational management of the Resources of the Area, including the efficient conduct of activities in the Area and, in accordance with sound principles of conservation, the avoidance of unnecessary waste;

(iii) The expansion of opportunities for participation in such activities consistent, in particular, with articles 144 and 148 of the Convention;

(iv) Participation in revenues by the Authority and the transfer of technology to the Enterprise and developing States as provided for in the Convention and the Agreement;

(v) Increased availability of the minerals derived from the Area as needed in conjunction with minerals derived from other sources, to ensure supplies to consumers of such minerals;

(vi) The promotion of just and stable prices remunerative to producers and fair to consumers for minerals derived both from the Area and from other sources, and the promotion of long-term equilibrium between supply and demand;

(vii) The enhancement of opportunities for all States Parties, irrespective of their social and economic systems or geographical location, to participate in the development of the resources of the Area and the prevention of monopolization of activities in the Area;

(viii) The protection of developing countries from serious adverse effects on their economies or on their export earnings resulting from a reduction in the price of an affected Mineral or in the volume of exports of that Mineral, to the extent that such reduction is caused by activities in the Area;

(ix) The development of the common heritage for the benefit of mankind as a whole; and

(x) That conditions of access to markets for the imports of minerals produced from the resources of the Area and for imports of commodities produced from such minerals shall not be more favourable than the most favourable applied to imports from other sources.

(c) Ensure that the Resources of the Area are Exploited in accordance with sound commercial principles, and that Exploitation is carried out in accordance with Good Industry Practice;

(d) Provide for the protection of human life and safety;

(e) Provide, pursuant to article 145 of the Convention, for the effective protection of the Marine Environment from the harmful effects which may arise from Exploitation, in accordance with the Authority's environmental policy, including regional environmental management plans, based on the following principles:

(i) A fundamental consideration for the development of environmental objectives shall be the effective protection of the Marine Environment, including biological diversity and ecological integrity;

(ii) The application of the precautionary approach, as reflected in principle 15 of the Rio Declaration on Environment and Development;

(iii) The application of an ecosystem approach;

(iv) The application of "the polluter pays" principle through market-based instruments, mechanisms and other relevant measures;

(v) Access to data and information relating to the protection and preservation of the Marine Environment;

(vi) Accountability and transparency in decision-making; and

(vii) Encouragement of effective public participation;

(f) Provide for the prevention, reduction and control of pollution and other hazards to the Marine Environment, including the coastline;

(g) Incorporate the Best Available Scientific Evidence into decision-making processes;

(h) Ensure the effective management and regulation of the Area and its Resources in a way that promotes the development of the common heritage for the benefit of mankind as a whole; and

(i) Ensure that these regulations, and any decision-making thereunder, are implemented in conformity with these fundamental policies and principles.

I – Members

China

(c) Ensure that the resources of the Area are exploited in accordance with sound commercial principles, and that exploitation is carried out in accordance with Good Industry Practice;

(d)Ensure that a reasonable balance between exploration for and exploitation of the resources in the Area and protection and preservation of the marine environment and ensure mutual due regard for each other between activities in the Area and other activities in the marine environment.

(e) Provide for the protection of human life and safety

(f) Provide, pursuant to article 145 of the Convention,

……

(iv) The application of "the polluter pays" principle as contained in principle 16 of the Rio Declaration on Environment and Development, through market-based instruments, mechanisms and other relevant measures;

Rationale

On (d), China believes that exploration for and exploitation of the resources in the Area and protection and preservation of the marine environment should be balanced and according to the articles 87 and 147 of the UNCLOS, other activities in the marine environment such as laying of submarine cables shall be conducted with reasonable regard for activities in the Area.

On (f) (iv), China believes that the "polluter pays" principle has different meanings and applicable conditions in different contexts. The "polluter pays" principle as reflected in principle 16 of the Rio Declaration on Environment and Development is the consensus reached by the international community. It is suggested that the "Rio Declaration on Environment and Development" should be referred here.

Japan

(e)(ii) The application of the precautionary approach~~, as reflected in principle 15 of the Rio Declaration on the Environment and Development~~

Rationale

Japan supports New Zealand's view on the practical implementation of the precautionary approach to the specific context of deep sea mining. To this end, this aspect should be taken into consideration in the development of the Exploitation Regulations and relevant Standards and Guidelines currently underway.

II - Observers to the International Seabed Authority as referred to in rule 82 of the Rules of Procedure of the Assembly

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Alt. These Regulations, and any decisions or activities undertaken under them, must be implemented in conformity with the Convention, and in pursuance of the Authority's production policy, environmental policy, sustainability policy, accountability policy, and the Authority's strategic objectives.

Rationale

This DR2 has become an unwieldy "catch-all" - it now contains over 30 items. Furthermore, DR2 is not comprehensively cross-referenced in other Regulations in a manner that would give it operational effect. The proposed Alt. wording that links DR to ISA decision-making aims to give DR2 more meaningful application. It also implements the proposal made by the USA that the long list of items in DR2 should be deleted in favor of a simplified, operational approach wherein the suite of ISA policy documents are simply cross-referenced in DR2, with a requirement that the Regulations are implemented in conformity with them. These policy documents should be developed as a matter of priority (before the Regulations) and can contain many of the important points that are currently listed in DR2.

Regulation 3
Duty to cooperate and exchange of information

In matters relating to these regulations:

(a) Members of the Authority and Contractors shall use their best endeavours to cooperate with the Authority to provide such data and information as is reasonably necessary for the Authority to discharge its duties and responsibilities under the Convention;

(b) The Authority, sponsoring States and flag States shall cooperate towards the avoidance of unnecessary duplication of administrative procedures and compliance requirements;

(c) The Authority shall develop, implement and promote effective and transparent communication, public information and public participation procedures;

(d) The Authority shall consult and cooperate with sponsoring States, flag States, competent international organizations and other relevant bodies as appropriate, to develop measures to:

(i) Promote the health and safety of life and property at sea and the protection of the Marine Environment; and

(ii) Exchange information and data to facilitate compliance with and enforcement of applicable international rules and standards;

(e) Contractors, sponsoring States and members of the Authority shall cooperate with the Authority in the establishment and implementation of programmes to observe, measure, evaluate and analyse the impacts of Exploitation on the Marine Environment, to share the findings and results of such programmes with the Authority for wider dissemination and to extend such cooperation and collaboration to the implementation and further development of Best Environmental Practices in connection with activities in the Area;

(f) Members of the Authority and Contractors shall use their best endeavours, in conjunction with the Authority, to cooperate with each other, as well as with other contractors and national and international scientific research and technology development agencies, with a view to:

(i) Sharing, exchanging and assessing environmental data and information for the Area;

(ii) Identifying gaps in scientific knowledge and developing targeted and focused research programmes to address such gaps;

(iii) Collaborating with the scientific community to identify and develop best practices and improve existing standards and protocols with regard to the collection, sampling, standardization, assessment and management of data and information;

(iv) Undertaking educational awareness programmes for Stakeholders relating to activities in the Area;

(v) Promoting the advancement of marine scientific research in the Area for the benefit of mankind as a whole; and

(vi) Developing incentive structures, including market-based instruments, to support and enhance the environmental performance of Contractors beyond the legal requirements, including through technology development and innovation; and

(g) In order to assist the Authority in carrying out its policy and duties under section 7 of the annex to the Agreement, Contractors shall use

their best endeavours, upon the request of the Secretary-General, to provide or facilitate access to such information as is reasonably required by the Secretary-General to prepare studies of the potential impact of Exploitation in the Area on the economies of developing land-based producers of those Minerals which are likely to be most seriously affected. The content of any such studies shall take account of the relevant Guidelines.

I – Members

Japan

(a) Members of the Authority and Contractors shall ~~use their best endeavours to~~ cooperate with the Authority to provide such data and information upon the request by the Secretary-General in writing with an explanation that such data and information is ~~as is reasonably~~ necessary for the Authority to discharge its duties and responsibilities under the Convention. This provision shall be applied to all members of the Authority and Contractors in a uniform and non-discriminatory manner;

(g) In order to assist the Authority in carrying out its policy and duties under section 7 of the annex to the Agreement, Contractors shall ~~use their best endeavours, upon the request of the Secretary-General, to~~ provide or facilitate access to such information upon the request ~~as is reasonably required~~ by the Secretary-General in writing with an explanation that such information is necessary for the Authority to prepare studies of the potential impact of Exploitation in the Area on the economies of developing land-based producers of those Minerals which are likely to be most seriously affected. The content of any such studies shall take account of the relevant Guidelines. This provision shall be applied to all Contractors in a uniform and non-discriminatory manner.

Rationale

Japan proposes to delete the phrase " use their best endeavors..." provided that the type of data/information to be provided by Contractors is clear. To that end, instead of " use their best endeavors..." we wish to propose to insert language indicating that requests for members of the Authority and Contractors are made in writing by the Secretary-General with an explanation that such data and information are necessary for the Authority and also propose that this rule apply to all Members of the Authority and Contractors in a uniform and non-discriminatory manner.

II - Observers to the International Seabed Authority as referred to in rule 82 of the Rules of Procedure of the Assembly

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[~~**(a)alt. Members of the Authority and Contractors shall cooperate with theAuthority to provide such data and information upon the request by the Secretary-General in writing with an explanation that such data and information is necessary for the Authority to discharge its duties and responsibilities under the Convention. This provision shall be applied to all members of the Authority and Contractors in a uniform and non- discriminatory manner;**~~]

1(e) Generally and in response to requests from the Authority, Contractors, sponsoring States, **[~~relevant~~ adjacent] coastal States** and members of the Authority shall cooperate with the Authority and each other in the establishment, funding and implementation of research programmes to understand the Marine Environment prior to exploitation and to observe, measure, evaluate and analyse the impacts of exploitation on the Marine Environment, including at the regional scale, to share the findings and results of such research programmes with the Authority for wider dissemination and to extend such cooperation and collaboration to the implementation and further development of Best Environmental Practices in connection with activities in the Area;

1(f) Members of the Authority, sponsoring States, and Contractors shall [~~use their best endeavours~~], in conjunction with the Authority, [~~to~~] cooperate with each other, as well as with other Contractors and national and international scientific research and technology development agencies, with a view to:

(i) Sharing, exchanging and assessing environmental data and information for the Area, including by use of data repositories and open-access databases;

(vi) Developing incentive structures, including market-based instruments, to support **[transfer of technology and capacity enhancement of developing states** and the Enterprise] and enhance the environmental performance of Contractors beyond the legal requirements, including through technology development and innovation; [and]

(vi)bis. Applying an ecosystem approach.

(g)alt. In order to assist the Authority in carrying out its policy and duties under section 7 of the annex to the Agreement, Contractors and member States **shall provide or facilitate access to such information upon the request by the Secretary-General in writing with an explanation that such information is necessary for the Authority to prepare studies of the potential impact of exploitation in the Area on the economies of developing land-based producers of those Minerals which are likely to be most seriously affected. The content of any such studies shall** be in accordance with any relevant Standards and take account of the ~~**take account of the relevant**~~ **Guidelines.** ~~**This provision shall be applied to all Contractors in a uniform and non-discriminatory manner.**~~

(h) The Council shall, taking into account recommendations by the Commission, adopt Standards ~~**Guidelines**~~ **concerning the duties mentioned in paras. (c) to (f) which**

establish requirements, obligations and procedural arrangements, including standardized data templates and methodology for data collection and analysis **within three years after the adoption of these regulations** or before any mineral production commences, whichever is the sooner**.**

(i) The Authority may issue reasonable requests to Contractors, the Enterprise, and member States to participate in joint research or test activities in accordance with directions issued by, and under the control of, the Authority, in order for the Authority to test proposed or adopted rules, regulations and procedures, as well as monitoring practices, and other institutional functioning.

(j) Contractors, the Enterprise, and member States shall cooperate with requests under paragraph (i).

Rationale

Regarding paragraph 1, the original text is preferable to this proposed (a)alt (crossed out above). DR39 already provides the Secretary-General with authority to request data and information. Including an overlapping duty here could cause confusion as some Regulations require Contractors to cooperate and provide data without the request of the Secretary-General (e.g. DR 46-48 concerning the EIS and EMMP). Similarly, all Regulations should be applied to relevant subjects in a uniform and non-discriminatory manner (and a new DR1(8) is proposed to cover that point, above). Expressly requiring that certain paragraphs should be applied uniformly, but not others, may unhelpfully suggest some discriminatory treatment is permissible.

Regarding subparagraph e, we have proposed some text to assist the ISA in encouraging and, as needed, requiring targeted collaborative studies aimed at important areas of uncertainty over environmental impacts that are common to all Contractors within a region and/or resource type. The ISA should be empowered to direct the scope, and control the operation, of such studies. Although we note that a more ambitious programme not captured by this proposed edit would be for the ISA to set a up a joint research fund into which Contractors paid a portion of their fees, which could then be used for marine scientific research required to inform the ISA's role as regulator or otherwise to further the ISA's objectives. This may be what is envisaged by, or could be incorporated into, Jamaica's proposal to create a "Environmental Research and Training Fund". A similar aim could also be achieved by Regulations or contract terms requiring or incentivising each Contractor to undertake certain marine scientific research projects outside their Contract Area (e.g. in APEIs), in addition to their Exploitation programme. For more on this topic, please see: White Paper, Dr. Kevin Murphy (Pew, 2020) and Fifth Report of the Code Project - Part 1 (Pew, 2019) ('More Science' section).

Regarding paragraph f, we believe the addition of 'sponsoring States' would make this provision more consistent with (e). Deletion of 'best endeavors' is suggested, as proposed by various members and observers. For subparagraph i, propose this addition based on submissions made by ISA Observer the Deep Ocean Stewardship Initiative ('DOSI'), a network of scientists who bring first-hand knowledge of challenges and opportunities associated with data sharing and use. Regarding subparagraph iii, we recommend that a standardized approach across the region is necessary to obtain robust and comparable data within that region (see submission on the draft Regulations by DOSI). Standardized procedures for REMP development and review should therefore be adopted, as elaborated

below (DR44bis, and Annex IVbis). Lastly, we propose the addition of a new subparagraph (vibis) to "apply an ecosystem approach". Cooperative effort will be essential to effective application of an ecosystem approach and this approach should, in turn, form the basis for relevant research initiatives and programmes. For more on this subject, see: Guilhon, M, Montserrat, F, and Turra, A. Recognition of ecosystem-based management principles in key documents of the seabed mining regime, ICES Journal of Marine Science [2020]

Regarding paragraph g(alt), we recommend the inclusion of "member States" as this will be an important source for information about metal supply and demand and prices, which the Economic Planning Commission will need to fulfil its role here.

Regarding the paragraph h, we agree with Germany's proposed addition, but suggest that data-sharing protocols should be in place before mineral production occurs to ensure that monitoring data is recorded and used appropriately. Data and methodology standards across contracts are an important means of the ISA discharging its UNCLOS duties to promote, and coordinate and disseminate the results of, marine scientific research with respect to activities in the Area, and to ensure effective protection for the marine environment from activities within the Area. Standardized data templates and methodology will help provide clear expectations for Contractors, reassurance to stakeholders about levels of scientific rigour, and comparable data, usable not only for individual project management but also for regional environmental assessments.

Finally, we propose two new paragraphs. The ISA is untested as a regulator, and there are no well-established practices for performance and monitoring of deep-sea mining world-wide. It is therefore recommended that the ISA should establish compliance monitoring practices in provisional form and then test and refine them in detail during a pioneer phase of, for example, an early Contractor test-mine in a joint venture with the Enterprise. This amendment is proposed to allow this.

Regulation 4
Protection measures in respect of coastal States

1. Nothing in these regulations affects the rights of coastal States in accordance with article 142 and other relevant provisions of the Convention.

2. Contractors shall take all measures necessary to ensure that their activities are conducted so as not to cause Serious Harm to the Marine Environment, including, but not restricted to, pollution, under the jurisdiction or sovereignty of coastal States, and that such Serious Harm or pollution arising from Incidents in their Contract Area does not spread into areas under the jurisdiction or sovereignty of a coastal State.

3. Any coastal State which has grounds for believing that any activity under a Plan of Work in the Area by a Contractor is likely to cause Serious Harm or a threat of Serious Harm to its coastline or to the Marine Environment under its jurisdiction or sovereignty may notify the Secretary-General in writing of the grounds upon which such belief is based. The Secretary-General shall immediately inform the Legal and Technical Commission, the Contractor and its sponsoring State or States of such notification. The Contractor and its sponsoring State or States shall be provided with a reasonable opportunity to examine the evidence, if any, and submit their observations thereon to the Secretary-General within a reasonable time.

4. If the Commission determines, taking account of the relevant Guidelines, that there are clear grounds for believing that Serious Harm to the Marine Environment is likely to occur, it shall recommend that the Council issue an emergency order pursuant to article 165 (2) (k) of the Convention.

5. If the Commission determines that the Serious Harm or threat of Serious Harm to the Marine Environment, which is likely to occur or has occurred, is attributable to a breach by the Contractor of the terms and conditions of its exploitation contract, the Secretary-General shall issue a compliance notice pursuant to regulation 103 or direct an inspection of the Contractor’s activities pursuant to article 165 (2) (m) of the Convention and Part XI of these regulations.

I – Members

China

(4) If the Commission determines, taking account of the relevant ~~Guidelines~~ Standards, that there are clear grounds for believing that Serious Harm to the Marine Environment is likely to occur, it shall recommend that the Council issue an emergency order pursuant to article 165 (2) (k) of the Convention.

Rationale
With regard to paragraph 4 of this regulation, in order that the issuance of emergency orders by the Council is more authoritative, China proposes to substitute the legally binding “standards” for the term “guidelines”. It is also suggested that the procedures and rules through which the Council issues emergency orders should be clarified to make this paragraph more operational.
With regard to paragraph 5 of this regulation, in accordance with the UNCLOS, if the Commission determines that the Serious Harm or threat of Serious Harm to the Marine Environment is attributable to a breach by the Contractor, it shall make recommendations to the Council, the organ that is entitled to make decisions on the measures to be taken. The Secretary-General has no authority to issue a compliance notice or to order an inspection on the Contractor's activities. If there is need to delegate relevant power to the Secretary-General, it should be authorized by the Council with specific terms of reference provided for in the Exploitation Regulations.

II - Observers to the International Seabed Authority as referred to in rule 82 of the Rules of Procedure of the Assembly

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Regulation 4 Alt1. Rights and legitimate interests of the coastal States.

2. Contractors shall take all measures necessary to ensure that their activities are conducted so as not to cause [~~[serious]~~ ~~[significant]~~]harm to the Marine Environment, including, but not restricted to, pollution, **in areas** under the jurisdiction or sovereignty of coastal States, and that such [~~[serious]~~ ~~[significant]~~] harm or pollution arising from Incidents in their Contract Area does not spread into areas under the jurisdiction or sovereignty of a coastal State.

2bis.Such measures [pursuant to paragraph 1] **shall include consulting with any coastal State** ~~**in close proximity**~~ adjacent **to a proposed exploitation area prior to submitting an application for approval of a Plan of Work.** Monitoring of potential transboundary impacts, accurate and precise recording of the operational area, and **Consultations with any coastal State concerned shall be maintained** by the Contractor throughout the term of the Contract, **with a view to ensuring that the rights and legitimate interests of coastal States are not infringed.**

3. Any coastal State which has grounds for believing that any activity under a Plan of Work in the Area by a Contractor is likely to cause ~~Serious H~~harm or a threat of ~~Serious H~~harm

to its coastline or to the Marine Environment under its jurisdiction or sovereignty, or the exploitation by the Contractor of resources lying within national jurisdiction without the relevant State's consent, may notify the Secretary-General in writing of the grounds upon which such belief is based. The Secretary-General shall immediately inform the Legal and Technical Commission, the Contractor and its sponsoring State or States of such notification. The Contractor and its sponsoring State or States shall be provided with a reasonable opportunity to examine the evidence, if any, and submit their observations thereon to the Secretary-General within **[**a reasonable time**] [24 to 72 hours]**.

3bis. Regulation 4(3) shall apply mutatis mutandi to any State with grounds for believing that such harm or threat of harm may be caused in any location by an activity under a Plan of Work.

~~**3bis. The coastal States in providing the evidence of potential [Serious] Harm or a threat of [Serious] Harm to Marine Environment under its jurisdiction may submit the result of independent overview on the result of environmental impact assessment and Mitigation and respond plan of the Contractor site whose site adjacent or across to its jurisdiction.**~~

3ter. In the event of ~~pollution causing~~ ~~[Serious]~~ Harm to the **Marine Environment and** the **livelihood of** any **coastal community, ~~[relevant~~ adjacent~~]~~ coastal States which have grounds for believing ~~that pollution is originating from~~** such harm is caused by **activities in the Area, shall notify the Secretary-General ~~in writing through appropriate channels~~ of the grounds upon which such belief is based and request ~~for~~ a prompt inspection ~~as regulated in~~ pursuant to regulation 96.**

3quater. [**The Secretary-General**]**, upon** the **request of** an **~~[relevant~~ adjacent~~]~~ coastal States, shall ~~instruct prompt~~** promptly initiate **inspection** in accordance with regulation 96(3)(b) **~~in which affected coastal States shall be invited to accompany the inspection,~~** and invite representatives of the coastal State to participate in the inspection, [**no later than 24 hours after such request was made by ~~affected coastal~~** the **States**] **to assess whether ~~pollution~~** the harm **is attributable to activities in the Area.**

4. If the Commission determines, taking account of the relevant evidence and **[**~~Guidelines~~**] Standards**, that there are clear grounds for believing that ~~Serious Harm~~ harm or a threat of ~~H~~harm to the Marine Environment is occurring or likely to occur, it shall recommend that the Council issue an emergency order **which may include an order for the suspension or adjustment of operations** pursuant to article 165(2)(k) of the Convention. **Upon the receipt of the emergency order, the Contractor shall take necessary measures in accordance with regulation 28 (3).**

5. If the Commission determines that the ~~Serious~~ ~~H~~harm or threat of ~~Serious~~ ~~H~~harm to the Marine Environment, which is likely to occur or has occurred, is attributable to a breach by the Contractor of the terms and conditions of its exploitation contract, the Secretary-General shall notify the Sponsoring State and [*insert relevant ISA organ*] shall issue a compliance notice pursuant to regulation 103 or direct an inspection of the Contractor's activities pursuant to **[**article 165 (2) (m) of the Convention and Part XI of these regulations**] [regulation 96]**.

6. In the case of ~~serious~~ harm **~~damage~~ to the Marine Environment** within any national jurisdiction **resulting from** the activities of the Contractor, ~~**accidents or contingencies**~~ or in the case of exploitation of resources lying within national jurisdiction without the relevant State's consent, the Contractor shall be strictly liable for any response and clean-

up costs, and for any damage **that cannot be fully contained, ~~m~~Mitigated ~~or repaired~~, the Authority, ~~should~~ shall ~~set~~ require the Contractor to pay compensation ~~measures~~, proportionally to the damage caused.**

<u>Rationale</u>

For the title of this regulation we prefer The proposed Alt1. heading, as it reflects the wording of UNCLOS Article 142 (to which this DR4 aims to give effect).

Regarding paragraph 2, the duty here should be to avoid any harm to any State's national environment. Coastal States are likely to wish to avoid any effect upon the marine environment and activities in their jurisdiction; and the deletion of 'serious' (or 'significant') is in keeping with the 'no harm' duty whereby States shall ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction (reflected in the Stockholm Declaration in 1972, the Rio Declaration (Principle 2), the Convention on Biological Diversity (Article 3), and the UNFCCC (recital 8 of its preamble) and now recognised as customary international law). According to UNCLOS, 'serious harm' is a very high threshold [e.g. see Art. 162(2)(w) UNCLOS], which should be prohibited in any location, in any event.

Regarding paragraph 2bis, this important amendment proposed by Australia should be reflected in a new paragraph. Under the previous draft, the onus of identifying harm or likely harm, was unfairly imposed solely on the coastal State (which may be unlikely to have access to the modelling or monitoring data of the Contractor, sponsoring State and the ISA). It has been noted by several States and delegates that this is not an accurate reflection of the precautionary approach. This insertion places a requirement upon the Contractor to conduct consultations. This should be reinforced by a requirement to report on those consultations in the Plan of Work application (e.g. EIS), and in annual reports, as proposed in the relevant Regulations below.

Regarding the paragraph 3*bis*, we believe the amendment made by one of the council members could create confusion about the type of evidence that would be examined under DR4(3). Such an independent overview could be one type of evidence, but it should not be made a prerequisite of informing the ISA of a potential breach of sovereign rights. We propose a different 3*bis*, which introduces a parallel provision enabling any State to notify the ISA if they have reason to believe serious harm may occur in any location. This is proposed to reflect UNCLOS, which applies the concept of the common heritage of [hu]mankind and places environmental protection obligations on all States, therefore creating an obligation to the international community (as well as coastal States), and giving all States a legitimate interest. [Source: Fifth Report of the Code Project - Part 2 (Pew, 2019), also Drazen et al. 2020] It would also be an option to widen the language of DR4(3) to apply to all States and locations, rather than to have this as a separate provision.

Regarding paragraphs 3ter and 3quarter, we recommend these inspection mechanisms be extended to cover any harm however caused, not only pollution-caused harm. We also recommend linking this to the relevant inspection provision (DR96), which allows for State participation in inspections. Depending on how the wording of DR96 is settled, the reference to the Secretary-General may also need review here.

Regarding paragraph 4, we agree with China and Costa Rica's proposal that the reference to (non-binding) 'Guidelines' in DR4(4) should be amended to (binding) 'Standards' which should address, inter alia, the criteria for serious harm as well as evidence gathering and evaluation processes.

Regarding paragraph 5, if Regulation 96 or 103 are amended so that the Secretary-General does not have powers to order an inspection or issue a compliance notice, then this paragraph (5) will need to be amended so that the appropriate organ of the ISA is given the role. Also, the draft Exploitation Regulations contain provisions whereby the ISA may communicate non-compliance or other issues to the Contractor (e.g. by way of a compliance notice) but the same provisions do not require the ISA or the Contractor to share those communications with the sponsoring State. It is recommended that this be remedied to best enable the sponsoring State to carry out its duties.

Lastly, regarding paragraph 6, we propose an amendment to place liability clearly upon the Contractor for the costs of any clean-up or compensation if harm has occurred (including harm not due to breach of contract or violation of other ISA rules by the Contractor). Otherwise there is a liability lacuna. Sources: Africa Group 2019 submission to ISA Council on legal liability, Fifth Report of the Code Project - Part 2 (Pew, 2019), papers of the Legal Liability Working Group.

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 these regulations.

2. Each application shall be submitted:

(a) In the case of a State, by the authority designated for that purpose by it;

(b) In the case of the Enterprise, by its competent authority; 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 a State enterprise or one of the entities referred to in paragraph 1 (b) above shall also contain:

(a) Sufficient information 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; and

(b) The principal place of business or domicile and, if applicable, the place of registration of the applicant.

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.

II - Observers to the International Seabed Authority as referred to in rule 82 of the Rules of Procedure of the Assembly

The Pew Charitable Trusts

2(b) In the case of the Enterprise, by its Director-General ~~competent authority~~; and

3. Each ~~application~~ applicant ~~by a State enterprise or one of~~ referred to in Regulation 5(1)(b) above ~~should~~ shall 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).

[~~(a) Sufficient information 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; and~~

~~(b) The principal place of business or domicile and, if applicable, the place of registration of the applicant.~~]

Schedule: Use of Terms and Scope

"**Effective Control**" or "effectively controlled" requires a substantial and genuine link between sponsoring State and Contractor, which includes for non-State actors the location of the company's management and beneficial ownership, as well as the ability of the sponsoring State to ensure the availability of resources of the Contractor for fulfilment of its contract with the Authority and any liability arising therefrom, through the location of such resources in the territory of the sponsoring State or otherwise.

Rationale

Regarding paragraph 1, a definition of 'effectively controlled' in the Schedule to the Regulations would help the LTC and other stakeholders understand how the 'effective control' criterion should be interpreted and applied. This point has been raised, inter alia, by submissions to the ISA from Costa Rica, Italy, DOSI, IUCN, DORD, IASS, and The Pew Charitable Trusts and in interventions made by numerous delegations during the March 2022 Council Session. We proposed wording for a definition that could be added to Schedule: Use of Terms and Scope.

"Effective control" of a Contractor is required by UNCLOS from the sponsoring state [UNCLOS Articles 139 and 153(2)]. UNCLOS does not expressly define "effective control", but does indicate that "nationality" and "effective control" are separate concepts, not to be conflated. Many ISA Contractors currently are either States Parties themselves (not requiring sponsorship) or State-owned enterprises, where questions of effective control do not arise. But there have in recent years been an increasing number of contract applicants who are private sector companies, sponsored by States in which they are incorporated. Indeed, ISA practice in granting Exploration contracts to non-state actors has focused (for the purposes of effective control and identifying the correct State of

sponsorship) only on the location of the registration of the Contractor company. A more logical interpretation of the "effective control" criterion might look also at ownership and business management as factors relevant to determine the level of de facto control by the State or its nationals. For example, a de facto approach was taken in the Convention on the Regulation of Antarctic Mineral Resource Activities (CRAMRA), which requires "a substantial and genuine link" between sponsoring State and operator, which includes for non-State actors an examination of the location of the company's management; and then defines "effective control" as "the ability of the Sponsoring State to ensure the availability of substantial resources of the Operator for purposes connected with the implementation of this Convention, through the location of such resources in the territory of the Sponsoring State or otherwise." The ISA should adopt a similar approach. Indeed, having a Contractor that is owned and managed by non-state nationals, and/or which has little meaningful presence or resources within the sponsoring State, would not seem to be an optimal arrangement for any sponsoring State, as it would likely reduce the benefits flowing to that State, and also to reduce the Government's ability to take regulatory action and enforce compliance measures. But does not reduce the State's legal liability or risk as a sponsoring State. (Additional sources: Rojas and Phillips (2019) "Effective Control and Deep Seabed Mining: Toward a Definition", and Willaert (2022) "Transparency in the field of deep sea mining : filtering the murky waters"..

Regarding paragraph 2, we believed that a specific authorized person should be named for the Enterprise.

Regarding paragraph 3, we note that regulation 7(1) sets out the required contents of an application for a Plan of Work for Exploitation (with reference to Annex I). This Annex includes requirements for the 'name of applicant, and 'place of registration', 'place of business/domicile'. It is therefore confusing to have these requirements repeated here in DR5 (which is the Regulation about 'qualified applicants' not about the content of applications), especially where the requirements are expressed in different terms. It is therefore suggested that sub-paragraphs (a)-(c) be deleted, and that the same content is instead covered (only) by Annex I (and brought into effect by DR7). It might also be useful to migrate the text of this paragraph DR5(3) into DR7.