

**TEMPLATE FOR SUBMISSION OF TEXTUAL PROPOSALS DURING THE 27TH SESSION:
COUNCIL - PART I**

Informal Working Group - Environment

Please fill out one form for each textual proposal which your delegation(s) wish(es) to amend, add or delete.

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

Pew Charitable Trusts

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

DR 4

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.

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

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]]~~ Harm or a threat of ~~[[Serious]]~~ 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 promptly~~ 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.

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

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 3bis, 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 3bis, 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](#).