

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

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.

1. Name of Working Group:

Institutional Matters

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

The Pew Charitable Trusts

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

Draft Regulation 4

4. 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.

The facilitators’ proposed amendments are reflected in red/blue.

Our proposed amendments and our questions or comments regarding the facilitator’s remarks are indicated as in-line edits in magenta. Where we propose deletions of the facilitator’s text this is shown ~~in strikethrough and bold~~.

1. Nothing in these regulations affects the rights and legitimate interest of coastal States in accordance with article 142 and other relevant provisions of the Convention, including its provisions on consultation, prior notification, and the taking of measures consistent with the relevant provisions of Part XII as may be necessary to prevent, mitigate or eliminate grave and imminent danger to their coastline, or related interests from pollution or threat thereof or from other hazardous occurrences resulting from or caused by any activities in the Area

3. Contractors shall take all measures necessary to ensure that their activities are conducted so as not to cause harmful effects to the Marine Environment, including, but not restricted to, pollution, damage to the flora and fauna, ecological balance and other hazards to the Marine Environment in areas under the jurisdiction or sovereignty of coastal States, and that such harmful effects or pollution arising from activities in its Contract Area does not spread into areas under the jurisdiction or sovereignty of a coastal State. ~~Such measures shall include consulting with any potentially affected coastal State with a view to ensuring that the rights and legitimate interests of coastal States are not infringed.~~

Proposal of a new 4)

4) ~~Such measures~~ Contractor measures pursuant to paragraph 3 shall include consulting with any potentially affected coastal State, as identified in the relevant Regional Environmental Management Plan, 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 potentially affected coastal State 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.

(10) If the Commission determines, taking account of the relevant Standards and Guidelines, that there are clear grounds for believing that Serious Harm or the threat of Serious Harm to the Marine Environment is likely to occur ~~as the result of Contractor operations~~, 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 and take all necessary measures to prevent Serious Harm to the Marine Environment. Such recommendation shall be taken up by the Council on a priority basis. Upon the receipt of the emergency order, the Contractor shall take necessary measures in accordance with regulation 28 (3).

(11) If the Commission determines that ~~the harmful effects or~~ Serious Harm, or threat of Harmful Effects or 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 notify the Sponsoring State and the Council shall issue a compliance notice pursuant to regulation 103 ~~and an Inspector shall promptly carry out an investigation of relevant aspects or direct an inspection~~ of the Contractor's activities pursuant to ~~article 165 (2) (m) of the Convention and~~ Part XI of these regulations.

Proposal of a New 12)

In the case of harmful effects to the Marine Environment within any national jurisdiction resulting from the activities of the Contractor, 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, mitigated or repaired, the Authority, shall require the Contractor to pay compensation, proportionally to the damage caused and taking into account any compensation already claimed against the Contractor in national proceedings brought in accordance with Article 235 of the Convention.

4.bis Duty of the Member State to notify.

(former new 7) Regulation 4(6) 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. ~~After the notification in paragraph 1 takes place~~ Following the notification from the State, the procedure established in 4(10) and 4 (11) shall ~~be~~ apply.

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

Paragraph 1 seems to have stopped short, as it was not clear what "taking of measures" referred to. We have added language from article 142, which we believe to be the intent of this provision, to avoid ambiguity.

We support this version of paragraph (3). The duty here should be to avoid any harm in any State's national waters. Coastal States are likely to wish to avoid any effect upon their marine environment and activities in their jurisdiction; and the current draft seems 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). Also, with the newly proposed paragraph 4, the last sentence of paragraph 3 can be deleted. Although, as mentioned above, more detail regarding consultation and notification protocols is needed beyond what is currently described in these Regulations.

Regarding paragraph 10, we broadly support the alternative language proposed - although we question whether this should be located in DR4 or elsewhere, such as in DR 103. While it's a general duty for the ISA to act to prevent serious harm, it's not specific to coastal states, which is the focus of DR 4. This paragraph may need to be reviewed after the inspection provisions in Part XI are more settled.

Regarding paragraph 11, We wonder though whether an inspection would not also be helpful following the need for an emergency order pursuant to paragraph (10)? If there was a threat or occurrence of Serious Harm to the Marine Environment, this should be investigated whether or not it was caused by a breach of contract. Indeed, if this occurred without contract breach, then it suggests an urgent need to amend the Plan of Work, to ensure that the operations are brought within parameters that do not permit Serious Harm to occur.

We note also that any investigation into alleged contract breach or incidence of harm - as envisaged by this provision - will gather evidence that may subsequently be used by affected persons to bring a claim for damages (or criminal prosecution) against the Contractor in a national court. The right to bring such a claim is clearly enshrined in Article 235(2) of UNCLOS. An affected person is unlikely to be able to obtain evidence of what has occurred on the mining vessel unilaterally, so will need to rely upon the Inspector's findings. It is possible that the ISA and/or the Sponsoring State may also be included in any such legal claim for damages, insofar as liability may attach to them if their action or inaction has contributed to the harm. This is one important reason why the independence of the Inspectorate will need to be carefully preserved. In any event, the reference to Article 165(2)(m) of the Convention should be deleted. Article 165 relates to the duties and powers of the LTC, and not the Secretary-General, as it has been attributed here. Sub-paragraph (2)(m) of Article 165 pertains to a general requirement for the LTC to make recommendations to the Council regarding the direction and supervision of a staff of inspectors. It is not a power to order a specific inspection.

Regarding paragraph 12, This proposed amendment is important to place liability clearly upon the Contractor for the costs of any clean-up or compensation if harm has occurred, in accordance with the 'polluter pays' principle. The paragraph may benefit from an addition at the end *'taking into account any compensation already claimed against the Contractor in national proceedings brought in accordance with Article 235 of the Convention'* so it is clear that a Contractor should not be doubly penalised for the same issue in separate fora.

It could also be considered to add to this paragraph *'harm caused to persons or property'*, as well as harm to the environment, as these would seem to be other potential incidents of harm that may require repair or compensation, for which a Contractor should also be strictly liable.