

Small working group on “coastal States”(SWGCS) – Report to the Council on the intersessional work

The small working group on “coastal States” held one in person meeting in Kingston, on 26 March 2024, during part I of the 29th ISA Council Session and two online intersessional meetings, on May 16 and June 27.

The group was led by Portugal and the mailing list has more than 50 entries, from 30 delegations with a wide geographical distribution, including:

Argentina	France	Japan	Poland
Australia	Federated SM	Kenya	Russian Federation
Brazil	Germany	Mexico	Spain
Canada	Greece	Nauru	Tanzania
Chile	India	Netherlands	United Kingdom
China	Ireland	Nigeria	United States
Denmark	Ivory Coast	Norway	
Finland	Jamaica	Philippines	

The group has the broader aim of reaching an agreement on language on coastal States in the draft regulations on exploitation of Mineral resources in the Area (DR). It was agreed to work on the basis of DR.93ter. and DR.4.

To guide the discussions, the following **guiding questions** were put forward:

1. What would be the legal basis for coastal States consultations?
2. How would coastal States be identified (self-identification, identification by third parties, a combination of both)?
3. Should coastal States consultations follow a different process from the general Stakeholders consultations (formalities, timing, stages, addressing of the outcome of the consultations and other)?

4. What should be the appropriate language to refer to coastal States to be consulted?
5. What would be the appropriate placement for different rules on coastal States consultation (regulations, standards, guidelines, annex)?

At **the first online intersessional meeting**, the SWGCS focused on the first two questions.

The underlying purpose of **question one** (*What would be the legal basis for coastal States consultations?*) was to hear delegations' views on the legal basis provided for in the Convention, if any, allowing for the establishment of a consultation mechanism of coastal States.

There was general agreement that Article 142(2) of the UN Convention on the Law of the Sea (the Convention) requires consultations with the coastal State when the resource deposit in the Area lies across limits of its national jurisdiction. Furthermore, in cases where activities in the Area may result in the exploitation of resources lying within national jurisdiction the consent of the coastal State is required.

However, most delegations considered that the Convention does not preclude consultations with coastal States outside the specific circumstances of its Article 142(2). Delegates discussed whether Article 142(3) of the Convention include consultations, albeit not explicitly mentioned. Some delegations considered that consultations (i) are necessary to give effect to the rights of coastal States in Article 142(3) of the Convention; and (ii) to operationalize the obligation to prevent harm, the duty of reasonable regard and are an expression of the general obligation to cooperate. Some delegations argued that the legal basis for consultations could be found in international customary law and in several provisions of the Convention, such as Articles 145, 147 and 221.

One delegation mentioned that consultations are common practice in the mining industry. Two delegations stated that they were not prepared, at this stage, to consider consultations outside the scope of Article 142(2) of the Convention. One delegation mentioned that DR93ter could refer to "relevant provisions" of UNCLOS without limiting to specific Articles.

Question 2 (*How would coastal States be identified (self-identification, identification by third parties, a combination of both?)*) aimed to discuss a fundamental step of such a consultation mechanism, if established: the criteria that States must fulfill in order to be considered coastal States for the purposes of the consultation mechanism under discussion.

A broad majority of delegations favored self-identification, or a combination of self-identification and other supplementary means of identification, including identification by Contractors and the ISA Secretariat. There was also a general understanding that self-identification could be guided by criteria provided for in the regulations—possibly a standard. It should not be “free for all.”

One delegation favored a geological identification by the Regional Environmental Management Plans (REMPs). Others pointed out that REMPs would not provide such information and that not all States were involved in their development. In general, delegations that are supportive of self-identification and a combination of methods and were opened to also include REMPs.

One delegation suggested that a mechanism be developed to notify coastal States of the potential impacts on the marine environment of areas under their national jurisdiction and coastlines.

At **the second online meeting**, the group focused on the remaining questions:

Question 3 (*Should coastal States consultations follow a different process from the general Stakeholders consultations*) aims to determine whether it may make sense to have a special consultation procedure for coastal States that differs from the procedure for other States and stakeholders. Five sub-questions were introduced for further guidance, without delegations being asked to necessarily cover them in their interventions:

- First, *whether the consultation involving coastal States should have some formality (for example start with a Note Verbal).*
- Second, *whether consultations should take place before or after the documents are finalized.*

- Third, *when should such consultations take place—at the stages of development of environmental plans, review of environmental plans, performance assessment stage, closure plans, etc.*
- Fourth, *how should consultations with coastal States take place. On this issue, it might be a good opportunity to discuss the meanings of “proactive” and “tar*

The discussion highlighted the need for a certain degree of distinction between Stakeholders consultations and consultations with States, in particular potentially most affected States by the planned activity—an umbrella term that may be relied upon in establishing this consultation mechanism. It was suggested that certain examples or criteria may be included in the regulations under this umbrella term to provide guidance for States to self-identify as *potentially most affected State* - only those States identified as such would then be part of the subsequent outreach consultation.

Delegations expressed their views on which States could be considered potentially most affected. Different delegations referred to (i) adjacent coastal States or coastal States that are adjacent to the contract area; (ii) States with activities in the contract area; (iii) States with interests in the activity; or (iv) States with liability or responsibility under international law.

Delegations put forward several suggestions on how these consultations may differ from the consultations with other States and stakeholders. For example, it was suggested that (i) consultations should be active and direct; (ii) based on the same documents that would be used for the wider consultations with other States and Stakeholders; (iii) but before they are finalized and published; and that (iv) these documents should reflect the results of these consultations with coastal States. One delegation mentioned the need for confidentiality when issues of sovereignty would be involved. The avoidance of a duplication in consultations was raised.

Consultations could be organized through the ISA Secretariat, although more direct contact between the Contractor and the relevant States could be considered. One delegation suggested that States could designate a focal point for the purpose of consultations.

Another delegation noted that, in the case provided for in Article 142(2) of UNCLOS, a distinction had to be made which might require a separate consultative procedure. Finally, one delegation considered that all States should be consulted and that all information relating to the contracts should be made public in the interests of transparency.

Question 4 (*What should be the appropriate language to refer to coastal States to be consulted?*) is deeply intertwined with Question 3, which became particularly clear when most delegations felt the need to address it during the discussion of Question 3. Should delegations agree, at least in principle, that a special consultation procedure for coastal States should be established, this question aimed to have a preliminary discussion on what wording would be appropriate for the establishment of such a procedure. To this end, it was recalled that the recently adopted BBNJ Agreement uses, in Article 32, “adjacent coastal States and any other States adjacent to the activity when they are potentially most affected States”, that includes:

- “Coastal States whose exercise of sovereign rights for the purpose of exploring, exploiting, conserving or managing natural resources may reasonably be believed to be affected by the activity.”
- “States that carry out, in the area of the planned activity, human activities, including economic activities, that may reasonably believe to be affected.”

Some delegations were in favor of using the term “adjacent coastal States”, as this term is already used in the BBNJ Agreement. One delegation argued that the term “adjacency” should not be used as it is not included in the Convention. Some delegations favored a reference to States located in a certain proximity to the area where the planned activity is being considered, bearing in mind, *inter alia*, the environmental impact of the activities on the States in that geographical proximity.

As mentioned in the discussions under Question 3, other potentially most affected States that do not fulfil the geographical proximity requirement should also be included. However, the wording should limit the number of States that can potentially be included in these consultations. On this issue, one delegation expressed a preference for maximum transparency and inclusivity.

Discussions on **question 5** - *What would be the appropriate placement for different rules on coastal States consultation? (regulations, standards, guidelines, annex)* were considered premature and will take place in the future.

The meeting concluded with an attempt to assess the progress made so far and to decide on the next steps.

Delegations considered (i) that progress had been made and that common ground is being reached on important points that had been addressed so far, but (ii) that the group is not yet ready to submit a wording proposal at this stage. In this context, a version of DR93.ter reflecting the discussions so far has been circulated to the group for comments. Further discussion will be required before the group would be ready to submit a wording proposal. Therefore, I would like to propose that the group proceeds with its intersessional work.

I thank the delegations for their engagement in the discussions and constructive participation, as well as being flexible with the challenges of the scheduling of meetings across many time zones. On a personal note, it has been a pleasure to coordinate this working group.

Maria Luís Mendes
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