**Non-paper submitted by Mexico to the Small Working Group on the rights and interests of Coastal States**

March 25, 2024

Mexico expresses its strong support for the efforts of the Small Working Group on the Rights and Interests of Coastal States, which is diligently coordinated by the Portuguese delegation. In this regard, Mexico has prepared this non-paper to contribute to the ongoing discussions by addressing some of the key questions guiding the group's work. Specifically, this document will address the following issues in the order listed below:

1. What should be the appropriate language to refer to coastal States to be consulted?
2. What would be the legal basis for Coastal States consultations?
3. How would coastal States be identified (self-identification, identification by third Parties, a combination of both)?
4. 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)?

## 1. What should be the appropriate language to refer to coastal States to be consulted?

Mexico believes that a key issue in the working group's discussions is clarifying the purpose of holding differentiated consultations for what are currently termed "coastal States."

While Mexico, like many other States, recognizes the value in conducting differentiated consultations with those States “potentially most affected” by activities in the Area, it argues that limiting this to adjacent coastal States does not fully safeguard the rights of all States under UNCLOS. Moreover, the use of this term or any other ambiguous language, may lead to new debates over the criteria for determining which States are considered adjacent or which require differentiated consultations.

Mexico suggests that **the matter should be approached by distinguishing between rights and legal interests**. This distinction justifies conducting differentiated consultations with States that may be “most affected” by activities in the Area.

The Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA), adopted by the International Law Commission (ILC), may offer useful guidance. ARSIWA distinguishes between "injured States" and "any State other than the injured State".

The term "injured State" refers to situations where an individual right has been particularly affected. The definition is as follows:

> "State whose individual **right** has been denied or impaired by [an] internationally wrongful act or which has been denied or impaired by the internationally wrongful act or which has otherwise been particularly affected by that act."[1]

In the commentaries to the Draft ARSIWA, the ILC acknowledged that "a broader range of States may have a **legal interest** in invoking responsibility and ensuring compliance with the obligation in question [and that], in certain situations all States may have such an interest, even though none of them is individually or specially affected by the breach".[2]

Therefore, the key distinction lies in the fact that the term "injured State" is directly related to the rights of a particular State, while "any State other than the injured State" refers to a collective legal interest shared by several or all States in obligations established for the benefit of the international community, regardless of whether a specific State was individually or specially affected.[3]

The ILC further explains that when "any State other than the injured State" invokes responsibility, it does so on behalf of the collective interest, not as an injured party, but as a member of the international community to whom the obligation is owed. While an "injured State" also holds a collective interest, it is distinguished by being directly affected by the breach in a way that distinguishes it from the generality of other States to which the obligation is owed.[4]

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[1] International Law Commission (ILC), Draft articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA), with commentaries, 2001, p. 116.

[2] The ILC explains that the terms "injured States" and "any State other than the injured State" seek to avoid problems arising from the use of possible misleading term such as "direct" versus "indirect" injury or "objective" versus "subjective" rights". Ibid.

[3] Ibid., p. 117.

[4] The ILC further explains: "The term "specially affected" is taken from article 60, paragraph (2) (b), of the 1969 Vienna Convention. Even in cases where the legal effects of an internationally wrongful act extend by implication to the whole group of States bound by the obligation or to the international community as a whole, the wrongful act may have particular adverse effects on one State or on a small number of States. For example a case of pollution of the high seas in breach of article 194 of the United Nations Convention on the Law of the Sea may particularly impact on one or several States whose beaches may be polluted by toxic residues or whose coastal fisheries may be closed. In that case, independently of any general interest of the States parties to the Convention in the preservation of the marine environment, those coastal States parties should be considered as injured by the breach. Like article 60, paragraph (2) (b), of the 1969 Vienna Convention, subparagraph (b) (i) does not define the nature or extent of the special impact that a State must have sustained in order to be considered "injured". This will have to be assessed on a case-by-case basis, having regard to the object and purpose of the primary obligation breached and the facts of each case. For a State to be considered injured, it must be affected by the breach in a way which distinguishes it from the generality of other States to which the obligation is owed." Ibid., p. 119.

It is noteworthy that **UNCLOS distinguishes between rights, freedoms, and collective interests**, such as the protection and preservation of the marine environment. **These concepts could serve as criteria for determining which States require differentiated consultations** when their rights are directly impacted, as opposed to States that act in relation to broader collective interests.

However, the concept of "injured States" does not encompass situations where a State suffers harm despite the absence of an internationally wrongful act. Consequently, Mexico proposes incorporating elements from the concept of "States likely to be affected" from the ILC's *Draft Articles on Prevention of Transboundary Harm from Hazardous Activities*.

This document defines "States likely to be affected" as "States in the territory of which there is the risk of significant transboundary harm [to persons, property or the environment] or which have jurisdiction or control over any other place where there is such a risk." Transboundary harm is further defined as "harm caused in the territory of or in other places under the jurisdiction or control of a State other than the State of origin, whether or not the States concerned share a common border."

Indeed, the ILC explains that "[t]his definition includes, in addition to a typical scenario of an activity within a State with injurious effects on another State, activities conducted under the jurisdiction or control of a State, for example, on the high seas, with effects on the territory of another State or in places under its jurisdiction or control." An example provided is the harmful impacts on ships or platforms of other States on the high seas.[5]

Given these considerations, Mexico suggests developing a definition for "potentially most affected States". This definition should ensure that **consultations are held with States whose rights under UNCLOS may be affected**, rather than those with only a general legal interest. Additionally, the definition should include **States that may suffer harm to persons, property, or the environment due to activities in the Area**.

**2. What would be the legal basis for Coastal States consultations?**

- In respect of Coastal States across whose jurisdiction resource deposits shared with the Area lie, the legal basis is **article 142 of UNCLOS**.
- In the case of "potentially most affected States", the legal basis is the **obligation of prevention under customary international law**.

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[5] ILC, Draft Articles on Prevention of Transboundary Harm for Hazardous Activities, with commentaries, 2001, p. 153.

**3. How would coastal States be identified (self-identification, identification by third Parties, a combination of both)?**

A potentially most affected State could be identified as a result of a risk assessment, including an environmental impact assessment. A provision could be established allowing any other State that believes its rights may be affected, or that it may suffer a particular or individual harm, to participate in the consultations.[6]

**4. 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)?**

Mexico acknowledges the importance of conducting differentiated consultations with "potentially most affected States" by activities in the Area. These consultations are essential to ensuring that the rights of relevant States under UNCLOS are fully protected, and they play a crucial role in safeguarding States from potential harm resulting from exploitation activities.

In answering this question, Mexico has identified key elements required by UNCLOS and/ or customary international law to conduct differentiated consultations with:

i) Coastal States across whose jurisdiction resource deposits shared with the Area lie, and

ii) "Potentially most affected States".

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[6] Article 11 of the Draft Articles on Prevention of Transboundary Harm for Hazardous Activities, with commentaries, may be used as a basis. This article states as follows:

"1. If a State has reasonable grounds to believe that an activity planned or carried out in the State of origin may involve a risk of causing significant transboundary harm to it, it may request the State of origin to apply the provision of article 8. The request shall be accompanied by a documented explanation setting forth its grounds.

2. In the event that the State of origin nevertheless finds that it is not under an obligation to provide a notification under article 8, it shall so inform the requesting State within a reasonable time, providing a documented explanation setting forth the reasons for such finding. If this finding does not satisfy that State, at its request, the two States shall promptly enter into consultations in the manner indicated in article 9.

3. During the course of the consultations, the State of origin shall, if so requested by the other State, arrange to introduce appropriate and feasible measures to minimize the risk and, where appropriate, to suspend the activity in question for a reasonable period."

Additionally, Mexico has considered the elements of the obligation of "reasonable regard" under Article 147(1) of UNCLOS, which may be relevant to the discussions of DR 93bis, concerning stakeholder consultations.

Mexico hopes that this analysis will contribute meaningfully to the ongoing efforts of the working group.

## I. Differentiated Consultations

In the following sections, we will analyze the requirements outlined by UNCLOS and/or customary international law for two categories of States and, based on that analysis, present Mexico's proposal for differentiated consultations.

### a) Coastal States across whose jurisdiction resource deposits shared with the Area lie.

Article 142 of UNCLOS provides that "[a]ctivities in the Area, with respect to resource deposits in the Area which lie across limits of national jurisdiction, shall be conducted with **due regard** to the rights and legitimate interests of any coastal State across whose jurisdiction such deposits lie."

For that purpose, "**[c]onsultations**, including a system of **prior notification**, shall be maintained with the State concerned with a view to avoiding infringement of such rights and interests. **In cases where activities in the Area may result in the exploitation of resources lying within national jurisdiction, the prior consent of the coastal State shall be required**."

### b) "Potentially most affected States".

Under customary international law, States are obliged to use all means at their disposal in order to avoid transboundary harm -within or beyond national jurisdiction- from activities occurring in their territories or under their jurisdiction.[7] This due diligence obligation entails not only the adoption of appropriate rules and measures, but also a certain level of

[7] Pulp Mills on the River Uruguay (Argentina v. Uruguay), Judgment, ICJ Reports 2010, p. 14, paras. 55-56.

vigilance in their enforcement and the exercise of administrative control applicable to public and private operators, such as monitoring of activities undertaken by such operators.[8]

This principle of prevention comprises a series of procedural obligations, including the **duty to notify, inform, consult** and to **undertake risk assessments, including Environmental Impact Assessments** (EIAs).[9]

### c) Proposal for differentiated consultations for Coastal States across whose jurisdiction resource deposits shared with the Area lie and "Potentially most affected States".

Mexico proposes that the draft articles governing differentiated consultations for Coastal States across whose jurisdiction resource deposits shared with the Area lie, as well as "Potentially most affected States", should include the following elements:

- **Obligation to conduct risk assessments**, including environmental impact assessments.
- **Obligation to provide prior,[10] active,[11] timely[12] and effective[13] notice**.
- **Meaningful consultations** in good faith, with the aim of: i) reaching agreements on practical measures for a reasonable accommodation of rights; and/or ii) achieving acceptable solutions regarding measures to be adopted in order to prevent significant transboundary harm or at any event to minimize the risk thereof.
- **Reference to the obligation of prevention** and the **duty to cooperate**.

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[8] Ibid., para. 79.

[9] Ibid, at paras. 67-266 Section III ('The Alleged Breach of Procedural Obligations'), and Section IV ('Substantive Obligations'). See also Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua) and Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica), Judgment, I.C.J. Reports 2015, pp. 705– 710 (procedural obligations), pp. 710– 712 (substantive obligations), pp. 719– 726 (procedural obligations), pp. 726– 737 (substantive obligations).

[10] Prior notice means that notice must be given before the activity is initiated.

[11] Active notice is where a party takes measures directly to contact and inform the other side.

[12] Timely notice means providing sufficient advance notice so that the concerned States have sufficient time to assess the potential effects, express concerns, prepare responses and /or engage in consultations.

[13] Effective notice means that relevant parties are adequately informed to engage in consultations or to take necessary precautions.

- **Timely sharing of relevant information** concerning that activity.[14]

For "Potentially most affected States" additional elements to consider include:

- **Notification of emergencies**.
- Development of **contingency plans** for responding to emergencies, in cooperation, with the State likely to be affected and competent international organizations.

In the case of coastal States with shared resource deposits, Article 142 of UNCLOS must be emphasized:

- In cases where activities in the Area may result in the exploitation of resources lying within national jurisdiction, **the prior consent of the coastal State shall be required**.

## II. **Reasonable regard** (DR93 bis. Relevant for Stakeholders consultations)

Article 147(1) provides that "[a]ctivities in the Area shall be carried out with reasonable regard for other activities in the marine environment." This obligation requires the provision of timely[15] and effective **notification**, sharing relevant information about the planned activities, and conducting meaningful **consultations** in good faith to reach agreements on practical measures for a reasonable accommodation of those activities.[16] "Meaningful consultations" reflect a genuine commitment to finding agreement between the parties involved, while "reasonable regard" implies an equitable balancing of interests, which may require a certain degree of voluntary restraint.[17]

In this case, a **constructive notice** may be sufficient. "Constructive notice" is where an operator posts information about their planned activities prominently on the internet, and its up to others to keep checking such information.

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[14] The exchange of information may continue until such time as the States concerned consider it appropriate even after the activity is terminated.

[15] Chagos Protected Area Arbitration, Mauritius v. United Kingdom, Award of 18 March 2015, para. 529.

[16] Ibid., para. 519.

[17] Ibid., para 535.

**Contribution to the Draft Regulations (DRs 2, 4, 31, 93 bis and 93 ter)**

In order to translate the above considerations into actionable regulatory content, and with a view to supporting the ongoing work of the Small Working Group and the Council, Mexico wishes to present the following textual suggestions and drafting elements for inclusion in Draft Regulations 2, 4, 31, 93 bis, and 93 ter, as an integral package.

Mexico respectfully invites delegations to consider this proposal in a **holistic manner**, as the suggested draft elements are interrelated and seek to establish a coherent framework.

## Regulation 2

## Principles, approaches and policies

### 1. Text Proposal

> "[...] [4. The following principles and approaches shall guide the application of these regulations]:
>
> (?) Prevention principle /No harm principle [...]"

### 2. Rationale

Given that the legal basis for differentiated consultations with "potentially most affected States" lies in the obligation of prevention under customary international law, it is essential that this principle be explicitly reflected in Draft Regulation 2.

The obligation not to cause significant transboundary harm[18] reflects a duty of due diligence in the context of prevention, rather than an absolute prohibition of harm. It entails primarily factual assessments rather than legal determinations, requires the demonstration of actual impairment of use supported by objective evidence, and must be evaluated on a case-by-case basis.

Including this principle in Draft Regulation 2 would ensure greater coherence between the normative foundations of the regulatory framework and the operational clauses of the Exploitation Regulations.

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[18] According to the International Law Commission, "significant" implies something more than detectable but does not necessarily meet the threshold of "serious" or "substantial".

## Regulation 4

## Rights and legitimate interests of Coastal States

### 1. Text Proposal

"Rights and legitimate interests of coastal States

1. Activities in the Area, with respect to resource deposits in the Area which lie across limits of national jurisdiction, shall be conducted with due regard to the rights and legitimate interests of any coastal State across whose jurisdiction such deposits lie, in accordance with article 142 of the Convention.

2. Nothing in these Regulations nor any rights granted or exercised pursuant thereto shall affect the rights of coastal States to take such measures consistent with 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."

### 2. Rationale

Mexico proposes that Draft Regulation 4 be limited to the content of Article 142 of UNCLOS. As part of Part I (“Introduction”) of the Exploitation Regulations, this provision should reflect general principles rather than procedural obligations, which may be more appropriately placed elsewhere within the Regulations.

While Mexico recognizes that the rights and legitimate interests of coastal States may extend beyond those explicitly provided for in Article 142 of UNCLOS, it considers that such broader matters are more appropriately addressed through other relevant provisions of the Regulations. In particular, with respect to the protection of persons, property, and the marine environment, Mexico refers to its earlier proposal to incorporate the prevention principle into Draft Regulation 2.

The present proposal incorporates the language of Article 142 with minimal adaptations for consistency with the structure and terminology of the Exploitation Regulations. Paragraph 2 of Article 142, which addresses procedural aspects, could be relocated to Part X (“General Procedures, Standards and Guidelines”).

It is important to emphasize that Mexico recommends the relocation -**not the deletion**- of the following provisions:

- Paragraph 6 of DR 4 should be moved to Part III, Section 5 of the Exploitation Regulations, as Regulation 32 on Emergency Response and Contingency Plans may provide a more appropriate framework. Its content could be discussed at a later stage, when it can be considered in conjunction with other relevant provisions.

- Paragraph 7 of DR 4 should be transferred to a more suitable section of the Regulations. Mexico proposes developing a new Part of the Exploitation Regulations on Responsibility and Liability, where this paragraph would be integrated. This new section would enable a comprehensive discussion of the following key elements:

    1. Heads of damage

    2. Allocation of responsibility

    3. Standards of responsibility

    4. Standing to bring claims

    5. Insurance and compensation mechanisms

**Regulation 31**

**Reasonable regard of other activities in the marine environment**

**1. Text Proposal**

> "1. Contractors shall, consistent with any applicable Standards and taking into consideration the Guidelines, carry out activities under an Exploitation Contract with reasonable regard for other activities in the Marine Environment, including the lying of submarine cables and pipelines, in accordance with Article 147 of the Convention.
>
> 2. The Sponsoring State, as well as the Contractor, shall enter into consultations with relevant Stakeholders under Regulation 93bis, with a view to reaching agreements on practical measures for a reasonable accommodation of those activities."

**2. Rationale**

Draft Regulation 31 gives effect to Article 147(1) of UNCLOS, which requires that activities in the Area be conducted with "reasonable regard" for other activities in the marine environment. This obligation entails the conduct of meaningful consultations to reach arrangements on practical measures for a reasonable accommodation of other activities in the marine environment.

The proposed text reflects this requirement by explicitly linking reasonable regard to the stakeholder consultation process established in Draft Regulation 93 bis. This cross-reference reinforces the need for information sharing and engagement with interested parties, in order to minimize potential conflicts and promote coordinated use of the marine environment.

**Regulation 93 bis**

**Stakeholder Consultation**

**(Based on the outcome of the discussions within the Small Working Group in Coastal States)**

**1. Text Proposal**

1. Consultations with Stakeholders, which include a system of constructive, timely and effective notification, shall be inclusive and transparent.

2. At least 2 weeks before the consultation begins, the Secretary General shall publish such advice on the Authority's website.

3. The Secretary General shall determine the consultation period of each consultation, which shall begin on the date of the publication of a notice of consultation and may not be less than 90 days.

4. The Secretary General shall publish a notice of consultation on the Authority's website, inviting Stakeholders to make submissions to the consultation, describe the matters on which submissions are sought, include the documentation that is the subject of consultation and other relevant information, and specify the final date for submissions. The applicant or Contractor shall provide the Secretary General with all information and documentation required to prepare a notice of consultation.

5. The Secretary General shall receive all submissions and transmit all submissions to the applicant or Contractor.

6. The applicant or contractor shall consider the submissions received and shall revise the documentation that was subject of consultation. The applicant or Contractor shall prepare a written response to consultation that collates and responds to the substantive comments expressed in the submissions and includes an explanation of any revisions to the document and how those revisions respond to substantive comments expressed in the submissions. The applicant or contractor shall submit the written response, with any revised documentation, to the Secretary General for transmission to the Commission.

7. Activities in the Area shall be carried out with reasonable regard for other other activities in the marine environment. To this end, meaningful consultations in good faith shall be maintained with States undertaking activities within the area covered by the Plan of Work, with a view to reaching an agreement on practical measures to reasonably accommodate such activities.

8. The Secretary General shall maintain a permanent public record of the notice of each consultation conducted under this Regulation, all submissions, and the written response to consultation, by publishing the notice, submissions and response on the Authority's website (except for Confidential Information which shall be redacted from documents before publication). The Secretary-General shall ensure that such consultation records relating to a specific Exploitation Contract are included in, or are accessible from, the relevant entry in the Seabed Mining Registrer, in accordance with Regulation 92.

9. The results of each consultation shall be summarized in a public report, including an analysis of the key points raised by stakeholders and how these key points were addressed.

**Regulation 93 ter**

**Consultations with potentially most affected States**

**(Based on the outcome of the discussions within the Small Working Group in Coastal States)**

1. Meaningful consultations in good faith, including a system of prior, active, timely and effective notification shall be maintained with States potentially most affected by the planned exploitation activity with a view to avoid infringement of their rights under the Convention and/or achieving acceptable solutions regarding measures to be adopted in order to prevent significant harm in their territory or in other places under their jurisdiction or control.

2. Consultations shall take place, following standards and taking into account the guidelines, at appropriate stages of preparation and execution of a plan of work by the contractor. Such consultations shall continue until such time as the States concerned consider it appropriate even after the activity is terminated. The outcomes of such consultations shall be included in the] different stages of preparing a Plan of Work, and at appropriate times during and at cessation of Exploitation activities, at the development of:

    (a) Scoping [report];

    [(b) Environmental Impact Assessment;]

    [(c) Environmental Impact Statement;]

    [(d) Environmental Management and Monitoring Plans;]

    [(e) Performance Assessment of the Environmental Management and Monitoring Plan;]

    [(f) Closure Plans;]

    [(g) Any review/update of the above documents [in light of] [required by] Material Change].

3. States potentially most affected by the planned activity are:

    (a) States whose rights under the Convention may be denied, impaired or otherwise affected by the activity carried out in the area covered by the Plan of Work.

    (b) States that may suffer significant harm to persons, property or the environment in their territory or in other places under their jurisdiction or control, as a result of the activity carried out in the area covered by the Plan of Work.

[4. If a State has reasonable grounds to believe that it is a potentially most affected State, it may request [the sponsoring State] to enter into consultations under paragraph 1 of this Regulation. The request shall be accompanied by a documented explanation setting forth its grounds.

4 bis. In the event that [the sponsoring State] nevertheless finds that it is under no obligation to enter into consultations under paragraph 1 of this Regulation, it shall so inform the requesting State within a reasonable time, providing a documented explanation setting for the reasons for such finding. If this finding does not satisfy that State, at its request, the two States shall promptly enter into consultations with a view to achieving acceptable solutions, based on an equitable balance of interests. If consultations referred to in paragraph 4 of this Regulation fail to produce an agreed solution, the State shall nevertheless take into account the interests of the alleged potentially most affected State, without prejudice to its rights.]

[4 Alt. Potentially most affected States shall be identified as a result of a risk assessment. If a State has reasonable grounds to believe that it is a potentially most affected State, it may follow the procedure that shall be further developed in Standards and Guidelines.]

5. [As appropriate,] the Secretariat, [Contractor, Sponsoring State and/or other States or relevant bodies] should [provide technical, financial and advisory support] to developing States, including small islands developing States, upon request, to identify potential effects of the planned activity on Marine areas and their resources under their jurisdiction.

6. This support should encompass an assistance mechanism, along with training and mentorship programs, to bolster local capacities].

7. Procedures for consultations with potentially most affected States shall be further developed in Standards and Guidelines].

8. The [Contractor] (Sponsoring State] shall develop contingency plans for responding to emergencies, in cooperation with the Authority and potentially most affected States.]

9. The [Contractor] [Sponsoring State] shall, without delay and by the most expeditious means at his disposal, notify potentially most affected States of an emergency concerning a planned activity and provide them with all relevant information].

10. Consultations with coastal States across whose jurisdiction resource deposits lie, shall take place, pursuant to article 142(1) and (2) of the Convention and in accordance with Regulation 93 quarter.

**2. Clarifications**

*Potentially most affected States*

(a) States whose rights under the Convention may be denied, impaired or otherwise affected by the activity carried out in the area covered by the Plan of Work.

> *Rationale: Subparagraph (a) addresses States' rights (just rights as opposed to legal interests) under the Convention. This encompasses coastal States' sovereign rights over resources within their maritime zones, as well as any other rights provided by the Convention, such as those in Part XI (e.g. exploration or exploitation contracts). Given that the wording aligns with the Convention's framework , States should find this language readily acceptable.*

(b) States that may suffer significant harm to persons, property or the environment in their territory or in other places under their jurisdiction or control, as a result of the activity carried out in the area covered by the Plan of Work.

> *Rationale: Subparagraph (b) aims to protect States from harm to people, property, or the environment within their territory or areas under their jurisdiction or control. This provision addresses States' concerns regarding the marine environment under their jurisdiction and has the added benefit of protecting property, such as submarine cables and other installations, both within and beyond national jurisdiction.*