

THE PEW CHARITABLE TRUST'S COMMENTARY

***ON THE REVISED CONSOLIDATED TEXT: DRAFT REGULATIONS ON  
EXPLOITATION OF MINERAL RESOURCES IN THE AREA,  
DATED 29 NOVEMBER 2024 (ISBA/30/C/CRP.1)***

Key

**Black font, red font, and grey text-boxes** are replicated from the Draft Regulations text.

**Blue font** represents commentary or edits proposed by The Pew Charitable Trusts.

## Part I

### Introduction

#### Regulation 1

##### Use of terms and scope

1. Terms used in the Convention shall have the same meaning in these Regulations.
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 and the applicable Standards and Guidelines in the Schedule.]
4. [Subject to paragraph 1 and 3the Schedule, terms used in these Regulations shall have the same meaning as in other rules, regulations and procedures of the Authority.]
4. ~~Terms and phrases used in these Regulations are defined for the purposes of these Regulations and the applicable Standards and Guidelines in the Schedule.~~
5. ~~Nothing in these Regulations shall affect the rights, jurisdiction and duties of States under the Convention, [including the rights and legitimate interests of the coastal states pursuant to article 142 of the Convention], the right to conduct marine scientific research in the Area pursuant to Articles 143 and 256 of the Convention, and the exercise by States of the freedom of the high seas, in accordance with Article 87 of the Convention.~~
65. These Regulations are accompanied 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.
- [66. Alt These Regulations are accompanied 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 [alt 1. including regional environmental management plans, [and conservation and management measures]] [alt 2. (6.bis) These Regulations are further complemented by Regional Environmental Management Plans.]
7. The Annexes, Appendices and Schedule to these Regulations form an integral part of the Regulations and any reference to the Regulations includes the Annexes, Appendices and Schedule thereto.

8. These Regulations are subject to the provisions of the Convention and the Agreement ~~and other rules of international law not incompatible with the Convention~~.

~~89. These Regulations shall be applied in a uniform and non-discriminatory manner.~~

~~910. [Nothing in these Regulations shall affect the rights, jurisdiction and duties of States under the Convention, including the rights and legitimate interests of the coastal states article 142 of the Convention, the right to conduct marine scientific research in the Area pursuant to Articles 143 and 256 of the Convention, and the exercise by States of the freedom of the high seas, in accordance with Article 87 of the Convention.]~~

With regards **paragraph (3)** of DR1, we would suggest deleting the reference to ‘applicable Standards and Guidelines’. The word ‘applicable’ implies that the paragraph applies to some Standards and Guidelines, and not others. We are unclear how this is to be determined, or what force the paragraph has if this is left unclear. We would suggest a better approach would be for each Standard and Guideline document to expressly state whether or not it adopts the same definitions as those used in the Regulations. That way the matter can be addressed sensibly on a case-by-case basis, in a way that is clearer to all stakeholders than this paragraph (3).

We propose deleting **paragraph (4)** of Regulation 1. We find the drafting ambiguous, whether the intention is for other RRP to follow the definitions in these Regulations, or vice versa – which may lead to confusion. We also consider the paragraph to be factually incorrect, as each set of ISA rules, regulations and procedures generally tend to set their own definitions and do not seek to influence other instruments. For example, there are already differences between the definitions used in the Exploration Regulations and the draft Exploitation Regulations, such as the definition of ‘Exploitation’. It is unclear to us how paragraph (4) is to be applied in this context. How can the definitions in the RRP of the Authority be the same, when they are expressly different? Further confusion may arise from a lack of agreement within the ISA as to **what constitutes ‘RRPs’** and what does not (for example: Council decisions, REMPs, Standards, Guidelines, LTC Recommendations for the Guidance of Contractors etc).

#### Comments

Delegations continue to disagree on the preferred version for what is now paragraph 5. In respect of the reference to Regional Environmental Management Plans, it bears recalling that proposals in respect of draft regulations 12 and 13 provide for their consideration in the context of submitting and assessing applications.

We are unsure why **paragraph (5)** is in black font, apparently indicating ‘consensus’ - given it is immediately followed by an alternative proposal. Our notes taken during the March 2024 Council session show the following delegations arguing for express inclusion of REMPs in this paragraph: Germany, Brazil, Chile, Denmark, Ghana on behalf of the African Group, Italy, Netherlands, Spain, Federated States of Micronesia, Costa Rica, and Belgium.

We also support the inclusion of **reference to REMPs**, which the Council has previously indicated will be a crucial part of the ISA’s environmental management regime and should be developed in conjunction with the Regulations. As we mentioned in the 28 and 29th Council sessions, Pew has produced a paper on the issue of giving legal effect to REMPs and the management measures contained within them, available here: <https://www.pewtrusts.org/-/media/assets/2023/10/giving-legal-effect-to-remps-pew-charitable-trusts.pdf>. We would welcome collective decision from the Council about the status of REMPs, in order to inform the drafting of the Regulations throughout.

In brief, our understanding is that REMPs are not binding in themselves, as they are not ‘rules, regulations or procedures’ of the ISA, they are a ‘plan’, and a policy document. They contain a range of information, including maps and scientific assessments, that is not phrased in binding terms. They do however contain essential elements to support the ISA’s duties to ensure effective protection of the marine environment from harmful effects of activities in the Area. As such, **relevant elements of REMPs should be binding on ISA decision-making and on Contractors** (e.g. protected areas and other management tools, regional goals and objectives). In our view, these specific elements (i) need to be clearly identified in each REMP, and (ii) need to be given binding effect by the Regulations (or a Council decision). On this basis, we are unsure if the term ‘complemented’ in paragraph (6) reflects the nature of REMPs accurately. We would suggest ‘*shall be read together with*’.

- Several delegations proposed changing the order of the paragraphs, which has been implemented.
- Delegations disagreed on whether the reference to Article 142 of the Convention should be altered, and no change has been implemented thereto.

While we do not have any objections in principle to **paragraph (9)**, we caution against cherry-picking some UNCLOS provisions over others. For example, the draft mentions the rights of coastal States (under Article 142). but – as was highlighted during the March 2024 session (by the Federated States of Micronesia, and supported by Jamaica, Portugal, Chile, Ireland, Denmark, Fiji and USA) – coastal States have other rights. As noted also by Canada (supported by France, Ghana on behalf of the African Group, China), the same point about not limiting rights by omission can be applied to States other than coastal States. Such rights include, for example, the rights of participation or of benefit for developing States and particularly land-locked and geographically disadvantaged States (under Articles 140 and 148). The draft reiterates the principle of freedom of the high seas (under Article 87), but not the exclusive jurisdiction of flag States over ships on the high seas (under Article 92). Other delegations queried why the right to conduct MSR in the Area was included, but not the freedom of MSR in the high seas.

We also recall the previous request from March 2024 (supported by Spain, the Federated States of Micronesia, Jamaica, Portugal, Ireland, and Denmark) to address all references to coastal States holistically and consistently, via a smaller working group of delegations.

- Delegations proposed the removal of the reference to the Agreement in paragraph 7, but there remained disagreement on this. From a legal perspective and in order to ensure consistency of drafting, it is recommended to retain the reference to the Agreement.
- A number of delegations suggested that the reference to non-discriminatory treatment is better suited to appear among the principles set out in draft regulation 2, which is why it is now incorporated therein at draft regulation 2 (4(a quat)).

We find no objection to these two points. But we note as a matter of procedure, the disagreement acknowledged in the explanatory text in relation to paragraph (7) whilst simultaneously including it without square brackets - with non-square-bracketed text described in the introduction as text for which the President has no doubt that there is consensus. We find this **drafting methodology** confusing. Like others, we would find it useful to have a text that includes all options and proposals (with attribution), so that they can be fully discussed by Council members.