

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.

## **Regulation 2**

### **Principles, approaches and policies**

1. These Regulations, and any decision-making thereunder, shall be applied in conformity with the principles governing the Area embodied in Section 2 of Part XI [and in Part XII] of the Convention.

[1. bis These Regulations shall also be applied in accordance with the policies relating to activities in the Area established in Articles 150 and 151 of the Convention and in the Annex of the Agreement.]

2. [Recognizing that the rights in the Resources of the Area are vested in humankind as a whole, on whose behalf the Authority shall act,] exploitation in the Area shall be carried out for peaceful purposes and for the benefit of humankind as a whole, taking into particular consideration the interests and needs of developing States, and [while] ensuring the effective Protection of the marine environment, including biological diversity and ecological ecosystem integrity, from harmful effects which may arise from such activities in the Area consistent with Article 145 of the Convention.

[3. Exploitation in the Area shall not commence until the legal framework intended for the effective protection and preservation of the Marine Environment is adopted and scientific evidence demonstrates that the Exploitation will be conducted in such a manner as not to cause significant and harmful changes to the Marine Environment and its resources and to effectively protect and preserve the Marine Environment pursuant to article 145 and [article 209 of] Part XII of UNCLOS.]

[3. Alt. Exploitation in the Area shall not commence until:

(a) The legal framework intended for the effective protection and preservation of the Marine Environment has entered into force [and the Authority has adopted an environmental policy];

(b) The implementation of [Target 3 of] the Kunming-Montreal Global Biodiversity Framework is well on track in the area beyond national jurisdiction; and

(c) Scientific evidence demonstrates that Exploitation will be conducted in such a manner so as: not to cause significant and harmful changes to the Marine Environment and its resources, [pursuant to Article 196 of the Convention, and] to effectively protect and preserve the Marine Environment, [including biological diversity and ecosystem integrity] pursuant to Article 145 and Part XII of the Convention, [including biological diversity and ecosystem integrity], and not to impede the full implementation of [Target 3 of] the Kunming-Montreal Global Biodiversity Framework in the area beyond national jurisdiction.

[4. The following principles and approaches shall guide the application of these Regulations]:

- (a) Intergenerational equity;
- (a) bis The principle of the common heritage of humankind
- (a) ter The principle of equity and the equitable sharing of benefits;
- (a) quat The principle of uniform and non-discriminatory application;
- (b) Precautionary principle or precautionary approach as appropriate;
- (c) Ecosystem approach;
- (c) bis An integrated approach to ocean management;
- (d) Polluter pays principle;
- (e) Open access to non-confidential data, and information;
- (f) Transparency in decision-making, including effective stakeholder involvement and public participation;
- (g) The use of the scientific methods taking into account the Best Available Scientific Information, as defined by the Council; and
- (h) The use of relevant traditional knowledge of Indigenous Peoples and local communities where available.]

5. Activities in the Area shall be carried out for the benefit of humankind as a whole, irrespective of the geographical location of States, whether coastal or land-locked, and taking into particular consideration the interests and needs of developing States.

6. Members of the Authority, Sponsoring States, Contractors, and the Authority shall use best efforts to ensure that the Authority performs its functions.

7. Members of the Authority, Sponsoring States, Contractors, and the Authority shall use best endeavours in their actions to uphold public trust and regulatory integrity of the Authority, and shall not engage on decisions in which they have a conflict of interest.

#### Comments

- Delegations continue to disagree in particular on the necessity of (and if so, the preferred version of) paragraph 3. This text retains the two iterations of paragraph 3 which received some support in the past, with all remaining proposals available online on the Authority's website.
- The revised draft also implements a number of restructuring proposals, and the text is presented in a clean version.

The use of 'clean version' here is inconsistent with the **drafting modalities** described in the President's introduction to this new text, and unhelpful as it obscures what changes have been made.

For **paragraph (1 bis)** - which was paragraph (5) in the February 2024 version of the text - our notes show a proposal from Portugal, supported by Ireland, to add wording here to include any General Policies adopted by the Assembly in accordance with Article 160. We support this proposal (and heard no objection to it, so are unsure why it has not been reflected in this new text).

This text's version of regulation 2 perpetuates what we think was an oversight in the February 2024 text, deletion of previous paragraph (2 bis) ("*Exploitation in the Area and other activities in the Marine Environment shall be carried out with **reasonable regard** for each other in accordance with article 147 of the Convention*"). We were not aware of any specific objections having been raised to that previous paragraph 2 bis, but do recall Germany, Italy and Portugal all requesting its re-insertion in March 2024, which we also support.

As a drafting note, we see in regulation 2(2) use of words (e.g. ‘exploitation’ and ‘marine environment’) that we believe should be capitalised to indicate that the **defined terms** are intended to apply.

We are pleased to see re-introduction of the paragraph (3) options. We consider it important that the ISA does include specific conditions that Council agrees are **prerequisites to Exploitation** commencing. Indeed, the precautionary approach / principle requires ‘cost-effective measure to prevent environmental degradation’ in the face of scientific uncertainty and the risk of irreversible damage. Inclusion of such ‘conditions precedent’ in the regulations reflects that obligation if they prevent Exploitation being permitted before relevant safeguards in place. It is also a means to operationalise the policy intent of Council, and to manage expectations and ensure a level playing field for potential investors and contractors. In general, we prefer paragraph (3 Alt) as more precise and enforceable than the other (3) wording.

In relation to (3 Alt)(a), we support the proposal to have an overarching **environmental policy** for the ISA, containing strategic environmental goals and objectives - and indeed consider it imperative to set a framework and a direction from Council for other instruments being developed, such as REMPs and environmental threshold standards. Although the LTC committed in 2019 to ‘prepare draft environmental goals, objectives and principles to support the development of standards and guidelines’ for the Council’s approval (ISBA/25/C/19/Add.1, paragraph (20)(f) – accessible at, <https://www.isa.org.jm/wp-content/uploads/2022/06/c19-add1-e.pdf>), there seems to be no progress on producing such a document. We hope inclusion of reference to this policy in Regulation 2 can avoid this important tool for environmental protection being further postponed and de-prioritised.

In relation to (3 Alt)(c), we welcome reference in the ISA’s Exploitation Regulations to **other international rules and processes**. We see this as aligning with the important legal principle of systemic integration, which urges a multilateral forum and international law-making process such as the ISA to take account of pre-existing outcomes of other multilateral fora and international law processes, to avoid fragmentation and inconsistencies in treaties and their interpretations (Article 31(3)(c) of the Vienna Convention on the Law of Treaties - see also commentaries from the International Law Commission).

We also recall Australia proposing during the March 2024 session of the Council some alternative language for **regulation 2(3)** (with a view to including references to other international law rules and processes whilst ‘future-proofing’ the Regulations). Along very similar lines, we note an alternative written submission made by the Netherlands for the same paragraph (<https://www.isa.org.jm/wp-content/uploads/2024/09/Netherlands-DR2.pdf>). We are disappointed to see neither formulation reflected here. We would suggest all such proposals be incorporated to allow for full discussion by the Council. We found the **Netherlands’ proposal** to include reference to the different phases of Standards and Guidelines, as prerequisites to Exploitation, helpful. Noting this formalised what we understand has previously been agreed by the Council. We recall that this proposal was not only made in a written submission but was also made orally by the Netherlands during the March 2024 session, where it was supported by three other delegations and objected to by none.

Paragraph (4)(c) has been amended to “**ecosystem approach**” (without definition). This was formerly “ecosystem-based management approach” which had a definition in the Schedule (now deleted). We note that a third formulation (“ecosystem-based approach”) is used in draft regulation 44 (without definition). We suggest that one term be chosen, used consistently, and defined to ensure mutual understanding of the term’s application to the Regulations. In this regard, we are fine with the use of “ecosystem approach” and recommend that the Regulations adopt or refer to the decision taken at COP-5 of the Convention on Biological Diversity on this specific matter (“Decision V/6: Ecosystem approach”, May 2000 <https://www.cbd.int/decision/cop?id=7148>).

We note that the words ‘inclusivity’ and ‘accountability’ have been deleted from paragraph 4(f) and would find an explanation useful. We could see a logic if ‘inclusivity’ was deleted on the basis that the same principle is covered by ‘public participation’ - and strongly recommend that the ISA urgently develops an institutional policy that sets out minimum standards and modalities for public participation procedures at the ISA, so stakeholders can be assured of such inclusivity. But we can see no logic to deletion of ‘accountability’ from regulation (2)(4)(f). We consider that ‘accountability’ encompasses important elements of lawful decision-making by a public body such as the ISA, as well as access to justice, which are otherwise lacking in the Regulations. We request re-insertion of ‘accountability’.

In paragraph 4(h) we support the inclusion of traditional knowledge of Indigenous Peoples and local communities; we do not support the language “where available.” It seems clear to us that Indigenous knowledge about the deep ocean exists and, having listened to Indigenous Peoples presenting at the ISA in recent years, we believe it is available by starting from persons known to the ISA.