September 2025

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 4

Rights ~~[~~and legitimate interests~~]~~ of coastal States and duty to notify

1. Nothing in these Regulations shall affect the rights and legitimate interests of [potentially affected] 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].

[1bis. [The Council shall elaborate standardized criteria for] [A Standard shall govern the] the definition of potentially affected coastal States. During the consideration of an application for Exploitation the Council shall define the list of potentially affected coastal States and address the issue of the relevant rights of coastal States.]

[1 ter. The Secretary-General shall inform potentially affected coastal States [~~,~~ as identified in the applicable Regional Environmental Management Plan], upon the submission of an application for Exploitation. Appropriate consultation and notification Procedures shall be developed within three years after the adoption of these Regulations or before any Commercial Production commences, whichever takes place first.]

2. Contractors shall take [in conformity with rules, regulations and procedures of the Authority all necessary measures] [~~all measures required and 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, [interference with the ecological balance of the Marine Environment] 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 Incidents or activities in ~~its~~their Contract Areas do not spread into areas under the jurisdiction or sovereignty of a coastal State.

3. [Contractor measures pursuant to paragraph 2] [~~Such measures by Contractors~~] shall include:

(a) ~~[~~Targeted and proactive consultations with any potentially affected coastal State in accordance with Article 142 of the Convention~~, [and as identified in the relevant Regional Environmental Management Plan]~~, prior to submitting an application for approval of a Plan of Work;

(b) Maintenance~~aining~~ throughout the term of the Exploitation C~~c~~ontract;

(i) Monitoring of potential transboundary impacts [to the areas within the jurisdiction of States];

(ii) Accurate and precise recording of the operational area [in conformity with these Regulations]; and

(iii) Consultations with any potentially affected coastal State, [in conformity with these Regulations and Article 142 of the Convention,] with a view to ensuring that the rights and legitimate interests of coastal States are not infringed.

4. Any coastal State which has grounds for believing that any activity under a Plan of Work in the Area by a Contractor or the Enterprise is likely to ~~could~~ cause harmful effects or a threat of harmful effects to its coastline or to the Marine Environment under its jurisdiction or sovereignty, or may result in Exploitation by the Contractor of resources lying within national jurisdiction without the relevant State's consent, shall notify the Secretary-General in writing of the grounds upon which such belief is based. The Secretary-General shall [~~immediately~~] [promptly] inform the ~~[~~Commission, the Council~~],~~ and the Contractor and its Sponsoring State or States or the Enterprise, of such notification. The Contractor and its Sponsoring State or States or the Enterprise shall be provided with a reasonable opportunity to examine the evidence, if any, provided by the coastal States as the basis for its belief, and submit their observations thereon to the ~~[~~Secretary-General~~]~~ ~~in the shortest possible time~~[as soon as practicable].

5. Regulation 4(5) shall apply mutatis mutandis 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, [and the procedure established in Regulation 4(7) shall also apply].

[5 Alt. Any State with grounds for believing that harmful effects to the Marine Environment were caused in any location by an activity under a Plan of Work, shall notify the Secretary-General in writing of the grounds upon which such belief is based. The Secretary-General shall promptly inform the Commission, the Council, and Contractors of relevant Regional Environmental Management Plan Area and their Sponsoring State or States or the Enterprise, of such notification. The Contractors and their Sponsoring State or States or the Enterprise shall be provided with a reasonable opportunity to examine the evidence, provided by the coastal States as the basis for its belief, and submit their observations thereon to the Authority. The Council shall consider such information.]

6. If the ~~[~~Commission~~]~~ determines, in accordance with the applicable Standards and taking into consideration the Guidelines, that there are clear grounds for believing that, as a result of the Contractor's operations:

(a) Serious Harm or the threat of Serious Harm to the Marine Environment is likely to occur or has occurred, the Secretary-General shall notify the Sponsoring State, and ~~[~~the Commission~~]~~ 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. [Pending the receipt of an emergency order, the Contractor shall take necessary measures in accordance with Regulation 28(3) and where applicable implement its Emergency Response and Contingency Plan pursuant to Regulation 33][~~Upon the receipt of the emergency order, the Contractor shall take necessary measures in accordance with Regulation 28(3)~~]; or

[~~(b) Other harmful effects, or threat of harmful effects, to the Marine Environment is likely to occur or has occurred, the Secretary-General shall notify the Sponsoring~~ State, ~~and the [Commission] shall recommend that the Council issue a compliance~~ notice ~~pursuant to Regulation 103 or direct an inspection of the Contractor's activities~~ pursuant ~~to Article 165 (2) (m) of the Convention and Part XI of these Regulations.~~]

7. 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 c~~E~~xploitation 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, ~~[and 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~~]~~.

Comments

- Delegations continue to diverge on the role and function of Regional Environmental Management Plans (including in the context of this draft regulation). Delegations are invited to consider this matter further.
- A new paragraph 1 bis has been suggested to tackle the position of coastal States. If the Council were to agree to 1 bis, the additional reference to Regional Environmental Management Plans designating the coastal State in question in paragraph 3(a) appears to be unnecessary.
- Further proposed amends are presented based on oral and written proposals received which, to date, has not been expressly opposed.

In our view DR4 needs re-consideration to ensure (i) that it aligns with other regulations, and (ii) that it performs the function it is intended for i.e. setting out the rights of coastal States. This would seem to be a good next area of focus for the **intersessional working group on Coastal States** that commenced after the ISA's July 2024 session, and which has so far worked on DRs93 ter and 93 quater[1] (with which DR4 should now be aligned, to avoid duplication and contradiction).

We also consider that, across the existing regulations that speak to coastal States rights, we still do not seem to have clear answers to the fundamental **questions about States' rights that need to be settled**. We see those questions as the following:

(1) Are there categories of States that have differing interests and rights from other States in terms of how they may be impacted by the harmful environmental effects of Exploitation (and is there a difference between 'interests' and 'rights')? We think: yes, to both questions.
(2) If so, what are those categories and how are they to be defined? This seems to have been the basis of some proposals in DR93ter but not clearly delineated, nor carried through to DR4. We think there may be different (though potentially inter-linked categories, e.g.:
    - States who have mineral deposits within national jurisdiction that straddle the boundary with the Area (Article 142 UNCLOS). The risk here may be twofold i.e. that their minerals are extracted without their consent, or that a ISA contractor working nearby causes harmful effects that prevent or make more difficult the State's ability to undertake future exploration or exploitation of the minerals within national jurisdiction.
    - States who are at risk from activities in the Area causing harmful effects to the marine environment that travel transboundary to affect sites within national jurisdiction or control. (Articles 145, 194(2), 209 UNCLOS, and the 'no harm' and prevent principles of international law as embodied in various treaties including the CBD and the UNFCCC). We note this may include impacts to the Continental Shelf or EEZ, to the coastline, or to exploration or exploitation sites under that State's control bordering the contract area in question.
    - States who are at risk of other adverse outcomes from the harmful environmental effects of activities in the Area. This may include impacts on economic rights (e.g. fisheries, tourism), impacts on the human rights (e.g. livelihoods, food security, human health, the right to a healthy environment, Indigenous rights). We note that these States may not necessarily even be coastal States, or be located close to the Contract Area in question.
(3) How, by whom and when are such States to be identified? We see that new insertions to DR4 seek to address this.
(4) What are the interests or rights that attach to the different State categories? Do these have procedural implications only e.g. a right to an additional notification and consultation process seem to suggest, or in some cases are there substantive rights implicated e.g. a right to prior consent or veto of an activity, or a right to compensation? We believe that both may apply depending on the categorisation of the State.

[1] https://www.isa.org.jm/wp-content/uploads/2024/11/DR.93ter_Rev2_DR.93quarter_Rev2_DR.93quinquies_submited_01.11.2024.pdf

Unless and until these points are agreed, it will be difficult to finalise DR4, and we find that currently DR does not answer the relevant questions and seems weak in terms of identifying or upholding individual State's rights not to suffer from harmful environmental effects of activities in the Area.

For specific drafting comments, we find **paragraph (1 bis) and (1 ter)** helpful. We agree that it seems an appropriate function for the Council, and that REMPs can also play a role. Though some harmonisation between the two paragraphs, and also with DR93ter (2) (which seems to contain a separate track of self-identification), may assist in clarifying roles and process. We also take the opportunity to reiterate that the existing and draft **REMPs** developed by the ISA to date do not in fact include an examination of who may be classified as potentially affected coastal States. We suggest this should be remedied, and included as required contents of any REMP.

We are however confused by the proposed addition at the end of **paragraph (1 ter)**: "*Appropriate consultation and notification Procedures shall be developed within three years after the adoption of these Regulations or before any Commercial Production commences, whichever takes place first.*" The drafting does not specify who is doing the developing, rending it hard to understand or enforce. We are also unclear whether the procedures referred to are for the ISA or for the Contractors to follow. And we are confused by timing. If the notification to States must happen before an Exploitation contract decision, then procedures developed after that (but before commencement of Commercial Production) will be too late.

Paragraph (2) appears to contain a standalone obligation for Contractors to protect the Marine Environment. As this part is not linked to coastal states, we would suggest separating it out and move it to the part of the regulations that deals with contractor obligations. We consider the duty needs re-wording. It should be a **mandatory obligation of *outcome* (i.e. not to cause the harm) and not only an obligation of conduct** as it is currently worded ('to take measures'). We note that DR13(9) (setting out the criteria for review of an Exploitation application) requires that no environmental harm is caused anywhere outside of the Contract Area and would suggest that this restriction also be used in DR4 and in other regulations where Contractor duties are set.

It is unclear how **paragraphs (4) and (5)** align with draft regulations 96 ter ("Request for inspection in the event of harmful effects to the Marine Environment")? DR4 (4) and (5) set out a procedure of: notification, examination of evidence, and possible compliance action. Where does an inspection (triggered under DR96 ter) fit in?

In paragraph (4) the word 'Exploitation' should not be capitalised, as the **defined term** relates to activity in the Area only, whereas paragraph (4) is intended to cover activity within national jurisdiction.

We would like to see inclusion of **new paragraphs (4 bis) and (4 ter)** proposed by the Intersessional Working Group on Underwater Cultural Heritage but unfortunately omitted from this text. The requirement to protect and safeguard UCH and the creation of a UCH Committee are key conceptual issues that should be included here for discussion.

We query whether **paragraph (6)** should be included in DR4 at all. It does not refer specifically to transboundary harm or impacts on coastal States. Compliance response in the event of possible harm to the Marine Environment is covered more generally elsewhere in the Regulations (e.g. DR33 "Preventing and Responding to Incidents". DR 96 quater "Request for inspection in the event of harmful effects to the Marine Environment", and DR103 "Non-Compliance Notice, Suspension, and Termination of Exploitation Contract"). Currently the different processes in different DRs could be triggered by the same issue and run concurrently but involve different parts of the ISA and produce different results, which is inefficient and confusing. If para 6 is retained, the drafting should be clarified. The wording 'and take all necessary measures to prevent Serious Harm to the Marine Environment' is unclear. We cannot interpret whether this wording is meant to place a duty on the Commission to take such measures; or whether it is suggesting that the LTC recommends the Council to take such measures; or whether it is suggesting that the Council's order may require the Contractor to take such measures. We also consider a cross-reference to the process for suspension contained in DR29ter may be useful in paragraph (6)(a) where a suspension is envisaged.

Similarly, with **paragraph (7)**, we are unclear whether there is a reason to set a specific **liability rule** only for environmental harm to States, as opposed to (i) other types of harm (e.g. to persons, property, commercial interests), and (ii) suffered by any person. It would be better to deal with liability and claims for compensation and other remedies as a whole in the Regulations, and not piecemeal. Liability is another topic which would benefit from a shared

conceptual understanding; without that understanding and a common goal to operationalise, it is not possible to finalise the regulations.

We are further unsure why 'strictly' has been deleted in paragraph (7) and suggest its reinstatement, in order to operationalise the **polluter pays principle**, and to ensure Contractor liability for any unpermitted harm arising as a result of the Contractor's activities in the Area regardless of conduct or fault. Indeed, it is interesting to us that paragraph (7) ends with "*and taking into account any compensation already claimed against the Contractor in national proceedings brought in accordance with Article 235 of the Convention*" [which we presume should be restricted to compensation paid to the same party for the same damage]. This drafting suggests that DR4(7) is intended to cover some other type of (international) proceedings for compensation, not in a national court. What proceedings are envisioned, and in what forum? We do not think the Regulations contain clear **liability procedures** and rules as currently drafted and again urge member States to take this up as a priority area.