TEMPLATE FOR SUBMISSION OF TEXTUAL PROPOSALS DURING THE 28TH SESSION: COUNCIL - PART II

Please fill out one form for each textual proposal which your delegation(s) wish(es) to amend, add or delete and send to council@isa.org.jm.

1. **Name of Working Group:**
   President's Text

2. **Name(s) of Delegation(s) making the proposal:**
   The Pew Charitable Trusts

3. **Please indicate the relevant provision to which the textual proposal refers.**

   Schedule Use of terms and scope

4. **Kindly provide the proposed amendments to the regulation or standard or guideline in the text box below, using the "track changes" function in Microsoft Word. Please only reproduce the parts of the text that are being amended or deleted.**

"~~Commission~~ LTC" means the Legal and Technical Commission of the Authority.

…

[Alt "Contractor" means a party to an exploitation contract (other than the Authority) in accordance with Part III of these regulations] [and, where the context applies, shall include its employees, subcontractors, agents and all persons engaged in working or acting for them in the conduct of its operations under the contract.]

…

"Designated representative" means the person so named on behalf of a Contractor on the Seabed Mining Register or prior to award of contract, in the application.

…

"Exploit" and **"Exploitation"** mean the recovery for commercial purposes of Resources in the Area with exclusive rights and the extraction of Minerals therefrom, including the construction and operation of mining, processing and transportation systems in areas beyond national jurisdiction ~~the Area~~, for the production and marketing of metals, as well as the D~~d~~ecommissioning and C~~c~~losure of mining operations.

…

"Guidelines" means documents ~~that provide guidance on technical and administrative matters,~~ issued ~~by the Authority~~**]** [Authority ~~**Commission and the Secretary-General, respectively**~~] pursuant to regulation 95. ~~[Guidelines have to be considered as recommendatory].~~

~~**[Alt "Guidelines"** means a document that supports the implementation of the Regulations from an administrative and technical perspective. Guidelines will also clarify documentation requirements for an application, detail process requirements (e.g. for the public consultation process, annual reporting and periodic review), and provide guidance on the interpretation of regulatory provisions. The Guidelines are recommendations and not requirements].~~

…

"Mitigate" and **"Mitigation"** includes:

(a) Avoiding an Environmental Eeffect altogether by undertaking or not undertaking a certain activity or parts of an activity;

(b) For Environmental Effects that cannot be avoided, mMinimizing effects by limiting the degree or magnitude of the activity and its implementation [to the extent practicable and necessary to ensure protection of the Marine Environment];

(c) For Environmental Effects that cannot be avoided or minimised rRrectifying the effect by repairing, rehabilitating or restoring the affected Marine Environment; and

(d) For Environmental Effects that cannot be avoided, minimised or rectified, rReducing or eliminating the impact over time through preservation and maintenance operations during the life of the mining activity;

~~[(e) Offsetting, only as a last resort.].~~

…

"Rules of the Authority" means ~~[the Convention], [the Agreement]~~, these regulations and other rules, regulations and procedures of the Authority [including Standards] ~~**[and Guidelines]**~~ [decisions of the Council or Assembly of the Authority, and any other ISA instruments expressed as being binding upon Contractors] as may be adopted from time to time.

5. Please indicate the rationale for the proposal. [150-word limit]

Regarding **"Authority" t**he Regulations should clarify when the Enterprise is included within the use of the word 'the Authority' and when it is not. There is a tension and potential conflict arising from the status of the Enterprise as both a Contractor and an organ of the Authority, which will require careful management. To start, the Enterprise should not be included in the general definition of 'the Authority', but should be specifically referenced in certain circumstances (e.g. requirements to adhere to policies of the ISA), and in such instances the wording 'and The Enterprise' will need to be added. A similar consideration and delineation will need to occur with regards the Enterprise and the definition of 'Contractor' for the purposes of the Regulations.

Regarding **"Agreement"** This definition needs to be applied consistently throughout the Regulations, as we currently see different references to the Agreement e.g. 'the Agreement relating to the Implementation of Part XI of the Convention', or 'the 1994 Agreement'.

Regarding **"Closure"** We support inclusion, and the substance, of this definition.

Regarding "**Commercial Production**" we agree with the footnote (and the note of the Chair of the Open-Ended Working Group in his facilitator's text in relation to DR 64) which state that a clearer definition of 'Commercial Production' is needed. Commercial Production is a key milestone within the mining operation, e.g. the commencement of Commercial Production is the date from which royalties must be paid, and the end of Commercial Production is the date at which the Closure Plan is implemented. Given that both the commencement and cessation of Commercial Production imply financial costs to the Contractor, there may need to be not only an objective definition of 'Commercial Production' in the Regulations, but also an objective process by which the ISA can verify whether or not Commercial Production has commenced, is being maintained, and/or has ceased. We note some attempt to achieve this in the Open Ended Working Group on the payment regime with regards DR27, and note that the work on that Draft Regulation needs to be aligned with the various references to Commercial Production in the President's text.

This may be an area in which precedent from national jurisdiction is useful. We note, for example, the following definition of 'Commercial Production' in the Model Mining Development Agreement (prepared by the Mining Law Committee of the International Bar Association.) "production equal to [sixty percent (60.0%)] of the Project's constructed initial annual design capacity as shown in the Feasibility Study [Mining Workplan], averaged over a continuous three-month period" - copy accessible here: https://www.mmdaproject.org/

Regarding "**Commission**" We wonder whether 'the LTC' may be a better defined term for the Legal and Technical Commission, to avoid confusion with other Commissions that will or may be created in the future (e.g. the Economic Planning Commission).

There is a use of the term '**communication'** in DR3 which does not appear to match this definition. The word could perhaps be replaced or deleted from DR3.

Regarding "**Contract Area**" Noting that this definition is limited to the Area (ie the seabed, ocean floor and subsoil only), checks should be made throughout the regulations to ensure the wider marine environment is not inappropriately excluded when the term 'Contract Area' is used. For example, DR46 as currently drafted requires the Contractor's delivery of environmental objectives 'in the Contract Area' (only) or Annex VI refers to monitoring stations or protected areas in the 'Contract Area' (only) - which are presumably inadvertent exclusions of the water column, sea surface etc, which should be corrected.

Regarding **Alt "Contractor**" We support this alternative language, though suggest a small addition to indicate that the party concerned is the other party only, and not the Authority (who is also a party to the Contract). Additionally, we note this definition would, and presumably intends to, include the Enterprise. If there are any instances in the Regulations where the term 'Contractor' is not intended to include the Enterprise, this should be expressly stated.

Regarding "**Decommissioning**" We support this addition - the draft Regulations repeatedly use the term 'decommissioning' without defining it. It is also often used in the phrase 'decommissioning and closure' implying that these are two distinct terms with different meanings. These terms should be defined for the avoidance of doubt.

Regarding "**Designated Representative**" we suggest an addition to capture a situation prior to award of a contract, to ensure the definition works for all uses of 'designated representative' in the Regulations. Given there are references that arise in the context of an application i.e. before a contract has been awarded (which would mean there was not yet any entry on the Seabed Mining Register).

Regarding "**Feasibility Study**", as indicated previously (in the context of DR25), we believe further consideration should be given to the definition and content of a Feasibility Study. The meaning attributed to it here in the Schedule, is extremely wide and would appear to overlap considerably with the Mining Workplan, EIS, EMMP and Financing Plan, already required under the regulations. We consider that the Feasibility Study, as used in the context of these Regulations, is really a study designed to verify or modify the information previously supplied in the Mining Workplan, and would suggest this is reflected more accurately in this Schedule, as well as in the body of the Regulations.

Regarding "**"Good Industry Practice" ["Best Industry Practice"]** We are a little confused with the use of the terms: GIP, BEP, BASE/BASI, BAT throughout the Regulations, and consider this is a matter than could be usefully taken as a specific issue for attention from a working group or other volunteer, to analyse how the terms are used in different places in the Regulations, and to check that it is consistent, and that the definitions provided in this Schedule make sense. In our view, Best Environmental Practices, which is a standard required by the ISA from Contractors (and sponsoring States) in delivering their environmental obligations under the Regulations, should encompass use of Best Available Scientific Evidence/Information, and Best Available Techniques and this should be clear from the definition of BEP in the Schedule. So that each time 'BEP' is used in the Regulations, there is no need to add 'BASE/BASI' or 'BAT' alongside. Whereas, in our view, 'Good Industry Practice' represents a threshold of reasonableness within the context of the range of abilities and practices within the sector. GIP should be used in the Regulations each time there is a need to hold the Contractor to perform its functions with due diligence and reasonable care (ie not negligently). GIP should not encompass BEP; they are separate standards that should be applied independently.

With regards the definition for '**Guidelines'** in the Schedule, we would caution against insertions here that attempt to have operative effect. The Schedule should be for defining the term only. Not for establishing rules (e.g. 'Guidelines are recommendatory', 'Guidelines will provide guidance on the interpretation of regulatory provisions' These points should be included in DR94. The Schedule should simply describe Guidelines as meaning 'documents issued pursuant to regulation 95'.

Regarding **Alt "Material Change**", we support the alternative text.

Regarding **"Mitigate"** and **"Mitigation", w**e suggest that the definition of Mitigate in the Schedule should more clearly show that it is a hierarchy, so that minimization is only used for effects that cannot be avoided, restoration is only used for effects that cannot be avoided or minimized - and so on. However, we do not believe offset should be included in the definition of Mitigate or referenced in the regulations as it is here. While off-setting is often a part of the mitigation hierarchy in other sectors, based on current scientific evidence, offsetting the impacts of environmental harm towards unique and vulnerable deep ocean ecosystems will not be possible. Ecosystems are not fungible, and the preservation of one cannot offset the destruction of another, and so we cannot see offsetting in that context ever being compatible with UNCLOS.

We also suggest that 'Environmental Effects' with capitalised 'e's to indicate it is a defined term, should be used throughout this definition. Finally, we would welcome a 'legal scrub' whereby it can be checked each time the term 'Mitigate' or 'Mitigation' is used in the Regulations that it is used correctly. We have noticed in the past a tendency for delegates to want to add words like 'avoid, minimise' etc. into the Regulations text every time the word Mitigate is used, presumably not realising those concepts are already captured in the defined term. See for example DR44 which currently reads 'and Contractors shall apply a priority order to avoid, minimize, mitigate, [and] remediate, [and restore] harm to the Marine environment', which means avoid, minimise, restore etc. are being required from Contractors twice.

Regarding "**Monopolization"** we agree with the delegations who have noted that the ISA needs to agree a definition of 'monopolization' to be applied for the purposes of contract approval. UNCLOS Annex III, Article 6(3)(c) contains one example of possible monopolization. But that applies only to developed States with nodule contracts (and not to non-State Contractors, any entity operating in reserved areas, or any crusts or sulphides contracts); and sets an almost unattainable threshold of geographic coverage before monopolization is deemed to have occurred (e.g. 2% of the Area). A broader proposed definition for monopolization should be provided in the Regulations. This could be done by a new insertion of a defined term in the Schedule to the Regulations. We note there is suggested text in this regard, in the OEWG's facilitator text [prepared for the July 2023 session] (which refers to 75% of the ore extracted from the Area at any time), which would still like to understand more about the rationale behind it. This seems like an important policy point, and we think it may be a subject upon which Council could request a recommendation from the LTC. We would also like to highlight the importance that the parent company, and wider corporate structure, of a contractor should be taken into account, to avoid monopolisation via a loophole

Regarding "**Rules of the Authority**", we support most of these changes in the definition of 'Rules of the Authority', which we consider should include all and any instruments from the ISA that are intended to have binding effect. For this reason we do not agree that Guidelines should be included here. The insertion 'including Standards' (proposed by Australia) suggests that Standards would be among the rules, regulations and procedures ('RRP') of the ISA. We note this is consistent with the recommendation of the LTC that Standards are RRPs. However we note that elsewhere the Regulations use '[RRP] as well as Standards' suggesting that Standards are not RRP. The Council should decide whether Standards incorporated into these Regulations are RRP; and this should be reflected throughout the Regulations. NB this may be an important distinction because UNCLOS enables suspension or termination of a Contractor's rights in the event of violation of the contract or RRPs, and not in the event of violation of other instruments.

Regarding "**Special Circumstances**", If the term 'special circumstances' is used only in DR70 (in relation to payment of royalty by instalment) [which we note is under discussion for deletion,in the OEWG], then we do not consider it necessary for there to be a defined term in the Schedule. If the wording 'special circumstances' is retained in DR70, the we would instead support the current proposal made in the OEWG facilitator's text that Standards will set out the details of such special circumstances.

Regarding '**Standards'**, we support Alt 2. As this avoids attempts to include substantive operative provisions, in the definitions section of the Regulations.