

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

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:** ENVIRONMENT

- 2. Name(s) of Delegation(s) making the proposal:** PORTUGAL

- 3. Please indicate the relevant provision to which the textual proposal refers.**
New provision regarding consultations with coastal States: Regulation 93ter

- 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.**

Regulation 93ter

Consultations with coastal States

1. Targeted and proactive consultation with adjacent coastal States and any other coastal States adjacent to the areas of a planned activity when they are potentially most affected States, shall take place at different stages of a plan of work, when documents are being developed and at other appropriate times during and at cessation of exploitation activities, in particular at the development of:
 - a) Environmental Plans;
 - b) Any review/update of the environmental plans in light of Material Change;
 - c) Performance Assessment; or
 - d) Closure Plans.

2. Potentially most affected coastal States shall be determined by taking into account the potential effects of the planned activity and includes:
 - a) Adjacent coastal States and any other coastal States adjacent to the areas of a planned activity whose exercise of sovereign rights for the purpose of exploring, conserving or managing natural resources may reasonably be affected by the activity;
 - b) Adjacent coastal States and any other coastal States adjacent to the areas of a planned activity whose exercise of jurisdiction with regard to the protection and preservation of the marine environment may be reasonably affected by the activity; and
 - c) Coastal States identified as potentially affected by the REMP.

3. The Secretariat should assist developing States, including small islands developing States, upon request, to identify potential effects of the planned activity on areas under their jurisdiction.
4. At the different stages indicated in paragraph 1 above, the following steps will be taken:
 - a) The contractor/sponsoring State informs the Secretary-General that is ready to engage in a target and proactive consultation. The contractor must then provide a geographical description of the area to be covered by the plan of work and may indicate any coastal State adjacent to the areas of a planned activity that they believe to meet the criteria for potentially most affected States based on studies and available knowledge;
 - b) The Secretary-General notifies all States, via Note Verbal, that a plan of work is being prepared for the area "X" and requests them to communicate, within [...] days, whether they meet the criteria for potentially most affected coastal States;
 - c) Coastal States that believe they meet such criteria must justify this based on the criteria outlined above in Section II and other relevant information;
 - d) The Secretary-General informs the contractor/sponsoring State of the coastal States that have communicated that they meet the criteria for potentially most affected;
 - e) The contractor must then undertake targeted and proactive consultations with the coastal States in question [to be further developed in a standard/guideline, which may address inter alia the following issues: (i) the provision of access to information to the coastal States in question relating to the environmental impacts of the planned activity; (ii) consideration of the views and comments of the coastal States in question; (iii) provision of written responses specifically addressing such views and comments, in particular with respect to potential impacts in areas under national jurisdiction; (iv) revision of the planned activity, if appropriate].
5. If the planned activity includes resources that lie across limits of national jurisdiction, the contractor/sponsoring State must exercise due regard to the rights and legitimate interests of the coastal States across whose jurisdiction such deposits lie, and shall:
 - a) Notify the coastal State of the intention to submit a plan of work;
 - b) Hold regular consultations with the coastal State in question to avoid violation of its rights and interests in the marine resources over which the coastal State exercises sovereignty;
 - c) Obtain the prior consent of the coastal States in question if the activity could result in the exploitation of the marine resources over which the coastal State exercises sovereignty; and

- d) Provide opportunity and resources for the coastal State in question to monitor the exploitation activity within the meaning of Article 142 (1) and (2) of UNCLOS.

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

1. Our legal reading of UNCLOS, including Article 142, suggests that consultations of coastal States cannot be governed by an overarching rule for stakeholder consultations. Coastal States not only have certain rights and interests, but also have obligations by virtue of their geographic location. These special circumstances are recognized by UNCLOS, which accordingly affords coastal States specific prerogatives, including in terms of consultation, as reflected in Article 142. These are prerogatives that coastal States do not share with other stakeholders, including other States. Portugal is thus of the view that consultations with coastal States should follow a specific-tailored process, including formal arrangements for interaction between coastal States and contractors and other relevant stakeholders.
2. Article 142(2) requires consultations with the coastal State when the resource deposit in the Area lies across limits of its national jurisdiction. This provision aims to ensure that the sovereign rights of the coastal State over the mineral resources in question are respected by providing the coastal State with the opportunity and the ability to participate in the process. UNCLOS, however, does not provide a similar explicit mechanism for the purposes of paragraph 3. Such a mechanism is, nevertheless, essential to ensure that coastal States can fulfil their duty to prevent, mitigate, or eliminate grave and imminent danger to their coastline. Moreover, in those cases where the planned activity will affect or may potentially affect areas within national jurisdiction, such mechanism is likewise instrumental to allow the concerned coastal State(s) to fully exercise their sovereign rights for the purpose of exploring and exploiting, conserving, and managing of natural resources, as well as their jurisdiction with regard to the protection and preservation of the marine environment, in the areas within their national jurisdiction¹. This is the rationale behind Article 32 of the BBNJ Agreement, which states:

Parties shall ensure the timely public notification of a planned activity [...], and planned and effective, time-bound opportunities [...] for participation of all States, in particular adjacent coastal States and any other States adjacent to the activity when they are potentially most affected States [...].”²

¹ See, Article 56(a) and (b) of UNCLOS.

² Our emphasis. See, for the purposes of defining the term “potentially most affected States,” Article 32(2) of the BBNJ Agreement.

3. For the reasons stated above, targeted and proactive consultations with adjacent coastal States and any other coastal States adjacent to the areas of a planned activity when they are potentially most affected States must take place at an early stage, when documents are being prepared and drafted, and at other appropriate times during and at the cessation of exploitation activities, so that their rights and legitimate interests, that could potentially be affected by the planned activity, be duly regarded and reflected in those documents, as appropriate.
4. The outcome of the targeted and proactive consultations with adjacent coastal States and any other coastal States adjacent to the areas of a planned activity when they are potentially most affected States should include full acknowledgement of coastal States' input and, where appropriate, further engagement between the consulting and consulted parties with a view to addressing any substantive comments and/or concerns raised during the consultations. The procedure should thus be set up in such a way that it provides for:
 - a) contractors to consider and address the comments and observations of the coastal States in question in final documents; and
 - b) the right of the coastal States in question to react if the consulting party fails to consider and address their comments and observations.

I. Defining *potentially most affected States*

5. The term *potentially most affected States* is a crucial element of this regime. The BBNJ text³ can provide us insightful guidance not only in this regard, but also on a possible targeted and proactive consultation mechanism. The definition of this term takes into account the potential effects of the planned activity and includes:
 - a) Adjacent coastal States and any other coastal States adjacent to the areas of a planned activity whose exercise of sovereign rights for the purpose of exploring, conserving or managing natural resources may reasonably be affected by the activity;
 - b) Adjacent coastal States and any other coastal States adjacent to the areas of a planned activity whose exercise of jurisdiction with regard to the protection and preservation of the marine environment [of their EEZ] may be reasonably affected by the activity; and
 - c) Coastal States identified as potentially affected by the REMP.

³ See, Article 32(2) of the BBNJ Agreement.

II. Targeted and proactive consultation procedure

6. The procedure for the targeted and proactive consultation can be guided once again by the regime adopted for the EIA consultation under the BBNJ Agreement.⁴ The steps could be as follows:

- a) The contractor/sponsoring State informs the Secretary-General that it is preparing to submit a plan of work and is ready to engage in a target and proactive consultation. The contractor must then provide a geographical description of the area to be covered by the plan of work and may indicate any coastal State adjacent to the areas of a planned activity that they believe to meet the criteria for potentially most affected States based on studies and available knowledge;
- b) The Secretary-General notifies all States, via *Note Verbal*, that a plan of work is being prepared for the area “x” and requests them to communicate, within a reasonable time, whether they meet the criteria for potentially most affected coastal States;
- c) Coastal States that believe they meet such criteria must justify this based on the criteria outlined above in Section II and other relevant information;
- d) The Secretary-General informs the contractor/sponsoring State of the coastal States that have communicated that they meet the criteria for potentially most affected;
- e) The contractor must then undertake targeted and proactive consultations with the coastal States in question [*to be further developed in a standard/guideline, which may address inter alia the following issues: (i) the provision of access to information to the coastal States in question relating to the environmental impacts of the planned activity; (ii) consideration of the views and comments of the coastal States in question; (iii) provision of written responses specifically addressing such views and comments, in particular with respect to potential impacts in areas under national jurisdiction; (iv) revision of the planned activity, if appropriate*].

III. Timeline and support to developing States in particular small island developing States.

- a) The timetable for targeted and proactive consultations should be reasonable for all parties involved and allow for the full participation of developing States, including small islands developing States; and

⁴ See, Article 32(5) of the BBNJ Agreement.

- b) The Secretariat should assist developing States, including small islands developing States, upon request, to identify potential effects of the planned activity on areas under their jurisdiction.

IV. Resources that lie across limits of national jurisdiction

- 7. If the planned activity includes resources that lie across limits of national jurisdiction, the contractor/sponsoring State must exercise due regard to the rights and legitimate interests of the coastal States across whose jurisdiction such deposits lie, and shall:
 - a) Notify the coastal State of the intention to submit a plan of work;
 - b) Hold regular consultations with the coastal State in question to avoid violation of its rights and interests in the marine resources over which the coastal State exercises sovereignty;
 - c) Obtain the prior consent of the coastal States in question if the activity could result in the exploitation of the marine resources over which the coastal State exercises sovereignty; and
 - d) Provide opportunity and resources for the coastal State in question to monitor the exploitation activity within the meaning of Article 142 (1) and (2) of UNCLOS.