

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

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.

The facilitators' proposed amendments are reflected in red.

Pew's proposed amendments and our questions or comments regarding the facilitator's remarks are indicated as in-line edits in blue. Where we propose deletions of the facilitator's text this is shown in ~~in strikethrough and bold~~.

1. Name of Working Group:

IWG Environment

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

Pew Charitable Trusts

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

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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.

The purpose of the Fund is to finance ~~the funding of or compensation for~~ the implementation of any necessary measures designed to ~~prevent, limit or remediate~~~~[designed to prevent, reduce and control and if appropriate and feasible, limit and remedy]~~ mitigate or compensate for any loss or damage to the ~~marine environment of the Area or coastal states, or damage caused to third parties~~ arising from ~~exploration~~ ~~Exploitation activities in the Area~~, This includes the restoration and rehabilitation of the Area when technically and economically feasible and in accordance with Good Industry Practice, Best Environmental Practices and Best Available Techniques when the costs of such measures and efforts cannot be recovered from a Contractor or Sponsoring State, as the case may be for environmental damage outside of consented activity. Compensation shall include the costs for implementation of any necessary measures designed to prevent, reduce, mitigate, limit, and remediate any damage to the marine environment and its resources.

2. ~~Based on the precautionary-polluter pays principle the Contractor shall pay for any necessary measure to limit, remedy and compensate any damage to the Area arising from their mining~~ ~~Exploitation activities.~~

3. ~~In cases where the contractor's payment is insufficient to limit, remedy and compensate any damage to the Area arising from the mining activities, the compensation fund may be used.~~

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

As a general comment and as mentioned by others, we believe more discussion needs to be had on this provision. In our view, the purposes of the environmental compensation fund should be widened to address the recommendations of the ITLOS Advisory Opinion of 2011, to avoid a liability gap.

Para 1 could benefit from some restructuring and simplifying – the para could first set out the purpose of the Fund and state simply that the purpose of Fund is to provide adequate and prompt compensation for damages, including damages to the marine environment and the Area, caused by Activities in the Area.

Then it could set out the scope of Fund which would entail damages to the marine environment and to the resources of the Area. In this regard, we support the comments and text proposed by South Africa on behalf of the African Group so that the fund could be accessed for environmental damage caused under consented “activities” as well, such as might be the case if models for plume dispersion prove wrong and there are unanticipated adverse impacts.

And then the para should lay out who the eligible claimants are – which to our understanding would be broadly any entity suffering harm, including states, international organizations or private entities.

We also support the comments made by others that the EFC should only be accessed where attempts to recover damages from the liable party or parties (Contractor and/or sponsoring State) have proven unsuccessful. Further, it should also be clarified how the EFC is used in conjunction with the Contractor’s environmental performance guarantee, and also potential pay-outs from insurers. We presume that those pots should be exhausted first, and losses should not be double-claimed. Paras 2 and 3 therefore could be clearer. Perhaps para 2 could be reworded to state that based on the polluter pays principle, recourse to the Fund is to be provided when 1) The damages exceed the amounts recoverable under the Contractor’s insurance or

2) The damages are exempt from liability under the Contractor’s Insurance