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.**

   Annex X

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.**

Section 4
Security of tenure and exclusivity

4.1 The Contractor is hereby granted the exclusive right under this Contract to Explore for and Exploit the resource category specified in this Contract and to conduct Exploitation activities within the Contract Area in accordance with the terms of this Contract. The Contractor shall have security of tenure and this Contract shall not be suspended, terminated or revised except in accordance with the terms set out herein and the Regulations.

Section 7
Responsibility and liability

7.1 [In accordance with the 'polluter pays' principle,] the Contractor shall be liable to the Authority for the actual amount of any damage, including damage to the Marine Environment, arising out of its wrongful acts or omissions, and those of its employees, subcontractors, agents and all persons engaged in working or acting for them in the conduct of its operations under this Contract ~~including the costs of reasonable measures to prevent and limit damage to the Marine Environment,~~] [arising out of its wrongful acts [or omissions]], account being taken of any contributory acts or omissions by the Authority or third parties. This clause survives the termination of the Contract and applies to all damage [arising out of the Contractors wrongful acts [or omissions]] regardless of whether it is caused or arises before, during or after the completion of the Exploitation activities or Contract term. [For the purpose of this clause 7.1 and 7.2, 'wrongful acts or omissions', means any act or omission attributable to the Contractor that results in damage [not anticipated and approved in the Plan of Work], irrespective of bad intention or negligence]. [Recoverable damages under this clause include: costs of reasonable measures to prevent and limit damage to the Marine Environment, lost revenue, reinstatement, pay-out in lieu of actual reinstatement, and/or measures to compensate for third-party economic loss, as well as pure ecological loss and harm to the living resources of the Area.]

Section 9

9.1 The Contractor may renew this Contract in accordance with regulation 20 ~~for periods not more than 10 years each, on the following conditions:~~

~~(a) The resource category is recoverable annually in commercial and profitable] quantities from the Contract Area;~~

~~(b) The Contractor is in compliance with the terms of this Contract and the Rules of the Authority, including rules, regulations and procedures adopted by the Authority to ensure effective protection for the Marine Environment from harmful effects which may arise from activities in the Area;~~

~~(c) This Contract has not been terminated earlier; and~~

~~(d) The Contractor has paid the applicable fee in the amount specified in appendix II to the regulations.~~

~~9.2 To renew this Contract, the Contractor shall notify the Secretary-General no later than one year before the expiration of the initial period or renewal period, as the case may be, of this Contract.~~

~~9.3 The Council shall review the notification, and if the Council determines that the Contractor is in compliance with the conditions set out above, this Contract [shall be] [may be] renewed on the terms and conditions of the standard exploitation contract that are in effect on the date that the Council approves the renewal application.~~

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

Comments on Section 3: Undertakings:

We note that DR18bis (1.bis) provides that "A Contractor shall carry out the proposed Plan of Work in accordance with these Regulations, Good Industry Practice, Best Available Scientific Evidence and Best Environmental Practices, using appropriately qualified and adequately supervised personnel". If that is retained (which we would support) we are unclear whether it is necessary to repeat a similar obligation here, and/or whether issues may be caused by the lack of consistency in the wording between DR18bis and this Annex X (3.2).

We are also unclear what section 3.3 adds to the mix. Is this an additional requirement? Or a(nother) duplication?

Section 3.3(d) of Annex X appears to be duplicative of other provisions in this Contract (e.g. 3.2, 3.3(a)), as well as various provisions of the regulations.

Rationale for amendment in Section 4, para 1: The Regulations contain some grounds for Contract revision and/or suspension that are not also included in the Contract terms (e.g. for suspension, the following DRs all present circumstances in which suspension may occur that are not covered in the Contract terms: DRs 4(10) and 28 (emergency order), 21 (termination of sponsorship), 29 (market conditions), and 99 (by inspector)). So this should be reflected in this section 4.1 to avoid undermining those regulations by apparently contracting-out of them.

Sections 4.2, 4.3 and 4.4 may be better incorporated into the Regulations, rather than as terms of an individual contract. Particularly as the subject-matter affects a third party: the one applying for exploration or exploitation - which will not be a party to the contract that will contain this term. Indeed, clause 4.2 is already covered by DR15(2)(a) and DR18(2); and clause 4.3 is covered by DR15(2)(b) and DR18(3). Deletion from this Annex will avoid unnecessary repetition, and the possibility of conflicting provisions.

We highly support 6.2 bis - It is highly likely that Contractors will deliver their Plan of Work via engagement of multiple subcontractors and suppliers with which the ISA will have no direct contractual relationship. It is therefore essential to ensure the rules contained in the Regulations are applied to all parties involved, and to make the Contractors accountable for the activities of those third parties they appoint. Several respondents to the 2020 stakeholder consultation on the draft Standards and Guidelines for Environmental Management Systems (e.g. Australia, Belgium, Chile, Costa Rica, Portugal, Trinidad and Tobago, IASS, The Pew Charitable Trusts: copies here) raised this concern.

On section 7, we support the additions, with some small drafting amendment suggestions for clarification purposes (e.g. to ensure the contractor is not made liable for compensation in relation to damage to the marine environment that was authorised as part of the mining operation in the Plan of Work). In an infant industry, where the unforeseen can be assumed, a causation-based standard – as opposed to a fault-based standard – would seem to be the prudent choice. A causation-based standard also incentivizes risk reduction, a particularly important consideration in a context where harm may be irreversible. We consider that this is well-achieved by the proposed explanation of 'wrongful acts and omissions' in this section 7.1.

For further information on this topic we recommend June 2019 submission by the African Group. and this paper prepared by a Legal Liability Working Group set up by the ISA Secretariat, the Commonwealth Secretariat and the Centre for International Governance Innovation: Mackenzie, R (2019) 'Liability for Environmental Harm from Deep Seabed Mining Activities: Defining Environmental Damage'.

As a general comment on Section 8, we wonder if it should be re-visited to check for consistency, once the text of DRs 28 and 29 have been settled. It may be preferable in fact to delete section 8 and to ensure that force majeure issues are fully dealt with in the Regulations instead. There is otherwise a risk of overlap, and inconsistency, between the requirements placed on Contractors in the Regulations and in the Contract. For example, DR 28 and 29 has the Contractor notify the SG and the sponsoring State if it cannot perform its Plan of Work, whereas s.8 requires notification by the Contractor to the Assembly. DR29 gives the Commission and the Council the power to determine whether or not the force majeure reason provided is reasonable, and then to permit a suspension or reduction of activities, whereas DR28 and s.8 appears to leave this entirely to the Contractor's own discretion. Section 8.3 also envisages an extension to the contract term in force majeure circumstances (without referring to the procedure by which this would be obtained), which is not envisaged in DR 28 or 29. Indeed the Regulations' provisions for contract term renewal (DR20) do not cross-refer to Section 8 of Annex X, nor address directly a force majeure situation. DR20 also imposes a specific limit on a time extension that may be granted, which does not appear consistent with section 8.3 either.

Section 9 overlaps (and conflicts with) DR20. These need to be reconciled. Renewals could be better addressed in DR20, and cross-referenced here. To avoid duplication and inconsistency, and to promote accountability, transparency, and consistency, any such overlap should be resolved in favour of the Regulations. Indeed this section 9 (and other parts of the contract that are covered by the Regulations) could be deleted entirely, given the Contract already requires the Contractor to adhere to the Regulations, as a condition of the contract.

On Section 11 (Termination of sponsorship), DRs 21 and 24 already set out the rules and procedures that will apply in the event of a change of control or termination of sponsorship. The content of this section 11 is not completely consistent with the current drafting of the relevant provisions of DR21 and 24, bearing in mind that that text is also currently under negotiation and subject to change. We suggest

these matters should be covered fully in the Regulations and referenced here, or section 11 can be deleted (given the Contract already requires adherence to the Regulations). To cover the same matters in different terms in the body of the regulations, and in the contract, is problematic, and leads to regulatory uncertainty and may cause difficulty for the ISA to enforce compliance in the future.

Regarding section 12, Suspension arises in different scenarios throughout the Regulations (e.g. DRs 4(10), 21, 28, 29, 80, 99), though the terminology about what is suspended varies (e.g. suspension of 'operations', 'activities', 'production', 'contract'). Suspension and termination of contract and monetary penalties are also covered in DR103, with numerous pending amendment proposals. This has created conflict between the regulations and provisions here, which will only increase with further adoption of the pending amendments. This conflict exists for both process (e.g. DR80, DR103, and Annex X all provide slightly different decision-making criteria and processes, for a suspension for breach of contract) as well as for substance (e.g. Annex X section 12 contains circumstances in which suspension may be triggered by the Council such as provision of false information, failure to recover sufficient minerals etc), which are not mirrored by operational provisions in the Regulations. This means the Council has not been given the necessary powers in some instances to give effect to the contractual terms. It is not clear why the same points would need to be covered in both Regulations and individual contracts. Instead, points covered under DR103 should be cross-referred here, and triggers included in Section 12 need to be reflected in the Regulations (e.g. in DR103). Consideration may also be given to deletion of section 12 from Annex X, as Contractors are already obliged by the contract to comply with the Regulations, including the regulations that deal with suspension, termination and penalties.

Section 16 needs to be aligned to check for consistency and to avoid conflict with the Regulations, specifically regulation 57 (Modification of a Plan of Work). It is unclear to us whether section 16.1 seeks to restrict the circumstances in which modification to a contract can occur (i.e. where it becomes inequitable, impracticable or impossible). If so, this is incompatible with the Regulations, which include different scenarios in which a Plan of Work (which is part of the contract) can or even must be amended (e.g. the Mining Workplan may need to be amended upon receipt of the Feasibility Study, the Closure Plan may need to be amended nearer the end of the production period, any part of the Plan of Work may be modified after the prescribed performance review processes under DR58, or in light of new information, or in light of new Standards etc. Some Plans even include requirements for regular review and update within them eg.the Health and Safety Plan and the Maritime Security Plan).