

**TEMPLATE FOR SUBMISSION OF TEXTUAL PROPOSALS DURING THE 29<sup>TH</sup> 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.im](mailto:council@isa.org.im).

**1. Name(s) of Delegation(s) making the proposal:**

The Pew Charitable Trusts

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

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**3. 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 55 Alt.2. [IWG ENV]**

**Purpose of the Environmental Compensation Fund**

1. Based on the polluter pays principle and as reflected in these Regulations, it is the responsibility of the Contractor to pay for any necessary measure to limit, mitigate, remedy and compensate any damage arising from the activities conducted under an Exploitation Contract.

2. In cases where situations may arise, where a Contractor does not meet its liability in full, including where the damage exceed the amounts recoverable, or are exempt from liability, under the Contractor’s insurance pursuant to regulation 36, while the Sponsoring State is not liable under Article 139 (2) of the Convention, the compensation fund ECF may be used ~~as a last resort after exhausting all other possibilities.~~

3. The purpose of the Fund ECF is to finance the implementation of any necessary measures designed to Mitigate or compensate for any loss or damage, wheresoever arising, to the Marine Environment, coastal or any other states, for to any damage-caused third parties (including damage to persons or property, and economic loss), arising from activities conducted under an Exploitation Contract.

Proposal 1: The Fund ECF shall cover at least 2 situations:

- (a) Where there is damage caused by Contractor as a result of a Contractor’s non-compliance with the Plan of Work, contract, or these Regulations; activities that were not consented; or
- (b) Where there is unforeseen damage is caused by Contractor activities that were conducted in compliance with the Plan of Work, contract and these Regulations that were consented activities or where the Contractor acted negligently.

Proposal 2: The Fund shall cover at least 2 situations:

- (a) Where there is damage caused by contractor activities that were not consented; or
- (b) Where there is unforeseen damage caused by contractor activities that were consented activities or where the Contractor acted negligently.

3 bis Any person affected by loss or damage of the type described in paragraph 3 may apply to the Authority for consideration for compensation from the ECF in accordance with the rules and procedures of the ECF established pursuant to regulation 54.

4. Compensation to any person affected by damage pursuant to paragraph 3 shall claimable from the ECF may include the costs for implementation of any necessary measures designed to Mitigate any damage to the Marine Environment and its resources.

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5. The ~~Fund~~ ECF shall be subject to periodic review, including the consideration of whether Restoration has become technically and economically feasible and could be carried out 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.]

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

As indicated in our comment to DR 54, we recommend consistent use of the same term throughout the relevant regulations to refer to the Environmental Compensation Fund, and consider 'ECF' the better option to avoid risk of confusion with any other of the various funds managed by or for the ISA.

It is our impression that lack of consensus persists with regards the purpose of the ECF. Questions that we think could be clarified include:

- Should the ECF cover only environmental damage, or also other types of claims (e.g. personal and property damage, and economic loss)? (We believe the latter).
- Should the ECF only be accessible to the Authority, or also to States and private entities who suffer damage? (We believe the latter).
- Should the ECF cover damage caused only to and in the Area, or should it also cover damage beyond this, wherever it is located (e.g. in the high seas or the jurisdiction of a coastal state)? (We believe the latter).
- Should the ECF cover damage that was caused by only unlawful or negligent actions, or also those caused by permitted and lawful actions (with unanticipated consequences), accidents and 'no-fault' situations? (We believe the latter, noting that all existing international liability funds operate on a 'strict liability' basis).

We have made some proposed textual amendments on these points above (in paragraph (3), and insertion of a new paragraph (3 bis). We do also consider these significant policy questions require more discussion and agreement from the Council, before the regulations about the ECF can be progressed and settled. Useful resources to support further discussion in this regard include the ISA Technical Study 27 on an Environmental Compensation Fund for activities in the Area, and a paper of the ISA's former Liability Working Group drawing from experience of other international compensation funds to consider application in the ISA's context (accessible online here: <https://www.cigionline.org/publications/liability-environmental-harm-deep-seabed-mining-activities-defining-environmental/>).

We do not believe the 'last resort' wording in paragraph (2) is correct and believe it can be deleted. We are also unclear from the current drafts of DR55(alt) and DR55(alt.2) how the ECF will relate to the Contractor's insurance. We have provided proposed language in paragraph (2) to try and clarify this connection.

Whilst we agree with the principle behind the proposed wording in paragraph (3) that states the fund may be used either in the event of harm caused as a result of unpermitted activity, or as a result of harm caused from permitted activity but that had not been previously anticipated, we consider that either the drafting should be tightened to remove ambiguity and/or that this could be removed as redundant. Applying a strict liability approach means that the fact of harm caused by an Exploitation contractor should be sufficient to enable a claim to be made. The ISA can then assess that claim in accordance with the relevant rules to be established for the ECF (under DR54).