

**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.

1. Name of Working Group:

Informal Working Group on Inspection, Compliance and Enforcement

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.

DR 103

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 103

Compliance notice, suspension, and termination of exploitation contract

1. At any time, if it appears to the ~~{Inspectorate}~~ [Compliance Committee] ~~{Commission}~~ based on reasonable grounds, [including a report from an Inspector], or failure to comply with a written instruction under regulation 99, that a Contractor is in breach of, [or is at risk of breaching], the terms and conditions of its exploitation contract, ~~{Part XI} {provisions of the Convention related to activities in the Area, the Agreement and} the rules, regulations and procedures or the Rules~~ of the Authority, ~~or these regulations~~, the ~~{Commission} {Inspectorate}~~ [Compliance Committee] shall ~~{make recommendations to the Council to}~~ issue a compliance notice to the Contractor requiring such action as may be specified in the compliance notice and shall report immediately to the Council on the issue of such notice-instruct the Secretary-General, with copy to the sponsoring State and the Council to: ~~to:~~

(i) seek dialogue with the Contractor to discuss and attempt to resolve the issue;

(ii) issue written warnings, including warnings in relation to possible action the Authority may take in the event of failure to act or future breaches;

(iii) agree with the Contractor on an improvement plan, which shall include: actions to be taken to return to compliance, how the actions ‘effectiveness will be monitored and reported, the time permitted for action, and subsequent steps should the actions be unsuccessful, or should non-compliance continue;

(iv) agree with the Contractor a modification to the Plan of Work, in accordance with regulation 57; or

~~(v) issue a compliance notice to the Contractor requiring the Contractor to take such action as may be specified in the compliance notice.~~

~~[(i) seek dialogue with the Contractor to discuss and attempt to resolve the issue];~~

~~(ii) issue written warnings, including warnings in relation to possible action the Authority may take in the event of failure to act or future breaches;~~

~~(iii) agree with the Contractor on an improvement plan, which shall include: actions to be taken to return to compliance, how the actions' effectiveness will be monitored and reported, the time permitted for action, and subsequent steps should the actions be unsuccessful, or should non-compliance continue;~~

~~(iv) agree with the Contractor a modification to the Plan of Work, in accordance with regulation 57; or~~

~~(v) issue a compliance notice to the Contractor requiring the Contractor to take such action as may be specified in the compliance notice.]~~

[1.bis. Actions taken under this Regulation by the Authority should be commensurate with the gravity, frequency, and other circumstances of the actual or anticipated breach by the Contractor, which may include taking account of the Contractor's previous conduct under contract with the Authority.]

~~[1.bis.Alt. The Authority should discuss the issue in detail with the Contractor to inform decisions of the Council.]~~

[1 ter. Paragraph (1) bis. notwithstanding, where regulations 4(5), 36(3), 52(8), 99(3) and 102(3) apply, the Authority shall issue a compliance notice under paragraph 1(iv).]

2. ~~[A compliance notice may be issued only in case of breach of the terms and conditions of its exploitation contract, Part XI and provisions of the Convention related activities in the Area, the rules, regulations and procedures of the Authority, or these regulations]~~ A compliance notice shall:

(a) Describe the ~~[alleged] breach and~~ the factual basis for its ~~issuance~~; and

(b) Require the Contractor to take remedial ~~or corrective~~ action or other such steps as the ~~[Secretary General] [Inspectorate]~~ [Compliance Committee] ~~[Council]~~ considers appropriate to ensure compliance within a specified time period ~~and may include:~~

~~(i) the implementation of an improvement plan setting out actions to be taken to return to compliance, how the actions' effectiveness will be monitored and reported, the time permitted for action, and subsequent steps should the actions be unsuccessful, or should non-compliance continue; or~~

~~(ii) agreeing with the Contractor a modification to the Plan of Work in accordance with regulation 57.~~

~~2-bis. Actions specified in the compliance notice should be commensurate with the gravity, frequency or other circumstances of the [alleged] breach.~~

3. For the purposes of article 18 of annex III to the Convention, a compliance notice issued under this regulation constitutes a warning by the Authority.

4. The Contractor shall be given a reasonable opportunity not exceeding 30 days to make representations in writing to the Secretary General concerning any aspect of the compliance notice, who shall transmit same to the ~~[Inspectorate]~~ [Compliance Committee] ~~[Commission]~~. Having

considered the representations, the ~~[Inspectorate]~~ [Compliance Committee] ~~[Commission]~~ may make recommendations to the Council to confirm, modify or withdraw the compliance notice.

~~[4 bis. All measures imposed by the Compliance Committee shall be reviewed and ratified by the Council. In order to ensure a timely response from the Council, a designated member of the Bureau shall always be on-call in order to convey a virtual meeting of the Council.]~~

5. If a Contractor, in spite of one or more warnings by the [Authority] ~~[Inspectorate]~~ ~~[Council]~~, fails to implement the measures set out in a compliance notice and continues its activities in such a way as to result in violations of the fundamental terms of the exploitation contract, [provisions of the Convention related activity in the Area, the Agreement [Part XI] [and/or] the rules, regulations and procedures of the Authority, the Council shall suspend or terminate the exploitation contract by providing written notice of suspension or termination to the Contractor in accordance with the terms of the exploitation contract.

5 bis. The Secretary-General shall make public any compliance notice issued to a Contractor, as well as any response received from the Contractor [and Sponsoring State], subject to the confidentiality obligations of Regulation 90, ~~and shall present an annual report to the Council summarizing any compliance notices the Authority has issued.~~

[5. bis Alt 1 The Secretary-General shall make public any compliance notice issued to a Contractor, any response received from the Contractor or Sponsoring State or States, subject to the confidentiality requirements of Regulation 90. The Inspector- General shall present in their annual report to the Council a summary of any compliance notices the Inspectorate has issued.]

6. In the case of any violation of an exploitation contract not covered by paragraph 5 above, or in lieu of suspension or termination under paragraph 5 above, the Council may impose upon a Contractor monetary penalties proportionate to the seriousness of the violation which must be in line with indicative penalties set out in the relevant Standards, and which will include any administrative costs incurred by the Authority as a result of the violation.

7. Except for emergency orders under article 162 (2) (w) of the Convention, the Council may not execute a decision involving monetary penalties, suspension or termination until the Contractor has been accorded a reasonable opportunity to exhaust the judicial remedies available to it pursuant to section 5 of Part XI to the Convention.

~~[8. The Secretary-General shall notify the Council as soon as reasonably practicable of any matter requiring the Council to issue an emergency order under article 162(2)(w) of the Convention, in accordance with regulation 4(4).]~~

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

Regarding paragraph 1, we would like to retain the subparagraphs under DR103(1) that have currently been deleted and we would also propose alternative wording to the chapeau to better contextualise the sub provisions. It is important that a compliance notice not be assumed as the default disciplinary action nor the only regulatory tool available. Instead, the ISA should be empowered to take different progressive actions in the event of non-compliance, and where different types of

events can trigger different types of regulatory responses, tailored and proportionate to the situation.

This is the sort of approach that one would expect to see in a regulator's enforcement strategy. The ISA does not currently have a compliance and enforcement strategy, to our knowledge, which needs to be remedied.

We believe if these subprovisions are reinserted paragraph 1bisalt can be deleted. If para. 1 bis alt is retained 'Authority' should be replaced with 'Compliance Committee'.

Regarding the new language in para 2, we are confused about the requirement that a compliance notice can only be issued in the event of a contract breach which would contradict other parts of the regulations. For example, in DR99, a compliance notice can be triggered where an inspector's instruction has not been complied with. The inspector's instruction may have been issued to prevent endangerment to human health or to the environment, it does not require a prior breach of contract. Equally, paragraph (1) itself permits issue of a compliance notice on any reasonable grounds, including risk of breach – so again breach is not required as a prerequisite. We suggest amending this newly proposed paragraph (2) accordingly.

Paragraph 2bis seems duplicative of 1bis so suggest it be deleted.

We wonder if some aspects of deleted 4bis may be necessary to re-insert to cover how the Council will make a timely decision on compliance notices.

Regarding paragraph 5, references to suspension throughout the Regulations are inconsistent and should be harmonised.

- Firstly, there is inconsistency in the terminology used to describe what, specifically, is suspended ('operations', 'activities', 'production', or here: 'contract'), and these terms tend not to be defined or explained. For example: in practice, how does one legally 'suspend' a contract? This may lead to ambiguity, subjective interpretation, and difficulty for the ISA to enforce the requirements. We would suggest to use one of those terms that UNCLOS uses, which are 'suspension of operations' (Article 163(2)(w), 165(2)(k)) or 'suspension of rights under the contract' [Annex III Article 18(1)].
- Secondly, some of the suspension provisions – including this one in paragraph (5) lacks clear decision-making procedures and decision points, particularly with regard to when activities may or must re-commence.
- Thirdly there are different provisions that enable different types of suspension for the same breach. For example this DR103, as well as DR80 and Annex X all provide slightly different decision-making criteria and processes, for a suspension for breach of contract.

We would like to recommend a standalone 'Suspension of [operations]' Regulation should be introduced (and DR29(3) deleted). This new DR can:

- cross-reference the various different DRs that trigger suspension;

- set out appropriate decision-making procedures for initiating a suspension (including requisite warnings, and Contractor's right of response/appeal, where the Council is the decision-maker);
- provide that a suspension notice will specify what operations or rights must cease (and which – if any – may continue) and any other relevant terms and conditions for the suspension;
- establish which parts of the Closure Plan would apply during suspension; and
- set out appropriate decision-making procedures for ending a suspension, either by (a) re-commencement, or (b) termination and move to final closure.

It will be important to ensure the ISA retains appropriate decision-making control here, to avoid a situation where a Contractor could opt to remain in indefinite suspension, to avoid implementation of final closure requirements.

We are also unsure why this paragraph 8 has been deleted. Notification of such a situation to the Council seems both helpful and necessary for the Council to fulfil its obligations and to ensure the prevention of serious harm. Though the Secretary-General is not the appropriate entity to notify the Council; this should be the Compliance Committee.