

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.

DR 36

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.

1 bis. The insurance required under this regulation shall:

(a) be in effect from the start date of the Contract, until such time as the Environmental Performance Guarantee has been released back to the Contract in full by the Authority; and

(b) shall cover all potential harms to people, property, natural resources and environment that may occur, wherever located, or howsoever caused, as a result of the Contractor's activities in the Area.

1 ter. Upon receipt of a written request from a Contractor, the Commission shall, provide advice to the Contractor as to the satisfactoriness of a proposed insurance policy, in accordance with the relevant Standards, taking account of the Guidelines.

~~2. ——— Contractors shall include the Authority as an additional assured. A Contractor shall use its best endeavours to ensure that all insurances required under this regulation shall be endorsed to provide that the underwriters waive any rights of recourse, including subrogation rights against the Authority in relation to Exploitation.~~

3. The obligation under an exploitation contract to maintain insurance as specified in these regulations and the [relevant Standards and] Guidelines is a fundamental term of the contract. Should a Contractor fail to maintain the insurance required under these regulations, the [Secretary-General][Compliance Committee] shall issue a compliance [notice] [order] under regulation 103. ~~The Secretary General shall notify the Council at its next available meeting of such failure, and the corrective measures taken by the Contractor.~~

4. A Contractor shall not make any material change to or terminate any insurance policy [related to its Exploitation activities in the Area] without the prior consent of the [Council][Secretary General].

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

We note the facilitators comment and agree that further detail is needed in the Standards and Guidelines; however, this regulation should specify the duration and scope of the insurance. Without this direction from the Council it will be difficult to develop appropriate S&Gs.

Regarding para 2: Like others have mentioned on the floor, before deletion we believe further analysis is needed on this point. This inclusion would enable the ISA to claim on the Contractor's own insurance for any losses it suffers as a result of Contractor action (or inaction), rather than having to sue the Contractor; and also may prevent the insurance company from suing the ISA, if any losses the insurance company has to pay out for arose because of ISA negligence or fault. This seems sensible, however the viability of this requirement may turn on the availability of insurers willing to include the ISA as an additional insured. We presume the reason this deletion has been proposed is due to concerns about the infeasibility of this option. An analysis on this issue could be usefully integrated into the forthcoming report by the Secretariat on insurance requirements and market availability (see note above).

In para 3: This compliance notice requirement under this paragraph will have to be aligned with the decisions made regarding DR 103, and which ISA organ has appropriate authority to issue compliance notices.

We also recommend deletion of paragraph (3)'s final line about reporting, as it conflicts with DR103, which (as currently drafted) requires immediate report to the Council upon issue of any compliance notice.

We are unsure what specifically the compliance notice can or will say in this circumstances. Given the importance of insurance in this Exploitation regime, we wonder if a suspension of Exploitation activities until the insurance is re-instated might not be a more effective sanction in these circumstances, than a compliance notice, or be included as part of the compliance notice?

Regarding para 4, the Secretary-General is not the appropriate decision-maker for whether a Contractor can make a material change to a policy whose adequacy is a fundamental term of the contract approved by the Council. As others have suggested, we suggest that paragraph (4) should require consent from the Council, rather than the SG. If there are concerns about agility of decision-making, perhaps the LTC or compliance committee could serve this function more responsively.