

**TEMPLATE FOR SUBMISSION OF TEXTUAL PROPOSALS DURING THE 27TH SESSION:
COUNCIL - PART II**

Informal Working Group - Inspection, Compliance and Enforcement

Please fill out one form for each textual proposal which your delegation(s) wish(es) to amend, add or delete and send to council2022@isa.org.jm.

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.

DR 103

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 103

[Vessel notification,] ~~E~~lectronic monitoring [and data reporting system]

1. At any time, if it appears to [the Secretary-General] based on reasonable grounds that a Contractor is in breach of the terms and conditions of its exploitation contract, Part XI and the rules, regulations and procedures of the Authority, or as required pursuant to Regulations [4(5), 36(3), 52(8), 99(3), 102(3)], the [Secretary-General] shall issue a compliance notice to the Contractor requiring the Contractor to take such action as may be specified in the compliance notice.

At any time, if it appears to a principal organ of the Authority based on reasonable grounds that a Contractor is in breach of, or is at risk of breaching the terms and conditions of its exploitation contract, Part XI and the rules, regulations and procedures of the Authority or if requested by the Council to do so, the relevant organ may instruct the Secretary-General, with copy to the sponsoring State and the Council, 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.

(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) 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).

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 regulatory action taken by the Authority under paragraph (1) of the compliance notice. Having considered the representations, the [Secretary-General] may confirm, modify or withdraw the compliance notice.
5. If a Contractor, in spite of a warning raised~~warnings~~ by the Authority, fails to implement the measures set out in a compliance notice and continues its activities in such a way as to result in serious, persistent ~~and or~~ wilful violations of the fundamental terms of the contract Part XI of the Convention and the ~~Rules, regulations and procedures~~ of the Authority, the Council [shall] ~~may~~ 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 and shall present an annual report to the Council on any compliance notices the Authority has issued. Any action taken under this Regulation should be included by the Secretary-General in the annual compliance record prepared for each Contractor pursuant to Regulation 100bis.

Regulation 103 bis. Termination of Contract

1. An exploitation contract can only be terminated by:
 - a) all parties to the contract by mutual consent;
 - b) (b)the termination of State sponsorship, in accordance with regulation 21;
 - c) the Contractor in accordance with the terms of the contract, as covered by section 10 of the Annex X to these regulations;
 - d) the Authority in accordance with the terms of the contract, as covered by section 12 of the Annex X to these regulations; or
 - e) expiry of the term of the contract, without renewal.
2. Any suspension or termination of a contract by the Authority shall be by written notice to the Contractor, through the Secretary-General, which shall include a statement of the reasons for taking such action. The suspension or termination shall be effective 60 Days after such written notice, unless the Contractor within such period disputes the Authority's right to suspend or terminate the contract in accordance with Part XI, Section 5, of the Convention, in which case the contract shall only be suspended or terminated in accordance with a final binding decision in accordance with Part XI, Section 5, of the Convention.

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

Draft regulation 103 provides useful detail about use of compliance notices as a regulatory and enforcement tool. However, in our view, compliance notices should not be the only tool available. A robust enforcement strategy at the ISA enforcement should include progressive actions to be taken in the event of non-compliance, with clear triggers for when they can or should be used. Therefore, we recommend addition of wording to **paragraph 1** to provide an escalating array of compliance tools. Introducing these different options will allow the ISA to choose the appropriate response to the specific situation, and to apply regulatory powers in a proportionate manner. We consider it important also that both the sponsoring State and the Council should be notified of any compliance action to enable both to better carry out their respective regulatory duties to oversee the Contractor's activities.

In addition, the Regulations are not clear about the difference between a 'compliance notice' pursuant to draft Regulation 103 and an 'emergency order' pursuant to UNCLOS Article 163(2)(w) (and used in draft Regulation 4). Presumably, the latter can only be issued in more limited circumstances (i.e. only to prevent serious harm to the marine environment), and as an emergency measure rather than a compliance tool. As such, it does not necessarily require the same due process requirements as are included in this draft Regulation 103. But it may be useful for this point to be considered and explained further, and for there to be some cross-reference between this draft Regulation 103 and the provision in draft Regulation 4 that relates to emergency orders (see proposed para. 1ter).

Regarding **paragraph 5**, we support the amendment to 'shall' in paragraph 5, as suspension or termination of a contract should be mandatory (not optional) where, after warnings, there are continued serious, persistent or wilful violations by the Contractor. Use in paragraph 5 of the term 'fundamental terms of the contract' is appropriate, to reflect UNCLOS Annex III section 18. However, we consider that the Regulations should clarify the meaning of this term, to avoid confusion about which clauses of the contract could trigger these most serious consequences if

breached, and which would not, as they are not considered ‘fundamental terms’. We had previously proposed insertion of a new paragraph 9 in this section, to provide further information about which terms would be considered fundamental, and are happy to share that wording again. But we also concur with the facilitator’s suggestion that such a list may also be placed in a Standard.

With regards to **paragraphs 5bis and 6**, we find the proposed amendments helpful. Standards will ensure consistency in setting appropriate levels of financial penalties, with cost-recovery also considered.

Finally, we note the Facilitators comments that this Part of the Regulations may not be the correct location to include wording regarding general contract termination. But we do wish to reiterate the point that the draft Regulations do not at present list the circumstances under which a contract may be terminated. This seems like a critical omission. We understand that there are several circumstances in which termination may be un-related to compliance or enforcement, and so a separate section on termination might be most appropriate. For now, we propose the following new regulation be added but are flexible about where the regulation is located.