

**TEMPLATE FOR SUBMISSION OF TEXTUAL PROPOSALS DURING THE 27<sup>TH</sup> SESSION:  
COUNCIL - PART I**

***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.*

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

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.**

\*\*Note: Council amendments are in **Red** and Pew comments are in **Blue**.

**Regulation 103 Compliance action ~~notice and termination of exploitation contract~~**

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, **or if Regulations 4(5), 36(3), 52(8), 99(3) and 102(3) apply, or if requested by the Council to do so**, the Secretary-General shall, **with copy to the sponsoring State and the Council**, issue a compliance notice to the Contractor requiring the Contractor to take such action as may be specified in the compliance notice. **The Secretary-General shall inform the Council of any violations by a Contractor.**

**Alt. 1.** At any time, if it appears to the Secretary-General on reasonable grounds that a Contractor is in breach of In the event of a principal organ of the Authority or the Commission reasonably determining that a Contractor has breached, or is at risk of breaching the terms and conditions of its exploitation contract, **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:

- (a) seek dialogue with the Contractor to discuss and attempt to resolve the issue;
- (b) issue written warnings, including warnings in relation to possible action the Authority may take in the event of failure to act or future breaches;
- (c) 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;
- (d) agree with the Contractor a modification to the Plan of Work, in accordance with regulation 57; or
- (e) 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(d).

2. A compliance notice shall:

(a) Describe the alleged breach and the factual basis for it; and

(b) Require the Contractor to take remedial action or other such steps as the [Secretary-General] considers appropriate to ensure compliance within a specified time period.

~~[2bis. A copy of the compliance notice shall be sent to the Sponsoring State.]~~

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) the compliance notice**. Having considered the representations, the Secretary-General may confirm, modify or withdraw the **action compliance notice**.

5. If a Contractor, in spite of ~~[warnings]~~ **a warning raised** 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, **including compliance with Part XI of the Convention, the Agreement** and the ~~r~~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.

**5bis. The Secretary-General shall** publish compliance notices on the Seabed Mining Register and **provide an annual report to the Council in respect of any compliance notices 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.

6. In the case of any violation of an exploitation contract, 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.

**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).**

9. For the avoidance of doubt, the following non-exhaustive list of examples of non-compliance constitute a violation of the fundamental terms of the contract, Part XI of the Convention and the rules, regulations and procedures of the Authority, for the purpose of this Regulation

- (a) failure to maintain the required Environmental Performance Guarantee (regulation 26);
- (b) failure to maintain the required safety management system (regulation 30 bis.);
- (c) failure to maintain the required insurance (regulation 36);
- (d) failure to meet the reporting requirements provided by Regulations 38, 39 and 39bis;
- (e) failure to maintain the required environmental management system (regulation 46);
- (f) failure to pay the [annual reporting fee or the] annual fixed fee (regulations 84 and 85);
- (g) failure to comply with an environmental Standard issued by the Authority (regulations 45 and 94);
- (h) failure to comply with the financial terms of the exploitation contract (Part VII)

[... and add other examples]

### **Regulation 103 bis. Termination of Contract**

1. An exploitation contract can only be terminated:

- (a) by all parties to the contract by mutual consent;
- (b) by the termination of State sponsorship, in accordance with regulation 21;
- (c) by the Contractor in accordance with the terms of the contract, as covered by section 10 of the Annex X to these regulations;

- (d) by the Authority in accordance with the terms of the contract, as covered by section 12 of the Annex X to these regulations; or

by 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]**

General Comment: The ISA enforcement strategy should include progressive actions to be taken in the event of non-compliance. Starting with initial dialogue, it could proceed in ascending order of severity to: a mutually agreed environmental improvement plan, a formal compliance notice, then (seeking to avoid if possible) a suspension notice pertaining to specified activities, monetary penalties, contract suspension, revocation of contract, and referring criminal prosecution to Sponsoring States. Non-compliance triggers for these enforcement actions should be clearly delineated.

Regarding paragraph 1, several ISA delegates have indicated that they do not agree with the current DR103 which provides that the Secretary-General could issue compliance notices. The ISA needs (as a matter of some urgency) to develop internal procedures and an institutional framework to enable decision-making authority in the case of urgent matters. As the wording 'Secretary-General' may be replaced by a different organ of the ISA, depending on policy decisions that need to be taken by the ISA in relation to its enforcement strategy and its institutional set-up, it would be more convenient to refer to the "relevant organ" in relation to compliance actions. The sponsoring State and the Council should also be notified of any compliance action to enable both to better carry out their respective regulatory duties to oversee the Contractor's activities.

For ease of reference, a separate paragraph (1ter) should list the Regulations that specifically cross-refer to a compliance notice being triggered:

- DR36(3) is a failure by a Contractor to maintain requisite insurance.
- DR4(5) is where the LTC determines that Serious Harm to the Marine Environment is attributable to a breach of exploitation contract.
- DR52(8) is where non-compliance with the EMMP has been identified.
- DR99(3) is where an Inspector has issued a notice which has expired, and the matter remains unresolved.
- DR102(3) is where there is reasonable evidence to suggest unapproved mining activities.

Also, the Regulations are not clear about the difference between a 'compliance notice' pursuant to DR 103 and an 'emergency order' pursuant to UNCLOS Article 163(2)(w) (and used in DR4(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 DR103. But it may be useful for this point to be considered and explained further, and for there to be some cross-reference between this DR103 and DR4(4) (the provision relating to emergency orders).

Regarding the proposed deletion of subparagraph 2bis, this point (raised by the UK) is important, and might be better placed in the proposed alternative paragraph 1.

Regarding paragraph 5, 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. The terms of the contract already require compliance with Rules of the Authority, so there is no need to repeat that here. The proposed wording 'the Agreement' is also not needed because DR1(2) provides that 'the Agreement and part XI of the Convention shall be interpreted and applied together as a single instrument. [...] and references in these regulations to the Convention are to be interpreted and applied accordingly'.

Regarding paragraph *5bis*, the proposed insertion by UK (with additional edits) will assist with public access to information and Council-Contractor oversight, and may also act as a compliance incentive.

Regarding paragraph 6, Standards would be helpful to ensure consistency with regards appropriate levels of financial penalties, with cost-recovery also considered.

Regarding the newly proposed paragraph 9, this is not intended to be an exhaustive list of triggers for enforcement action, but it may be a good idea for the ISA to agree (and publish) such a list.

Lastly, the draft Regulations do not at present list the circumstances under which a contract may be terminated. Therefore, we propose a new Regulation (*103bis*), drawing upon DR103 (the circumstances that may trigger a compliance action), section 12 of Annex X to these Regulations (which provides standards contract terms for termination), and also UNCLOS Annex III, Article 18 (concerning the circumstances under which a contract may be terminated as a penalty (and reflected here in subparagraph (d))).