

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

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:

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.

Draft Regulation 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.

The facilitators’ proposed amendments are reflected in **red**.

Our proposed amendments and our questions or comments regarding the facilitator’s remarks are indicated as in-line edits in **blue**. Where we propose deletions of the facilitator’s text this is shown ~~in strikethrough and bold~~.

1. At any time, if it appears to the ~~{Secretary-General}~~ ~~[Inspectorate]~~ **[Compliance Committee]** based on reasonable grounds, including a report from an Inspector, that a Contractor is in breach of, **or is at risk of breaching**, the terms and conditions of its exploitation contract, Part XI ~~and~~ **or** the rules, regulations and procedures of the Authority, **or or as required pursuant to Regulations [4(5), 36(3), 52(8), 99(3), 102(3)], or if requested by the Council to do so, the** ~~{Secretary-General}~~ ~~[Inspectorate]~~ **[Compliance Committee]** shall issue a compliance notice to the Contractor requiring the Contractor to take such action as may be specified in the compliance notice, **with a copy to the sponsoring State, [and shall report immediately to the Council].**

1. alt At any time, if it appears to [the Compliance Committee] based on reasonable grounds, including a report from an Inspector, that a Contractor is in breach of, or is at risk of breaching, the terms and conditions of its exploitation contract, Part XI or the rules, regulations and procedures of the Authority or if requested by the Council to do so, the [Compliance Committee] 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).

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]~~ ~~[Inspectorate]~~ [Compliance Committee] considers appropriate to ensure compliance within a specified time period.

4. The Contractor shall be given a reasonable opportunity [not exceeding 30 days] to make representations in writing to the ~~[Secretary-General]~~ ~~[Inspectorate]~~ [Compliance Committee] concerning any aspect of the [compliance notice] [regulatory action taken by the Authority under paragraph (1)]. Having considered the representations, the ~~[Secretary-General]~~ ~~[Inspectorate]~~ [Compliance Committee] may confirm, modify or withdraw the compliance notice.

5. bis The Secretary-General shall make public any compliance notice and any response received from the Contractor, and shall present an annual report to the Council on any compliance notices the Authority has issued.

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

DR 103 is another provision that may benefit from allocation of responsibility to the Compliance Committee, to ensure that administrative limbs of the ISA are not taking policy decisions.

We suggest that the triggers listed in DR103 for issuance of a compliance notice should include: not only where breaches have occurred, but where there is a risk of breach as well, to enable pre-emptive action. We would also find it useful for this paragraph (1) to cross-reference the specific instances that occur throughout the other Regulations where compliance notices are envisaged (which by our reckoning includes: DRs 4, 36, 52, 99 and 102).

This would also be helpful to establish a link in this regulation between Inspector instructions issued under DR 99 and compliance notices issued under DR 103, as currently no cross-reference is made. Our understanding is that an Inspector instruction is likely to come first, and then a compliance notice may follow, such as in the event the Inspector instruction is not complied with, or is not sufficient to

remedy the breach. It is also our understanding that the same event should not be subject simultaneously to an Inspector instruction and a compliance notice, which could differ in their requirements. And that a contractor who has received an Inspector instruction should be given the opportunity to implement those instructions, before a Compliance Notice is issued. Having some cross-reference between the two provisions may assist to clarify the order of events, and inter-relation between these two different regulatory tools.

We suggest that the entity issuing the compliance notice, informs the sponsoring State, as well as the Council, to enable both to carry out their respective regulatory duties to oversee the Contractor's activities.

Pending further clarification of the link between DR 99 and 103, we would prefer to see DR103 replaced in its entirety by an alternative text that does not default to a compliance notice as the only regulatory tool available, but instead empowers the ISA to take different progressive actions in the event of non-compliance. This might include: informal or formal dialogue, written warnings, an improvement plan and/or agreed modifications to a Plan of Work. Not only a unilateral Compliance Notice, as currently enabled under DR103. If our formulation is preferred, then 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. ISA does not currently have an enforcement strategy, to our knowledge. That should be remedied urgently.

We support the amendments to 'paragraph 5, including the use of 'shall'. Suspension or termination of a contract should be mandatory (not optional) where after being warned, there are continued serious, persistent or wilful violations by the Contractor.

Use of the wording 'fundamental terms of the contract' is appropriate in this paragraph, to reflect UNCLOS Annex III section 18. However, the Regulations should clarify the meaning of this term, to avoid confusion about which terms of the contract could trigger these most serious consequences if breached, and which would not, as they are not considered 'fundamental'. We recall the facilitator's previous suggestion that a list of contract terms that would be considered fundamental, could be placed in a Standard.