

**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:

President

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 95

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. The Commission [or] [and where there is no conflict of interest] the Secretary General, [respectively] [shall] [may], [as the case may require] from time to time, [issue] [prepare] Guidelines of a technical or administrative nature, taking into account the views of [the Council and] relevant Stakeholders. Guidelines will support the implementation of these regulations from an administrative and technical perspective~~

~~1alt. The Commission or other subsidiary organs of the Authority where so requested by the Council, shall, from time to time, develop Guidelines of a technical nature, for the guidance of Contractors in order to assist in the implementation of these Regulations, taking into account the views of recognized independent experts [identified in accordance with Annex XI], and the views of ~~relevant Stakeholders~~ obtained from public consultation procedures undertaken in accordance with the relevant Standard and taking into account Guidelines.~~

~~1alt bis. The Secretary-General shall, from time to time, develop Guidelines of an administrative nature, in order to assist in the implementation of these Regulations, taking into account instructions from the Council and the views of the Commission as well as other relevant Stakeholders obtained from public consultation procedures undertaken in accordance with the relevant Standard and taking into account Guidelines.~~

~~1alt ter. Guidelines will support the implementation of the Regulations from an administrative and technical perspective. Guidelines will also clarify documentation requirements for an application, detail process requirements (e.g. for the public consultation process, annual reporting and periodic review), and provide guidance on the interpretation of regulatory provisions. [The guidelines are only of a recommendatory nature and does not affect the Contractor's performance of the exploitation contract by means other than the guidelines]~~

~~2. The full text of such Guidelines shall be [reported] [recommended] to the Council [for adoption]. [In case of Guidelines which are not of a predominantly administrative nature, the Council shall take into account statements submitted by Stakeholders during public consultation]. Should the Council find that a Guideline is inconsistent with the intent and purpose of the Rules of the Authority, it may direct request that the Guideline~~

be modified ~~[or withdrawn]~~. ~~[Where no such direction request is made the Council shall approve the Guidelines]~~.

~~2 bis. Where the Council approves the Guidelines, the Commission or the Secretary-General, as appropriate, shall issue the Guidelines.~~

2 bis. Guidelines prepared in accordance with paragraph [1 alt and 1 alt bis] may be issued on a provisional basis until approved (or modified or withdrawn) by the Council

3. The Commission or other subsidiary organ, ~~[in the case of technical Guidelines]~~ ~~[or]~~ ~~[and]~~ the Secretary-General, ~~[in the case of administrative Guidelines]~~ shall keep under review such Guidelines ~~[which shall be reconsidered, and revised subject to Council approval as needed, at least every five years from the date of their adoption or revision, and]~~ in the light of improved knowledge or information.

~~3. alt. The Commission and the Secretary-General shall review the Guidelines in the light of improved knowledge or information and submit their recommendations to the Council for further consideration and, possibly, adoption.~~

~~4. [Guidelines are only of a recommendatory nature and do not affect the Contractor's performance of the Exploitation contract by means other than the Guidelines.]~~ but Contractors shall ensure they are apprised of the Guidelines and take them into account in their performance of functions under these regulations and their contract; and observance of a Guideline by a Contractor may serve as evidence of compliance by that Contractor with the relevant Rules of the Authority to which the Guideline relates. The Authority may also request applicants or Contractors to identify and explain departures from Guidelines.

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

For paragraph 1, we support the ‘alt’ provisions, as these seem helpful to clarify the respective roles of relevant ISA organs in creating Guidelines, and the status of Guidelines in the regulatory framework. In paragraph (1 alt) we suggest adding reference to other subsidiary organs, in case there are occasions where other organs of the ISA are best positioned to issue Guidelines. For example, the Economic Planning Commission (once formed) might be tasked with developing Guidelines in relation to compensation or other measures of economic adjustment assistance for developing States whose economies are adversely affected by mining in the Area. We suggest adding language that empowers the Council specifically to request Guidelines to be developed and deleting ‘for the guidance of Contractors’ recognizing these guidelines will also be for other audiences e.g. ISA organs. Finally, and as suggested in DR 94 we note the need to clarify the requirement for public consultations, and to delete the word ‘relevant’ before ‘Stakeholders’ so as to align with the defined term ‘Stakeholders’ used in the Schedule to the Regulations. ‘Stakeholders’ as a defined term already encompasses a person’s interest or possession of expertise and information, it should not be further qualified and narrowed with the addition of the descriptor ‘relevant’ when used in the Regulations. These comments similarly apply for 1 alt bis.

We believe 1 alt ter can be deleted as (1)alt and (1)alt bis already describe that Guidelines may be administrative or technical, and are designed to assist in the implementation of the Regulations

For para 2 and 2bis, there appears to be a difference of opinion as to whether Guidelines should require Council approval or not. This should be settled and reflected here in this DR94(2) before the Regulations are finalised. The text proposed here, as amended by proposals by Germany and Jamaica, seems to make sense in terms of finding a middle ground between Council oversight and streamlined regulatory processes (i.e. the Council is required to approve Guidelines, but there is a default presumption of approval and adoption, where there is no express objection from Council). We suggest that the Council should be 'directing' its subsidiary bodies, rather than 'requesting'. We also do not think there should be exceptions for when the Council is required to take into account Stakeholder comments. We also think an additional provision (see proposed new 2bis) would be useful here to enable provisional application of Guidelines in the period before Council review. This may be helpful to avoid delays in providing guidance that may be urgently required.

Lastly, on paragraph 4, we note that the Regulations do not indicate the status or import of Guidelines. There is no general wording requiring Contractors to apprise themselves of Guidelines, or to take account of them in their conduct. Text has been deleted from the Standard Contract Terms requiring Contractors to "observe, as far as reasonably practicable, any guidelines which may be issued by the Commission or the Secretary-General from time to time" (section 3(c), Annex X). The ISA should instead use Guidelines as a means of compliance assurance, so that adherence to a Guideline, while not mandatory, provides a measure of comfort that the relevant outcome will meet ISA rules. We suggest deletion of the proposed text that Guidelines would not 'affect the Contractor's performance' of its contract, as we do not understand its meaning and it could undermine the usefulness of Guidelines. We also propose a new last line to paragraph (4), enabling the ISA to ask Contractors to explain departures from Guidelines. This is recommended both to help the ISA in reviewing Contractor compliance, and also so that the ISA is able to keep up-to-date with possible new and improved methodologies, and the currency of the Guidelines.