

TEMPLATE FOR SUBMISSION OF TEXTUAL PROPOSALS DURING THE 29TH 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(s) of Delegation(s) making the proposal:

The Pew Charitable Trusts

2. Please indicate the relevant provision to which the textual proposal refers.

DR 106 (and proposal for a new DR105 bis)

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.

DR 105 bis

Administrative Decision Review

1. Where a Contractor or a person directly affected by a decision of a subsidiary organ of the Authority considers that the decision has been:

(a) taken outside the legal powers conferred upon the decision-maker, or

(b) taken without adherence to the rules, regulations, procedures, and Standards of the Authority,

that person may apply within three months of notice of the decision to the Secretary-General for an administrative review of the decision in question, providing an explanation of the grounds for objecting to the decision.

2. Upon determining in accordance with the applicable Standard that an application made pursuant to paragraph (1) is not frivolous, vexatious or made in bad faith, the Secretary-General shall refer such matter to [the President of the Council] without delay.

3. Upon receipt of a referral from the Secretary-General pursuant to paragraph (2), [the President of the Council] shall convene a Review Committee comprising a representative from one member State from each of the chambers of the Council who shall, in accordance with applicable Standard, review the decision and whether it was lawfully and properly taken.

4. The Review Committee shall examine any referral and related evidence and decide either that the original decision was correct and appropriate in the circumstances, or that the original decision should be referred back to the relevant decision-maker for further deliberations in accordance with the findings of the Review Committee.

5. The Secretary-General shall provide the decision of the Review Committee to the applicant, and shall publish the decision or a summary of it on the website of the Authority.

106

Settlement of Disputes

1. Where a dispute arises concerning the interpretation or application of these Regulations and an Exploitation Contract,

(a) the disputing parties [may / shall] enter into good faith negotiations with a view to resolving the dispute including through any alternative dispute mechanisms mutually agreeable to the parties; and

(b) should the dispute remain unresolved despite best efforts undertaken in accordance with paragraph (1), the matter shall be settled in accordance with section 5 of Part XI[Part XV and Annex 6 of the Convention. ~~[and the rules of procedure adopted by the International Tribunal for the Law of the Sea for the conduct of expedited hearings concerning the Rules of the Authority.]~~

~~1 bis Nothing in this Regulation shall prejudice the ability of the Authority or a Sponsoring State to act pursuant to Section 3 of Part XI of these Regulations.~~

~~2. In accordance with article 21 (2) of annex III to the Convention, A~~any final decision rendered by a court or tribunal having jurisdiction under the Convention and the ~~r~~Rules, regulations and procedures of the Authority] relating to the rights and obligations of the Authority and of the Contractor shall be enforceable in the territory of ~~any~~each State party to the Convention affected thereby.

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

We recall during the third part of the twenty-eighth session that a few member States wished to further consider the merit of establishing (a) an interim opportunity for administrative review of the ISA organ decisions, and (b) negotiation and alternative dispute resolution, before going to an ITLOS proceeding (and without prejudice to the right to access ITLOS). We agree that this merits further discussion, recognising that contentious ITLOS proceedings may be onerous, expensive and long drawn-out. In addition, we note that the relevant provisions of UNCLOS do not permit recourse to dispute resolution by Stakeholders who are neither Contractors nor member States. Best practice in resource governance suggests an opportunity for Stakeholders to appeal decisions by a regulator to a neutral arbitrator.

With this in mind, we suggest a new DR105 to provide an administrative review process internally to the ISA, whereby Contractors, as well as other Stakeholders, could raise points of contention. Such a process would be in addition to, not a substitute for, the formal dispute resolution mechanisms as stipulated in Part XV of UNCLOS. (We note that a similar administrative review process ins has already been included to an extent in the regulations (e.g. DR 76 and 77) concerning financial matters, so this proposal merely seeks to make such appeals consistent and applicable to all decisions, not only one category of decisions).

We note that Standards would be needed to flesh this process out. These can include timeframes, rules for selection of Committee members, procedures for receiving evidence, examples of when decisions will not be reviewed (e.g. where the same matter has been reviewed before, where the person bringing the objection is not directly affected, where the specific subject matter is better suited to a complaint to the ISA's Ombudsperson, etc.)

We further propose in DR 106 to include provision for negotiation and alternative dispute resolution, where mutually agreed, as an option before (and without prejudice to) proceeding to litigation before ITLOS or commercial arbitration.

We suggest deletion in DR 106 (1) of the reference to the rules of procedure of ITLOS. We believe those rules will apply to an ITLOS proceeding as appropriate, without the ISA needing to legislate for it. We also note that Article 188 of UNCLOS allows that disputes concerning the interpretation or application of an ISA Contract can *"be submitted, at the request of any party to the dispute, to binding commercial arbitration, unless the parties otherwise agree"*. Such proceedings would not be subject to the ITLOS procedural rules, contrary to this DR106 wording.