

**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 96

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.

- The facilitator's proposed amendments are reflected in red.
- Our proposed amendments are indicated as in-line edits in blue. Proposed deletions of text proposed by the facilitator appears in strikethrough and bold.

Regulation 96

Inspections: general

1. The Council shall establish appropriate mechanisms for inspection, as provided for in articles 153 (5) and 162 (2) (z) of the Convention, before the effective date of any exploitation contract, which shall accord with the principles of:

- a. independence,
- b. transparency
- c. fairness,
- d. proportionality
- e. accountability,
- f. precaution;
- g. and shall ensure inclusivity, gender equality, and the effective protection of the health and safety of inspectors.

1. bis The Council shall approve and maintain a code of conduct for Inspectors and inspections, that takes into account the principles in paragraph (1) and includes provisions on identifying and managing conflicts of interest, and on information management and confidentiality.

2. The Contractor shall permit the Authority to send its Inspectors, who [may][shall upon request by sponsoring States or other party be concerned] be accompanied by a representative of thes sponsoring State or other party concerned, in accordance with article 165 (3) of the Convention, aboard all vessels and Installations whether offshore or onshore, used by the Contractor to carry out Exploitation activities under an exploitation contract as well as to enter its offices wherever situated. To that end,

Members of the Authority, in particular the sponsoring any State or States in whose national jurisdiction or on whose vessel the Authority wishes to conduct inspection activities, shall assist the Council, the Secretary-General and Inspectors in discharging their functions under the Rules of the Authority.

2 bis Nothing in these regulations shall be construed in any way inconsistently with the exclusive jurisdiction of the flag State over its vessels on the high seas as reflected in article 92 of the Convention; nor the enforcement rights of port States as reflected in article 218 of the Convention.

3. The [Secretary-General] [The Inspector] shall give reasonable notice to the Contractor of the projected time and duration of inspections for a period as necessary, the names of the Inspector(s) and any activities that the Inspector(s) are to perform that are likely to require the availability of special equipment or special assistance from the personnel of the Contractor, save in situations where the [Secretary-General] [the Inspector] has reasonable grounds to consider the matter to be so urgent that notice cannot be given, in which case the [Secretary-General] [the Inspector] may, where practicable, exercise the right to conduct an inspection without prior notification, such as when a compliance notice under regulation 103 has been issued to the Contractor in question or pursuant to Regulation 4(5) applies.

4. Inspectors may inspect during the whole lifecycle of the activities in the Area any relevant documents, ~~or items, which are necessary to monitor the Contractor's compliance, all other recorded data and or samples~~ and any vessels or Installations used in the Area in connection with activities in the Area, including its log, personnel, equipment, records and facilities.

(5)(d) Provide access to relevant monitoring equipment, books, documents, papers and records ~~and passwords which are necessary and directly pertinent to [determine compliance with terms and conditions of a contract and these Regulations including with] verify the expenditures referred to in the Plan of Work or necessary to determine compliance with the financial payments due under the exploitation contract and these regulations[terms and to verify the expenditures referred to in the Plan of Work]~~;

(5)(f) Accept the deployment of remote real-time monitoring and surveillance equipment, ~~where required by the Secretary General~~, and facilitate the activities of Inspectors in deploying such equipment and having access thereto; and

(6)(b bis) (b).bis An Inspector shall adhere to the Authority's code of conduct for inspectors and inspections established pursuant to draft regulations 96 (1) bis.

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

In paragraph 96(1), we suggest adding a timing requirement. The way the paragraph is phrased could be interpreted as a future duty for the Council. We consider it important that the ISA's inspectorate is operational as soon as possible, and certainly before any Exploitation commences.

In draft Regulation 96(1)(bis), we support the additional language proposed, which requires a Code of Conduct for ISA inspectors. We note that the proposed text references 'principles' in paragraph 1 that do not currently exist. We would therefore suggest that the following principles should be added into paragraph 1:

- independence
- transparency
- fairness,
- proportionality
- accountability,
- precaution.

We suggest these because they are well-established principles of best regulatory practice, and highly relevant to the ISA's circumstances. We also propose additional wording to ensure that the inspectorate upholds:

inclusivity, gender equality and the effective protection of the health and safety of Inspectors. These points reflect human rights principles as well as the duty of care owed to the inspectors. In that regard, we note recent published commentary about difficulties women and minority groups can experience participating in offshore work.

Regarding paragraph 2 and 2bis, several member States have previously noted the importance that the provisions of these regulations do not exceed the powers conferred upon the ISA by UNCLOS. This Regulation 96(2) includes a right for the ISA to inspect onshore premises under national jurisdiction, and the right for the ISA to inspect vessels on the high seas under flag state jurisdiction. These powers may need further consideration to avoid the ISA exceeding its jurisdiction to ‘inspect activities in the Area.’.

Considering onshore premises: inspections of facilities that are not located in the Area would be contingent upon cooperation of States. For this reason we propose to add to the Regulations a stronger and more specific focus on ensuring cooperation between the ISA and port States, flag States, and sponsoring States. However, it seems to us that this would fit best under Draft Regulation 3, which is specifically about a duty of cooperation between the ISA and States.

With regards to inspections in the Area the ability of the ISA to board vessels and installations for the purposes of inspection or enforcement may need further discussion and careful crafting of regulations to ensure the ISA can carry out its duties without exceeding powers given to it by UNCLOS. UNCLOS gives flag States exclusive jurisdiction over vessels on the high seas. This would seem to suggest that the ISA may need the express permission of the flag State each time it wishes to board. So, it seems that just adding ‘all vessels’ into these inspectorate provisions is not sufficient and could give rise to regulatory gaps, ambiguity, or conflict. In our opinion, further discussion is needed. We would welcome a study that has previously been requested, to consider some of the jurisdictional issues arising between States and the ISA, and would suggest an inter-sessional event on these complex issues may also be helpful.

Regarding paragraph 3, the proposed addition at the end of the paragraph references Regulation 4(5) pertaining to Coastal States. This addition provides one example for when a ‘surprise’ inspection could be conducted. If examples are to be given, it is important to note that serious harm to a coastal State is not the only circumstance in which an inspection without prior notification may be reasonable. Another example would be in the face of a compliance notice under regulation 103. We suggest adding that example to the end of paragraph 3. We would also like clarification on what is meant by the additional proposed wording: “for a period as necessary”. It is not clear if this ‘period’ refers to the notice period required for the inspection, or whether it refers to the duration of the inspection. It would be good to clarify the drafting here to avoid confusion.

Regarding paragraph 4, the content seems more related to an inspector’s powers, and for this reason may be better located to Regulation 98, which covers inspectors’ powers. In addition, the paragraph speaks about inspection of ‘personnel’. It is not clear what this might involve. If the Regulations are giving inspectors the power to conduct bodily searches, this should be more clearly stated, and we would expect more procedures to be outlined to ensure such a power is only used sparingly and appropriately. In our view, it would be more appropriate to delete references to inspection of personnel, in favour of a power for ISA inspectors to interview personnel - which we note is already covered by DR98.

Regarding paragraphs 5, in sub-paragraph (d) the following wording is used to justify use of this particular inspection power: it must be deemed ‘necessary and directly pertinent’. This is a high evidential threshold which appears to conflict with Regulations 96(4) and 98, which both use ‘relevant’ as the threshold. We suggest to amend this sub-paragraph (d) so that the power can be used to access relevant equipment, books and records etc. to ensure consistency between the different inspection powers and regulations. With regards sub-paragraph (f), we consider that there be a requirement for real-time data reporting for environmental monitoring of all Contractors as standard practice, rather than something that requires specific authorization on a case-by-case basis.

Regarding paragraph 6, we support this additional provision (b)bis), which requires inspectors to adhere to a code of conduct. This introduces a new and important accountability measures. The Code of Conduct can cover important matters such as confidentiality' and conflict of interest identification and management.