

**TEMPLATE FOR SUBMISSION OF TEXTUAL PROPOSALS DURING THE 27TH 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 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.

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

1. The Council shall establish appropriate mechanisms for ~~inspection~~ **directing and supervising a staff of Inspectors**, 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;

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 be accompanied by a representative of ~~its~~ **the Contractor's sponsoring** State or other party concerned, **in particular affected coastal States** [, in accordance with **article 142 and** article 165 (3) of the Convention,] [aboard 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.

- (a) Except where the circumstances described in paragraph (b) apply, ~~the~~ Secretary-General [Inspector] shall give reasonable notice to the Contractor of the projected time and duration of inspections, the names of the Inspectors and any activities that the Inspectors are to perform that are likely to require the availability of special equipment or special assistance from the personnel of the Contractor.
- (b) ~~save~~ ~~The circumstances in which~~ [in situations ~~where the Secretary-General has reasonable grounds to consider the matter to be so urgent that notice cannot be given, in which case the Secretary-General may, where [practicable] [deemed necessary]~~ ~~The Authority, sponsoring States and flag States shall cooperate towards the avoidance of unnecessary duplication of administrative procedures and compliance requirements;~~], exercise the right to conduct ~~an inspection~~ ~~may be conducted~~ without prior notification ~~are where:~~ ~~[where the Secretary-General may without prior notification direct an inspection of the Contractor's activities in accordance with regulation 4(5)]~~
 - (i) a compliance notice under regulation 103 has been issued to the Contractor in question;
 - (ii) (ii) an organ of the Authority determines for good cause that harm or threat of harm to the Marine Environment or human health and safety is likely to occur or has occurred; or
 - (iii) (ii) regulation 4(3 quater.) or 4(5) applies;

3bis. Taking into account regulation 3(b), the Authority may place Inspectors on Contractors' vessels for such periods as may be deemed necessary or expedient, including for long-term residential placements.

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

5. The Contractor and its agents and employees shall facilitate the actions of the Inspectors in the performance of their duties, and shall:

- (a) Accept and facilitate the prompt and safe boarding and disembarkation of vessels and Installations by Inspectors, ~~including provision of a berth for overnight stays;~~
- (b) Cooperate with and assist in the inspection of any vessel, or Installation ~~or equipment~~ conducted pursuant to this regulation;
- (c) Provide access to all relevant areas, items and personnel in offices or on vessels and Installations at all reasonable times;
- (d) Provide access to monitoring equipment, books, documents, papers, records and passwords which are necessary and directly pertinent to 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;
- (e) Answer fully and truthfully any questions put to them;
- (f) Accept the deployment of remote real-time monitoring and surveillance equipment, ~~where required by the [Secretary-General] [Council]~~, and facilitate the activities of Inspectors in deploying such equipment and having access thereto; and
- (g) Not obstruct, intimidate or interfere with Inspectors in the performance of their duties.

6. Inspectors shall:

- (a) Follow all reasonable instructions and directions pertaining to the safety of life at sea given to them by the Contractor, the captain of the vessel or other relevant safety officers aboard vessels and Installations; and
- (b) To the maximum extent possible, refrain from any undue interference with the safe and normal operations of the Contractor and of vessels and Installations~~[, unless the Inspector has reasonable grounds for believing that the Contractor is operating in breach of its obligations under an exploitation contract.]~~

(b bis). An Inspector shall adhere to ~~[be bound by strict confidentiality provisions and must have no conflicts of interest in respect of duties undertaken, and shall conduct his or her duties in accordance with]~~ the Authority's code of conduct for Inspectors and inspections ~~[approved by the Council]~~ established pursuant to DR96(1)bis.]

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

Regarding paragraph 1, the red insertion (proposed by Australia and Russia) more exactly reflects UNCLOS and ensures that inspector supervision is not overlooked. Further, Article 153(5) of UNCLOS should also be referenced, which gives the ISA the right to inspect all installations in the Area used in connection with activities in the Area.

We believe it would also make sense to use these Regulations to establish the Inspectorate oversight mechanism, rather than simply repeating the UNCLOS requirement to establish it in the future. Several consultation respondents commented upon the lack of detail in this Part of the draft Regulations, with disappointment.

The Regulations could advance this critical issue through these proposed edits, including a stipulation that the inspectorate be established before any exploitation commences, as well as the suggested guiding principles, and reference to the health and safety of inspectors, as suggested from Council discussions in March 2019 (interventions by Japan, France, Italy, Tonga, Germany, Belgium), and the July 2019 workshop held in Jamaica by Resolve and The Pew Charitable Trusts, on the ISA's future inspectorate (see here for: [copy of workshop report](#)).

Regarding paragraph 2, several member States (e.g. Japan, France, Italy, Tonga, Germany, Belgium) have noted the importance that the provisions of these regulations do not exceed the powers conferred upon the ISA by UNCLOS. Concern has been expressed as to whether inspection of premises under national jurisdiction may exceed the UNCLOS power for the ISA to 'inspect activities in the Area'. It will also be important not to clash with the flag State's exclusive jurisdiction over its vessels in the high seas. The ISA should, however, ensure to maintain maximum regulatory control, within its jurisdiction. Methods for doing so include retention of books and records requirements (DR39), and on-vessel monitoring mechanisms (e.g. DR96(3bis)).

Regarding the newly proposed paragraph *2bis*, we believe it will be important not to interfere with the IMO regime and flag / port state controls. This insertion may assist with that point.

Regarding paragraph 3, the ISA should retain powers to inspect and audit Contractors at any time, to allow for risk-based targeting, [see White Paper, Dr. Kevin Murphy \(Pew, 2020\)](#). This should include the possibility that ISA inspectors can conduct site visits or other inspection activities without giving prior notice to the Contractor in certain circumstances, though it is also important as a matter of public administrative law to set clear and stringent thresholds for when such an intrusive power can be exercised. This should be better delineated in the Regulations, as proposed in sub-paragraph (b).

Regarding the newly proposed paragraph *3bis*, this is suggested to bolster the ISA's powers to inspect Contractors. It gives the ISA (discretionary) powers to place permanent on-vessel observers. Source: [White Paper, Dr. Kevin Murphy \(Pew, 2020\)](#), and see also report from the [ISA Inspectorate workshop run by Pew / Resolve in July 2019](#). We note that a recent publication recommends the use of observers to fulfill the Contractor's ongoing monitoring requirements (similar to fishery observer programmes). Source: Mark Squillace. 2021. [Best regulatory practice for deep seabed mining](#). Also, we believed DR3(b) should be cross-referenced because of its relevance to the inspectorate provisions. The ISA and sponsoring State may wish to collaborate on inspection activities and information, and not to duplicate each other's efforts in that regard. E.g. not running two separate but overlapping observer programmes.

Regarding paragraph 4, we recommend moving this provision to DR 98 as it seems more related to an inspector's powers.

Regarding paragraph 5, it might be clearer to have a separate provision on Contractor roles and responsibilities regarding inspections. Particularly as there may be some overlap between this DR95(5), with DR75(2) and DR3. Though this is not necessarily problematic provided the language remains consistent across each provision.

Regarding paragraph 6, It might be clearer to have a separate provision on Inspector duties and obligations (in addition to powers). Also, for subparagraph b, as previously drafted, this provision lacked enforceability. It was not clear where the 'confidentiality' provisions would be found; nor who would have responsibility for identifying conflicts, by what process, and how such conflicts will be managed. We have made some amendments and included those in subparagraph *bbis*.