

THE PEW CHARITABLE TRUST'S COMMENTARY

***ON THE REVISED CONSOLIDATED TEXT: DRAFT REGULATIONS ON
EXPLOITATION OF MINERAL RESOURCES IN THE AREA,
DATED 29 NOVEMBER 2024 (ISBA/30/C/CRP.1)***

Key

Black font, red font, and grey text-boxes are replicated from the Draft Regulations text.

Blue font represents commentary or edits proposed by The Pew Charitable Trusts.

Regulation 96 ~~ter~~ bis
Aaccess to i Inspections

[1. The Inspector decides upon the manner of execution of the inspections. Inspections may be carried out announced, unannounced, remotely, virtually or onsite, or a combination of these.

1. bis. The [Chief Inspector]/[Inspector] shall give reasonable notice, [which may vary depending upon the chosen manner of execution pursuant to paragraph 1, to a Contractor of the inspection. This notice shall contain:

(a) information about the manner of execution of the planned inspection;

(b) the projected time and duration of inspections;

(c) the ~~number~~ames of the Inspector(s); and

(d) 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. ~~The activities of the Inspector(s) should in any case not impede activities in the Area unless otherwise provided in these Regulations.~~

2. [Where the Compliance Committee or the Chief Inspector have reasonable grounds to consider the matter to be so urgent that reasonable notice cannot be given, the Compliance Committee or the Chief Inspector shall instruct an Inspector to conduct an [impromptu] inspection, notwithstanding paragraph 1. bis., without prior notification to a Contractor ~~[without prior notification,]~~ and shall cooperate with a Contractor to conduct the inspection as soon as practically possible.]

2. bis. [The Inspector shall, upon request by any State Party or other party concerned, be accompanied by a representative of such State or other party concerned when carrying out the inspection.]

3. Inspectors may, [in accordance with these Regulations,] inspect any relevant documents, ~~for~~ items, personnel or digital information necessary to monitor a Contractor's compliance under its Exploitation Contract and the rules, regulations and procedures of the Authority which include inter alia, all recorded data and samples and any ships or Installations used by the Contractor to carry out Exploitation activities and activities related to such Exploitation activities in the Area, including its log, equipment, records and facilities, as well as interview relevant personnel. [The Inspector shall have the authority to take copies or samples as needed for further analysis].

4. The Contractor, ~~its subcontractors, agents and employees~~ shall cooperate with Inspectors and give full assistance to Inspectors in the performance of their duties, and shall:

- (a) Accept and facilitate the prompt and safe boarding and disembarkation of ships and Installations used to carry out Exploitation activities and activities related to such activities in the Area by Inspectors;
- (a) bis Keep the Chief Inspector and Sponsoring State or States notified of proposed ship schedules including support and supply vessels, and when feasible, inform the Chief Inspector before any ship commences its voyage to a Contractor's Contract Area to facilitate the conveyance of Inspectors and representatives of Sponsoring States, where appropriate and to keep the Chief Inspector informed if there is a change to proposed ship schedules due to operational, logistical or unforeseen circumstances;
- (a) ter Within 7 Days of the Chief Inspector informing the Contractor that the Inspector(s) would like to conduct an [announced] inspection of a Contractor's ship or Installation, the Contractor shall inform the Chief Inspector of the next date a ship will commence its voyage to the Contractor's Contract Area;-
- (b) Cooperate with and assist in the inspection of any ships or Installations or equipment used to carry out Exploitation activities and activities related to such activities in the Area conducted pursuant to this Regulation and comply with the requests of an Inspector;
- (b) bis Provide reasonable facilities, financed by the Contractor, including, food and [where feasible][suitable and secure] accommodation, to Inspectors;
- (c) Provide access [at all reasonable times] to all relevant areas, items and personnel [engaged in activities relating to Exploitation activities in the Area, and to relevant areas, items and personnel on ships and Installations engaged in Exploitation activities in the Area; ~~or on ships and Installations engaged in used to carry out Exploitation activities related to such Exploitation activities in the Area at all reasonable times;~~]
- (d) Provide access to relevant monitoring and surveillance systems and equipment, books, documents, papers and records [regardless of where they may be located] to determine compliance with terms and conditions of an 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 in a uniform manner and as required by the Council, the Compliance Committee, or the Chief Inspector;
- (f) bis Facilitate the activities of Inspectors to observe the Contractor's monitoring operations; and
- (g) Not obstruct, intimidate or interfere with Inspectors in the performance of their duties, or representatives of Sponsoring States, State, or other party concerned who accompany these Inspectors.] [Contractors shall also establish and communicate internal procedures to ensure that all personnel are aware of any comply with inspection requirements.]

Comment

There still seems to be disagreement as to whether it should be possible to carry out inspections without prior notifications. This element is thus retained in square brackets in paragraph 2. Furthermore, a joint proposal has been provided to offer more forms of inspections, including the possibility to use remote supervision technologies.

General comments

We believe **unannounced inspections** should be a routine, indeed essential, element of the inspection regime for the ISA. If a Contractor knows it will have advance notice for every inspection, it could have very low standards most of the time, only implementing best practice standards when an inspection is due. No regulator can be everywhere all the

time, hence it is common regulatory practice to impose a climate of uncertainty regarding inspection schedules, as an incentive for the regulated entity to operate to high standards at all times.

We heard some delegations indicating that such a practice may be dangerous. It is important to note the proposal is to enable inspectors to arrive ship-side for periodic spot-checks without the Contractor knowing they are coming days in advance – but it is not a proposal for the inspector to board a vessel surreptitiously(!) Some notice would be given as the inspection team approaches to ensure the necessary measures can be taken for the safety of the inspectors (e.g. boarding) and crew (e.g. temporary suspension of operations during boarding if appropriate), which is captured in DR97bis (1).

This DR96 bis exhibits a general **confusion about what and where may be inspected**, and how to describe it. This leads to convoluted and **unclear terminology**, such as (in paragraph (4)(b) and (c) above) “*relevant areas [for] activities relating to Exploitation activities in the Area... and relevant areas*”, and “*Exploitation activities and activities related to such activities in the Area conducted pursuant to this Regulation*” - which frankly make little sense. The key point is that it is essential to ensure any person, item or information that is directly related to Exploitation (in the Area) can be brought under ISA inspection scrutiny even if that person, item or information is not itself located ‘in the Area’. Examples may include: questioning the Contractor’s managing director wherever he/she is located, reviewing the Contractor’s corporate accounts in head office, examining the programming of a ‘digital twin’ in a sub-contractor’s premises, speaking to the Contractor’s auditors in their offices, examining samples in a laboratory, monitoring the off-loading of extracted minerals in the port to which they are being off-loaded, inspecting mining equipment in the country of manufacture before it is shipped out to the mine site etc. We suggest that this DR96 bis should use defined terms to streamline and specify this scope i.e. inspection can cover persons, items and information, wheresoever located, that is necessary for the ISA to access to inspect the compliance with the Regulations of ‘*Exploitation and Relevant Activities*’.

Furthermore in terms of **scope**, we find that DR96(ter) generally does not differentiate between inspections on a mining vessel and inspections by the ISA ashore (working in collaboration with the relevant State), and we would welcome clarification that the latter are intended to be covered in the regulations. Finally, we understand that the ‘inspections’ function should encompass types of evidence gathering *other than site visits* e.g. desk research, data analysis, legal assessment of use of powers etc. But such aspects other than site visits seem to receive much less attention in this Part XI of the Regulations.

As a practical matter, we wonder if the Council has given thought to how Inspectors may manage **interpretation** or translation, where they do not share a language with the persons running the operations that are being inspected? This also relates to the point raised by a couple of different Council members previously, that ‘an Inspector’ may be a misnomer, as a **multidisciplinary team - or a company – may be required** in fact for any inspection, to cover all the necessary functions. It is prudent that the Regulations be drafted in terms that do not preclude such arrangements.

Drafting comments

We think **paragraph (1)** should refer to ‘Chief Inspector’ - who should sign off on inspection schedules and strategies – not any individual ‘Inspector’; and we would also like to add the wording here “*in accordance with the Compliance strategy*”, so it is clear this decision is not unilateral or arbitrary. We find useful the various options now listed in paragraph (1) - though we wonder whether we need both DR96bis(1) and DR98(1 bis) that seem to cover the same ground? We also recall previous interventions (e.g. Brazil, Canada, Ireland) proposing a permanent inspectorate presence onboard a vessel, and wonder if this should be referenced in the regulations also?

Paragraphs (1), (1 bis) and (2) now appear somewhat contradictory about whether and how notice would be given in an unannounced inspection situation. We suggest that this could be managed by deleting current paragraph (2) and instead indicating that the obligation to give ‘*reasonable notice*’ can be met for an unannounced inspection by providing notice at the point of boarding. This should reassure those who seemed worried about dangerous vessel boarding by inspectors, and will ensure that there is a written notice, containing the various elements in paragraph (1 bis) for all inspections even ‘surprise’ ones, which seems like good process.

In **paragraph (3)** we are unsure whether the new proposed insertion of ‘*inspect... personnel*’ means to permit body searches. That seems intrusive and usually in national jurisdiction a process that would necessitate proportionate

justification and stringent procedural safeguards. We would like to clarify if it is the intention? If not, we suggest amending so it is clear this is a power to interview witnesses and not to allow physical searches of persons.

In the chapeau of **paragraph (4)**, we presume the text ‘*employees, subcontractors, and agents*’ was deleted because these entities are now subsumed within the definition of ‘*Contractor*’ in the Schedule to the Regulations, which we support. We note there remains inconsistency of use of this defined term in the Regulations. In some regulations Contractor-associated entities are listed separately and in some they are not. The defined term should be applied consistently throughout the Regulations. We would also recommend for the ISA to develop Standards or Guidelines to clarify for all stakeholders which specific regulations apply only to the named Contractor, and which apply to the wider category of associates (subcontractors, agents etc). The same Standard or Guideline could do the same division between regulations that are intended to apply to the Enterprise (or are not).

We wondered why **paragraph (4)(a bis)** references representatives of sponsoring States? This is incongruous amongst the other paragraphs that do not. We believe the Regulations should focus on the relationship between the ISA and the Contractor, and the ISA and the sponsoring State – but should not seek to legislate aspects of the relationship between the Contractor and the sponsoring State that should be governed by domestic law. We are not sure it is a given that the ISA would always be coordinating with a sponsoring State for every inspection and would like to avoid binding the Chief Inspector to do so. DR97(5) seems to cover this coordination aspect well, in any event. Finally, the inclusion only of the sponsoring State here, by omission appears to exclude other possible representatives who may be accompanying the inspector, which we find counter-productive.

In **sub-paragraph (4)(a ter)** it would be useful for the Chief Inspector to receive details of the port(s) of disembarkation (as well as the date), for planning purposes.

It would be better in **sub-paragraph (4)(f)** on remote surveillance equipment to be clear (a) who has power to take the decision, and (b) who is responsible to liaise with the contractor to give the decision effect. Currently it reads as if all three of the Chief Inspector, Compliance Committee and/or the Council may perform either of these functions, which we guess is not the intention. We also recall a point raised by India previously, that all communications between ISA and the Contractor should be conducted consistently through the same point of contact (the Secretary-General).

Sub-paragraphs (4)(c) and (d) could be merged and simplified. DR98 sets out what an inspection can involve, so a general obligation to comply with any request of an inspector made pursuant to these Regulations (including permitting access to areas, objects or persons at their request) would suffice here.

Further in this **sub-paragraph (4)(f)**, we do not understand how a Contractor can accept equipment ‘*in a uniform manner*’. We suggest deleting that phrase. If the intention is to establish that the deployment of remote monitoring equipment should be mandatory for all Contractors (which we would support), this should be done either in DR102 (which also requires remote monitoring systems), or for more specific detail via a Standard (which can be updated from time to time as monitoring technology evolves). We also note that different approaches at different times may legitimately be taken by the ISA in terms of inspection approaches for different Contractors. Such tailoring is best practice if it is done within an over-arching risk-based and accountable approach to compliance, which in our opinion would make sense in terms of cost-effectiveness as well as proportionality.

We support retention of **sub-paragraph (g)**. It is important that there is an obligation on Contractors not to impede or intimidate inspectors, otherwise there is no recourse to any sanctions or compliance action in such cases. This is important for the welfare of the Inspectors to whom the ISA has a duty of care. Other issues relating to the rights and well-being of inspectors, which the ISA may like to consider as it develops its Standards for inspections, include: Can criteria be applied to selection of inspection teams to enable mutual support? Is there radio equipment on board or other means for the inspector to communicate back to the ISA, including in case of an emergency? What is the process if an inspector reports to the ISA that they have been obstructed or intimidated? Is there a prescribed process if an inspector comes to harm or is reported missing? While details may be left to a Standard, the requirement to elaborate such processes must be contained in the Regulations, and it is essential that any relevant Standards be developed before a Plan of Work is submitted, so that Inspector protections may be evaluated against those Standards.

DR98(1)(h)(bis) empowers inspectors to use “**do not disturb**” notices, to enable them necessary time and space to inspect specific areas. If this is retained in DR98, then it would make sense to have a correlating obligation in DR96bis to require Contractors to respect the terms of any “do not disturb” notices employed by inspectors.