

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 98

Inspectors' powers

1. ~~An~~ Inspectors may, for the purposes of monitoring or enforcing compliance with the rules, regulations and procedures of the Authority and the terms of the Exploitation Contract:

(a) Question any ~~[relevant]~~ person ~~[who is deemed relevant by the Inspector and is]~~ engaged by the Contractor in the conduct of ~~[Exploration and]~~ Exploitation activities on any matter [regulated by] the rules, regulations and procedures of the Authority relate;

~~(a) bis Conduct an announced or unannounced, remote, virtual or onsite visit to the ship and installations used by the Contractor;~~

~~(b) Subject to any legal requirement, obligation or duty that would prevent disclosure:~~

~~(i)~~ Require any person who has control over, or custody of, any ~~[relevant]~~ document, whether in electronic form or in hard copy, including a plan, book or record, to produce a copy of that document to the Inspector ~~[immediately]~~ or at any other ~~[reasonable]~~ time and place required by the Inspector in writing;

~~(ii)~~ bis Inspect any relevant documents or items which are necessary to monitor the Contractor's compliance, all other recorded data and samples and any ship or Installation ~~engaged used~~ ~~[into-carry-out]~~ Exploitation activities and activities related to such ~~E~~xploitation activities in the Area] including its log, equipment, records and facilities and question ~~[relevant]~~ personnel.

~~(iii)~~ ~~(f)~~ [Seize] documents, articles, substance or any part or sample of such for [further] examination or analysis that the Inspector may reasonably require;]

~~(c)~~ Request from any person referred to in subparagraph (b) above the reason for any entry or non-entry in any ~~[relevant]~~ document over which that person has custody or control;

~~(d)~~ Examine any document produced under subparagraph (b) and make a copy of it or take an extract from it;

~~(e)~~ Inspect ~~[and/or test]~~ any machinery or equipment under the supervision of the Contractor or its agents or employees that, in the Inspector's opinion, is being or is intended to be used for the purposes of the Exploitation activities;

~~(f) [Seize] [Acquire copies of] [relevant] documents, articles, substance or any part or sample of such for [further] examination or analysis that the Inspector may reasonably require;]~~

[(g) ~~[Remove]~~ [Label] representative samples or [acquire] copies of assays of such samples from any ship or equipment used for or in connection with the Exploration and Exploitation activities that the Inspector may reasonably require;]

(h) Require the Contractor to carry out such procedures in respect of any equipment used for or in connection with the Exploitation activities as may be deemed [reasonably] necessary by the Inspector; and,

[(h) bis Issue a “do not disturb notice”, in writing, in order to allow the further inspection, examination or measurement of, or the conducting of tests concerning, any ship, Installations, equipment or facilities engaged in Exploitation activities and activities related to such Exploitation activities in the Area.]

(i) ~~An Inspector may~~ Pperforms any other prescribed function of the Authority as its representative in accordance with written authorization of the Council.

[3. Before an Inspector may seize any document under subparagraph 1(f) above, the Contractor may copy it.]

[4. When an Inspector seizes or removes any item under this Regulation, the Inspector shall issue a receipt for that item to the Contractor.]

5. An Inspector shall document any site visit or inspection activity and shall use any means to do so, including video, audio, photograph or other form of recording.

In terms of substantive points in DR98, we **object to the new chapeau in DR98(1)(b)** (*‘Subject to any legal requirement, obligation or duty that would prevent disclosure’*). According to the Compilation of Proposals this proposal came from the ISA private sector contractors NORI, TOML and BMJ. Whilst we are sympathetic to the idea of an exceptional situation in which a document may not be disclosable by a Contractor (e.g. due to legal privilege), we anticipate such circumstances would be limited. The wording here is much too broad in terms of what may be withheld. A ‘legal duty’ could, for example, include a non-disclosure agreement that a Contractor makes all employees sign about *any* information they obtain during their employment. In this way, it is also an exemption that could be intentionally exploited to withhold information (or even, unintentionally, create uncertainty and place persons on the vessel in an uncomfortable position in that they are not sure if they are under a legal requirement to disclose or not disclose information). To allow such an exemption to the ISA’s inspection requests would fatally undermine the entirety of this Part XI of the Regulations. Furthermore, DR98 is setting out the Inspectors’ powers – i.e. what the ISA has legal competence to do. Inspectors should be given legal competence to request any documents or information they deem relevant. It is not for an Inspector to second guess whether the subject of the request has other legal duties that may prevent disclosure. That is a matter for the Contractor. So if this exception is to be included in the regulations at all, then it should be in DR96bis(4) i.e. the provision that obliges Contractors to cooperate with inspections; and it should very carefully worded to avoid creating unintentional loopholes.

Sub-sub-paragraph (1)(b)(ii) empowers inspection of a ship and its “*log, equipment, records and facilities and [to] question [relevant] personnel*”. We are interested to understand the extent to which this is within the legal powers and jurisdiction set for the ISA by UNCLOS, insofar as this may relate to operational aspects and crew of a ship? In this regard, we hope that Pew’s 2024 Code Project study on the jurisdictional overlap between the ISA and shipping regimes may be helpful: <https://www.pewtrusts.org/-/media/assets/2024/03/code-project---enforcement-of-deep-sea-mining-regulations-at-sea.pdf>. The paper includes a recommendation, which we believe remains valid and urgent, for further work by the Council to explore the inter-relations between shipping law and the ISA’s regime for the Area, and the implications in law and in practice. Without such mapping the Council cannot legislate to close gaps and avoid overlaps.

In relation to wider jurisdictional issues, we are unsure if the Council shares a collective view as to **whether inspectors should be able to conduct inspections within national jurisdiction(s)** and whether Inspectors should be able to **seize samples and original documents** for evidentiary purposes. We would like to see Inspectors given sufficiently broad powers to do both, albeit that ‘inspections’ within national jurisdiction may not necessarily be done via site visits from the ISA and would likely necessitate cooperation from the relevant State authorities. With regards to seizing items, we think that original documents or samples may be required for evidentiary purposes in national proceedings

arising from ISA compliance cases. In addition, samples may need to be seized for additional testing, such as checking metal content that is claimed for royalty purposes or to test environmental samples. It is therefore important for the ISA to retain maximum powers (that are reasonable and supported by due process).

We recall a general observation about DR98 (e.g. made by Costa Rica, Ireland, the Netherlands in the Council's session of July 2024), that **'relevant' and 'necessary' modifiers** throughout the regulation serve to weaken it and should be re-considered. We agree. If an Inspector is, acting within the Regulations and the Code of Conduct, requesting to access information because they consider it important to their investigation into Contractor compliance, then it is inherently *'relevant'* and *'necessary'*.

In addition to those substantive comments, we also consider this DR98 would benefit from an overall check to remove drafting issues e.g.

- **Sub-paragraph (1)(a)** is not coherent. We suggest replacing with "*Question any person the inspector deems is engaged in, or holds relevant information about, Exploitation or Related Activities.*" We note that, generally, the defined term *'Related Activities'* has not been integrated into the Regulations since it was added to the Schedule.
- Do we need both **paragraph (1 bis)** of DR98 and paragraph (1) of DR96bis? They seem to cover the same ground.
- In **sub-sub-paragraph (1)(b)(ii)**, the wording *'including a plan, book or record'* could be deleted, as there seems no doubt that these examples would fall within the meaning of *'document'* which is the scope of this provision.
- We are unclear in **sub-paragraphs (b), (f) and (g)** what is included in the scope of *'samples'* - does it mean geological, biological, oceanographic? All of these? Precision in drafting will help avoid ambiguity in application.
- **Sub-paragraph (1)(c)** seems to be covered already by the *'question personnel'* part of sub-sub-paragraph (b)(ii).
- **Sub-paragraphs (1)(e) and (1)(h)** seem similar and could be merged.
- **Paragraph (5)** is not an Inspector's power, it is a requirement or function and so should be moved to DR97bis – indeed it could be merged with paragraph (1)(d) if DR97bis as there is overlap.