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Draft regulations for exploitation of mineral resources in the Area

Implementing an inspection mechanism for activities in the Area

Note by the secretariat

I. Background

1. Part XI of the draft regulations on exploitation of mineral resources in the Area ([ISBA/24/LTC/WP.1](#)) contains provisions relating to the powers and functions of the Authority and of its inspectors for the purposes of monitoring, reporting on and enforcing compliance with the rules of the Authority and the terms of an exploitation contract. It also places obligations on contractors to facilitate such inspection and comply with the specific requests of inspectors.

2. The Authority's right to inspect is established in article 153 (5) of the United Nations Convention on the Law of the Sea¹ and applies to "all installations in the Area used in connection with activities in the Area". Under the Convention, the Council is required to establish appropriate mechanisms for directing and supervising a staff of inspectors who are to inspect activities in the Area;² in other words, it is required to design and put in place an appropriate inspection mechanism. The Legal and Technical Commission is required to make recommendations to the Council regarding the supervision and direction of such staff;³ in other words, it is required to provide advice to the Council on the day-to-day functioning of the mechanism, including in connection with the inspection programme and schedule.

3. At its meetings held in July 2018 the Commission noted its obligation to make recommendations to the Council on an inspection mechanism and requested that the secretariat outline possible inspection mechanisms, including interaction with sponsoring State mechanisms, the development of a code of conduct for inspectors and the use of remote monitoring technology ([ISBA/24/C/20](#), para. 29). The Council

* [ISBA/25/C/L.1](#).

¹ United Nations, *Treaty Series*, vol. 1833, No. 31363.

² *Ibid.*, art. 162 (2) (z).

³ *Ibid.*, art. 165 (2) (m).



also invited the Commission to continue its consideration of those questions and explore appropriate remote monitoring technology and the administrative and operative costs that it entails ([ISBA/24/C/8/Add.1](#), annex I, para. 12 (a)).

4. The purpose of the present note is to provide the Council with the preliminary observations of the secretariat on the basis of the Commission's request. Specific comments by stakeholders in connection with the draft regulations relating to the current inspection provisions will also be considered by the Commission. These comments include the scope of inspection activities and the legal powers given to inspectors, the criteria that will trigger an inspection, the requirement for a regular schedule for inspections and matters relating to the jurisdictional competence of the Authority to board vessels⁴ and enter offices.

II. Discussion on an inspection mechanism

5. Designing a robust and transparent inspection programme will be key to the successful implementation of the Authority's regulatory framework. While the inspection mechanism envisaged under the Convention is designed to ensure compliance with the rules of the Authority, an inspection mechanism should also be viewed as an opportunity to improve the safety and reduce the environmental risks of activities in the Area, through the dissemination of best practices and learning experiences.

6. Enforcement activities must be effective in order to achieve the highest levels of compliance and must be properly resourced. At the same time, due regard must be given to economy and efficiency. In due course, as suggested by one member State, a risk-based approach to inspection must be developed to ensure that sufficient and expert resources are targeted to addressing the key risks. Consequently, in connection with activities in the Area, resourcing requirements and the inspection approach will change over time as data and information evolve, and resourcing needs will be re-evaluated in the light of the number of active exploration and mining operations and developments in the industry.

7. Enforcement activities are not limited to the Authority. Sponsoring States must also take all measures necessary and appropriate to secure effective compliance with the Convention.⁵ Such measures may extend to an inspection mechanism and information-sharing and, possibly, the placement of observers on board mining vessels. This is a matter for the sponsoring State or States. However, such measures should complement or support the Authority's inspection mechanism and not duplicate it.⁶ Enforcement activities by flag States will also be of relevance to activities in the Area. Other mechanisms to support the implementation of the regulations include market mechanisms, such as providers of conformity assessment services, where conformity can be verified by private sector entities, and, at a future date, an effective industry association.

8. As noted in paragraph 14 of document [ISBA/25/C/6](#), the Council is invited to consider a specific policy setting out the approach that it will take to such regulation. Given that enforcement and inspection are functions that will have a major bearing on regulatory effectiveness in securing compliance, such a policy should include regulatory enforcement and the clear objectives of such enforcement. It will include

⁴ The secretariat is advancing its discussions with the International Maritime Organization in connection with jurisdiction and cooperation, together with the development of a matrix of duties and responsibilities between the Authority and flag States.

⁵ United Nations, *Treaty Series*, vol. 1833, No. 31363, art. 153 (4) and annex III, art. 4 (4).

⁶ A matrix setting out the respective roles and responsibilities of the Authority and of the sponsoring State or States is under development.

details on how the inspection function is integrated into the existing governance structure of the Authority and on how the execution of enforcement activities will be independent of influence, political or otherwise.

III. Possible approach to an inspection mechanism for the Authority

9. There are good examples of inspection mechanisms and processes in other industry sectors, including for the regulation of oil and gas operators and inspection mechanisms under regional fisheries management organizations. In due course, a number of those mechanisms and processes should be benchmarked to establish good practices for the implementation of inspection programmes, in particular experiences in regulating remote activities, and including relevant inspections and measures by port States.

10. As highlighted in paragraphs 6 and 8, the economic efficiency and independent functioning of an inspectorate are key considerations in establishing an appropriate inspection mechanism, and in particular in enlisting the services of independent expert inspectors. To this end, the Council may wish to consider the mechanism adopted under the Convention on the Conservation of Antarctic Marine Living Resources. The principles for a system of observation and inspection to promote the objectives of and compliance with that convention are established in its article XXIV.

11. Under the system of inspection of the Commission for the Conservation of Antarctic Marine Living Resources,⁷ while inspectors designated by members of the Commission operate under its terms and conditions, they remain subject to the jurisdiction of the contracting party to the Convention (national authority) of which they are nationals. The inspector will report to the national authority, which in turn reports to the Commission. The Commission maintains a register of certified inspectors designated by its members. An inspectors' manual relating to the system of inspection has also been issued.

12. A similar approach could be adopted by the Authority, whereby its member States would recommend inspectors (subject to expertise in relevant subject matters and qualification guidelines) for inclusion in a register. The Legal and Technical Commission could then make recommendations to the Council on the inclusion of such inspectors in the register, for approval by the Council. The register should be maintained by the Contract Management Unit of the secretariat. The Unit should also be responsible for administering the inspection programme (as approved by the Council, on the basis of recommendations by the Commission) and for selecting and contracting (in conjunction with the relevant member State) inspectors from the register of certified inspectors to carry out inspection duties in accordance with a guidance document issued by the Council. As with the approach of the Commission for the Conservation of Antarctic Marine Living Resources, inspectors would remain subject to the jurisdiction of the member States of which they are nationals (to promote independence) and to the rules of the Authority, including a code of conduct for inspectors and an inspection manual (to promote consistency). Under draft regulation 98, the Secretary-General would report on an annual basis to the Council on the findings and recommendations of any inspection.

13. How and what inspectors should inspect can be assessed in due course following appropriate risk assessment and benchmarking, in particular those used by oil and gas

⁷ Commission for the Conservation of Antarctic Marine Living Resources, Text of the CCAMLR System of Inspection, Basic Documents, Part 9, available at https://www.ccamlr.org/en/system/files/e-pt9_2.pdf.

regulators. The costs of and funding options for an inspection mechanism will also require investigation. In addition, thought needs to be given to the role of member States in assisting the Authority in national jurisdictions, in particular as regards the auditing of books, records and samples, as well as any inspection by a port State that may be required, for example to verify ore volumes for the purpose of royalty calculations.

14. The development and implementation of a fit-for-purpose regulatory and enforcement framework needs to factor in the remoteness of future mining operations. The opportunity for spot inspections is limited. Equally, a physical inspection of the mining area is a practical impossibility. In the context of oil and gas operations, the move towards greater depths, higher pressures and increased uncertainty has resulted in the rapid advancement of remote real-time monitoring technology in connection with health, safety and environmental matters.

IV. Remote real-time monitoring and similar technology

15. The use of remote monitoring technology has been suggested by stakeholders in a number of responses to the Authority's consultation exercises in recent years. The use of such technology is addressed in draft regulation 100 (electronic monitoring system) to record the date, time and position of all mining activities and in draft regulation 94 (4) (f), under which a contractor may be required by the Secretary-General to accept the deployment of remote real-time monitoring and surveillance equipment.

16. In relation to activities in the Area, the appropriate use and role of remote monitoring and other safety-enhancing technology require investigation and discussion, including of the cost. In this regard, the Authority can learn from the inspection programmes put in place by other offshore regulators and the role played by remote technology in the regulation of oil and gas activities. An assessment can then be made regarding best practices in establishing the minimum requirements that the Authority should set in the exploitation regulations (and guidelines) for the use of remote monitoring technology and how the Authority could use such technology to carry out its enforcement activities more effectively in respect of the specific parameters of mining operations that should be monitored.

V. Suggested items for consideration and discussion

17. The Council is invited to take note of the points raised above and to consider an appropriate inspection mechanism, including the key elements and principles in establishing such a mechanism.
