

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.

**Section 2**

**Compliance**

**[Regulation 102**

**Compliance Committee**

1. A Compliance Committee (“the Committee”) is hereby established to assist the Council in carrying out its responsibility to exercise control over activities in the Area as provided for under Part XI of the Convention. All instances of non-compliance shall be brought to the attention of the Committee, which shall report to the Council. The Committee shall comprise 15 members [with appropriate regulatory compliance and enforcement expertise]. Each regional group shall designate 2 members from among Council members, who shall serve for a period of 2 years, with the possibility of extension. The remaining 5 members shall be designated by the Commission taking into account geographic representation and from among those with appropriate expertise within the Commission to carry out the functions of the Committee in accordance with this Regulation.

2. Without limiting the powers and functions conferred upon another organ of the Authority the Committee shall:

(a) Administer and manage the roster of Inspectors and matters relating to inspection, compliance and enforcement in accordance with relevant policies or directions issued by the Council;

(b) Provide recommendations to the Council on matters relating to inspection, compliance, and enforcement including clarifying what constitutes non-compliance;

(c) **[(c) Appoint Inspectors as required from the approved roster of Inspectors, according to the approved inspection programme and schedule or as may be required;]**

**[(d) Establish procedures and routines for investigation of possible instances of non-compliance;]**

(e) Review the annual reports of Contractors, as examined by the Commission, and consider any instances of non-compliance;

(f) Examine reports and recommendations from the Chief Inspector and Inspectors, and other relevant data and information and consider any instances of non-compliance;

(g) Report to the Council the results of inspections and resulting recommendations for enforcement action, in a timely and comprehensive manner and coordinate compliance matters with other organs of the Authority that play a role in inspection, compliance and enforcement;

(h) Investigate allegations from members of the Authority, members of the Commission, relevant [adjacent] coastal States or the Secretary-General, as well as from observers of the Authority and other Stakeholders on possible instances of Contractor non-compliance~~[-, including through any whistleblowing procedures under Regulation 101 bis.];~~

(i) Convene, with the support of the Secretary-General, a process to liaise with Contractors in cases of non-compliance or complaints, including conducting oral hearings and conduct an inquiry into any Incident;

(j) Consult and cooperate, through the Secretary-General with Sponsoring States, flag States, port States and competent international organizations [and any other relevant stakeholders] as regards compliance and enforcement measures;

(k) Issue Compliance Notices under Regulation 103, and in urgent cases, take any appropriate interim measures where necessary;

(l) Examining complaints under Regulation 101 and making any recommendations to the Council;

(m) Make recommendations to the Council for the issue of emergency orders and appropriate penalties; and

(n) Undertake in collaboration with the Secretary-General compliance promotion activities to promote understanding of and compliance with the rules, regulations and procedures of the Authority, including dissemination of best practice arising from inspection activities;

(o) Appoint, where time is of the essence, a competent independent person to perform any or all of the functions of an Inspector where the nature or subject matter of an inspection requires specialist knowledge or experience that is not available on the approved roster of Inspectors; and

(p) Perform any other duties that the Council directs in writing.

2. bis Any recommendations from the Commission to the Council pursuant to Article 165(i), (j) and (k) of the Convention, as well as any instances of non-compliance identified by the Commission or the Secretariat in the course of carrying out their functions or otherwise, shall be promptly forwarded to the Committee in the form of a report for consideration and further action as appropriate. With the exception of complaints made against the Committee, all complaints received pursuant to Regulation 101 and 101bis shall also be immediately forwarded to the Committee for consideration and further action as appropriate. Nothing in this provision shall limit the right of the Committee to commence its own investigation of non-compliance. In cases where complaints are made against the Committee, the Council shall directly address such complaints and determine how to proceed.

3. The Committee shall develop its own rules of procedure, including for the convening of hearings, which shall be approved by the Council.

4. Decisions of the Committee shall be taken by consensus. If all efforts to achieve consensus has been exhausted, decisions shall be taken by a majority of members present and voting. In the case of a tie, the Chair of the Committee shall have the decisive vote.

~~5. The Committee shall meet at regular intervals preferably using virtual means, and in urgent cases involving possible instances of non-compliance, shall convene virtually and on short notice. Members of the Committee shall rotate among themselves on a monthly basis in order to ensure that one member is always available "on call" in cases of non-compliance that require urgent action. In addition, the Committee shall appoint its own chair and vice chair. Unless otherwise determined by the Committee, the Chair~~

~~of the Commission, the Chief Inspector and a member of the Secretariat designated by the Secretary General shall be invited to attend the meetings of the Committee but without the right to vote. The Secretary General shall facilitate the meetings of the Committee.~~

6. Within 3 months of the end of a Calendar Year the Committee shall complete an annual inspection, compliance and enforcement report, together with a non-technical summary, and submit the report and summary to the Council for its consideration.

[7. The report shall include details of any regulatory action taken by a Sponsoring State or States as advised in writing ~~[to]~~[by] the Chief Inspector or Secretary-General ~~[Council/Compliance Committee]~~, any corrective action undertaken by a Contractor and any recommendations as to any enforcement action to be taken by the Council to which Regulation 100(2) refers. The report shall also include any findings and recommendations arising from inspections that may contribute to the development of Good Industry Practice, Best Environmental Practices and Best Available Techniques.]

8. The Secretary-General shall make publicly available a copy of the Committee's report and summary ~~on~~<sup>at</sup> the Authority's website, with any Confidential Information redacted.

9. The Council shall review and ratify any interim measures imposed by the Committee, and consider any of its recommendations as soon as practicable or at its next meeting. A member of the Bureau of the Council shall be on-call and shall convene a virtual meeting of the Council in the case of matters for urgent consideration, including the issue of emergency orders by the Council.

10. The Secretary-General shall provide such administrative support to the Committee and the Chief Inspector as is required, including the processing of all formal Communications and notifications to or from the Committee. All notifications to the Committee shall be addressed to the Secretary-General who shall promptly transmit them to Chair of the Committee.]

#### Comments

##### General comment:

- This regulation is subject to divergent views and are currently under discussion, including in the intersessional working group on an appropriate inspection mechanism. The proposal is pending further discussion and resolution. The above proposal is provided by one delegation during the twenty-eight session and gained support from some delegations. Below, an alternative proposal has been provided, which is submitted by the intersessional working group.

##### Specific comments:

- It has been proposed by a delegation that the appointments in para 2(c) and(d) should be conducted by the Council and not the Commission. Both subparas have been placed in square brackets for further considerations.
- It has been suggested to place the content of para 5 in the ROP. For the time being, the content is placed in the revised suspense document. It should also be considered to place the details in para 7 concerning the content of the report in a Standard.

We agree with the suggestion made by Norway to move this regulation to the beginning of Part XI of the Regulations.

As noted in the comment box, we appreciate the specific mechanism, responsibilities and accountabilities for decision-making on ICE issues remain to be settled by the Council. Our comments below focus on the text of DR102, without prejudice to the structure the Council ultimately chooses. Though in relation to paragraph (1), we would like to register our concern that the composition of the Committee proposed here in our view fails adequately to address the issue of **independence and separation of powers of the ICE function**. The proposal reflected in paragraph (1) is a combination of Council member and LTC members i.e. the same organs (and in some cases individuals) who will be simultaneously delivering the ISA's other functions (including rule-making, contract award, reviewing the royalty system and rates, etc).

Composition of the Compliance Committee (CC) aside, we generally find this DR102 quite well-drafted and comprehensive, and the following comments are quite minor.

It may be unwise to use both “**the Committee**” and “the Commission” shorthand, in the Regulations as these terms are easy to confuse (as per the second bullet point in the President’s box, above!) and there may also be other commissions and committees being established within the ISA in the future.

In relation to **sub-paragraph (2)(a)**, we consider that the CC’s functions should be exercised in accordance with the ISA’s **Compliance Strategy**. The CC should also be mandated to (develop – if it does not exist,) maintain and keep under review that Strategy, which should also guide the work of the Inspectors, and any other ISA personnel involved in ICE work. A coherent strategy will not only improve the efficiency and effectiveness of the ISA’s ICE interventions, but also adherence to it will enable the ISA to withstand legal challenges against their use of powers.

We do not see **sub-paragraphs (2)(c) and (d)** as requiring decisions by the Council, if the CC is properly accountable to the Council in its decision-making.

In **sub-paragraph (2)(h)** we suggest deleting the sources of information listed, so as not to exclude other potential sources. As a regulator, the ISA should follow-up on all allegations of non-compliance it receives.

We support the inclusion in **sub-paragraph (2)(j)** of other stakeholders. The ISA should be empowered to identify and explore any potential partners who may be able to support or facilitate inspection and compliance activities of the ISA.

**Sub-paragraph (2)(l)** should be phrased as ‘*subject to paragraph (2 bis)*’ to cover a situation in which a conflict of interest may arise, and to avoid these two sub-paragraphs contradicting each other.

As **sub-paragraph (2)(m)** (on emergency orders) covers a function already assigned to the LTC under UNCLOS Article 165, we suggest that it could be re-phrased here as a function for the CC to execute ‘*In conjunction with the Commission...*’

We appreciate the rationale to move the detail contained in **paragraph (5)** to rules of procedure instead of the Regulations. But we think it would be sensible to retain in the DR102 (e.g. in **paragraph (3)**), a requirement that the Rules of Procedure are designed to enable swift action and continuous accessibility, due to the potential for emergency situations needing agile response from the CC.

The drafting in **paragraph (7)** appears to have got confused, in two aspects. Firstly, it should read ‘*as advised by [the State] / to the Authority*’ to avoid ISA otherwise being bound to include info they do not have. Second, we are unsure whether the scope and purpose of this report is intended to be general trends to inform ISA policy, or individual cases to inform Council regulatory decisions? We raised the same point in relation to DR100(2) (above). We think these are two separate subjects, that should be distinguished here.

### **Regulation 102 Alt.**

#### **Inspection, Compliance and Enforcement Chamber**

- 1. The Council shall amend the Rules of Procedure of the Commission to establish the Inspection, Compliance, and Enforcement (ICE) Chamber consistent with the provisions of this Regulation.**
- 2. Within the Commission, the ICE Chamber shall have exclusive responsibility over inspection, compliance and enforcement matters.**
- 3. The ICE Chamber shall direct the Authority’s Inspection Programme, in line with any relevant guidance and directives that the Commission receives from the Council, and consistent with all applicable Regulations and relevant Standards and taking into considerations Guidelines in this Part.**
- 4. The ICE Chamber shall draft reports and develop recommendations on all matters regarding inspection, compliance, and enforcement that will be submitted to Council through a dedicated Commission Co-Chair.**

5. The Council shall only consider a recommendation or report related to inspection, compliance, or enforcement from the Commission that has been endorsed by the ICE Chamber.

6. Pursuant to the Rules and Procedures of the Commission, the Council shall elect ten members with appropriate expertise in regulatory compliance, inspection, or enforcement to serve in the ICE Chamber, giving due consideration to the principle of equitable geographic representation.

7. A State Party's representation in the ICE Chamber shall constitute its representation on the Commission.

#### Comments

- This alternative version of draft regulation 102 is submitted by the intersessional working group concerning an appropriate inspection mechanism.
- The proposal entails a division of the Legal and Technical Commission into two chambers. The rationale is to address the need for an independent compliance body and inspectorate reporting directly to the Council, while using existing governance structures and expertise.
- In this group, substantial parts of the “original” version of draft regulation 102 is also supported, but it was suggested by some delegations to defer these parts of the text in “original” draft regulation 102 to the Standards and/or Guidelines.

We are surprised to see this text presented as having been ‘submitted by the intersessional working group’ implying perhaps that this proposal enjoys consensus, as we had understood it as a new proposal raised by one delegation, amidst many other proposals – and in the context that several member States including one regional bloc had expressed a strong opinion that the CC must not be housed within the LTC.

We have the following concerns with this proposal:

- There is no indication in UNCLOS that the LTC can divide itself completely in this way, and certain UNCLOS phrasing (e.g. on LTC voting rules) may be hard to align with the proposal.
- Is the ‘no crossover’ approach workable? UNCLOS requires “the LTC” to do certain things, which may not be validly done if only half or part of LTC were involved.
- The proposal does not seem to address two key characteristics we consider essential for ISA’s ICE body, namely (i) agility - as LTC is bound by existing procedures, (ii) expertise - as LTC members are not (nor required to be) compliance experts.
- In our view, cost-effectiveness should not be the primary consideration when it comes to contractor compliance in the early stages of this sector. If anything, it needs to start with significant investment and meticulous scrutiny, and can then get cheaper and less intensive as we learn more and establish a track record of experience.
- Similarly, whilst the evolutionary approach can apply to the scale or application of the mechanism, it does not mean the mechanism itself should be partial or delayed.
- The proposal seems silent on a Compliance Committee. We are unsure if this is purposeful i.e. if the idea is just to have the LTC reporting to the Council, and nothing additional or in between? That seems to give the LTC rather too much autonomy, noting this is not matched with any decision-making powers so the Council would be needed for any meaningful action. This leaves us unclear how the proposal would enable the ISA to respond quickly in urgent situations.

In conclusion, we struggle to see what is achieved with this proposal, that would not be better achieved by creating another body subsidiary to the Council (i.e. the CC), to do the ICE function, with some collaboration with LTC where relevant – and adopting many of the same procedures and rules for LTC for efficiency.