

27 Resumed Session of the Council

October 31st to November 11th, 2022

Agenda Item 11

Submission of Brazil, Chile and Costa Rica, cosponsored by Federal States of Micronesia, New Zealand and Panamá, to the Informal Working Group on Inspection, Compliance and Enforcement for the establishment of a Compliance Committee

Background

In the development of the Draft Regulations on exploitation of mineral resources in the Area, the issue of compliance is among one of the most crucial themes. Securing compliance is one of the cornerstones of the ISA regime. Even if the ISA manages to develop a robust and ambitious regulatory framework, this will be ineffective if compliance is not satisfactory

During the 26th Session of the Authority, the Council decided to establish three Informal Working Groups (IWGs), with one of them dedicated to Inspection, Compliance and Enforcement. In the course of the discussions in the abovementioned IWG in February and July 2022, the need for a mechanism to ensure compliance was discussed, and several delegations stressed that the establishment of a “Compliance Committee” might be a good option.

As proposed during the July Session of the 27th meeting of the ISA, this Non Paper was prepared with the aim to initiate exchanges between delegations that expressed their interest at the Council in working together in developing a proposal for such a Compliance Committee.

Introduction

The International Seabed Authority (ISA), established under the UN Convention of the Law of the Sea (UNCLOS), is the “organization through which States Parties shall [...] organize and control activities in the Area”.¹ The ISA is also responsible to exercise control over such activities in order to secure compliance with the regulatory regime. This derives from the following UNCLOS provisions:

- *Article 153(1): “Activities in the Area shall be organized, carried out and controlled by the Authority on behalf of mankind as a whole”.*
- *Article 153(4): “The Authority shall exercise such control over activities in the Area as is necessary for the purpose of securing compliance with the relevant provisions of this Part and the Annexes relating thereto, and the rules, regulations and procedures of the Authority, and the plans of work approved”.*
- *Article 153(5): “The Authority shall have the right to take at any time any measures provided for under this Part to ensure compliance with its provisions and the exercise of the functions of control and regulation assigned to it thereunder or under any contract”.*

UNCLOS gives specific roles to the ISA organs to ensure compliance and also requires that an organ shall not take actions that have been assigned to another organ.

¹ Article 157(1) of UNCLOS.

ISA's main organs and their responsibilities related to enforcement and compliance

The main organs of the ISA are the Assembly, the Council and the Secretariat. The Assembly is the supreme organ of the ISA and the only one where all member States are represented.² The Council (36 members appointed by the Assembly) serves as the executive organ of the ISA and is entrusted with wide ranging decision-making powers, including those related to exercising control over and securing compliance from contractors.³ The Secretariat is the administrative organ of the ISA. It supports and assists in the work of the organs of the ISA and performs all administrative functions assigned to it by the Assembly and the Council.⁴

According to art 163 of UNCLOS, "each principal organ of the Authority [...] shall be responsible for exercising those powers and functions which are conferred upon it. In exercising such powers and functions each organ shall avoid taking any action which may derogate from or impede the exercise of specific powers and functions conferred upon another organ".⁵

The ISA also has several subsidiary bodies established under UNCLOS, namely, the Legal and Technical Commission and the Finance Committee, as well as the Economic Planning Commission (not yet in operation). Each subsidiary body has important roles in supporting the work of the Assembly and Council, including the exercise of control over activities in the Area in order to secure compliance with the ISA regime.

a) Council

- Article 162(2)(a): The Council shall "supervise and coordinate the implementation of the provisions of this Part on all questions and matters within the competence of the Authority and invite the attention of the Assembly to cases of non-compliance".
- Article 162(2)(l): The Council shall "exercise control over activities in the Area in accordance with article 153, paragraph 4, and the rules, regulations and procedures of the Authority".
- Article 162(2)(p): The Council shall "review the collection of all payments to be made by or to the Authority in connection with operations".
- Article 162(2)(u): the Council shall "institute proceedings on behalf of the Authority before the Seabed Disputes Chamber in cases of non-compliance".
- Article 162(2)(w): The Council shall "issue emergency orders, which may include orders for the suspension or adjustment of operations, to prevent serious harm to the marine environment arising out of activities in the Area".
- Article 162(2)(z): The Council shall "establish appropriate mechanisms for directing and supervising a staff of inspectors who shall inspect activities in the Area to determine whether this Part, the rules, regulations and procedures of the Authority, and the terms and conditions of any contract with the Authority are being complied with".

The Council's subsidiary bodies also support this role. The Legal and Technical Commission is responsible to support the work of the Council:

- Article 165(2)(c): The Commission shall "supervise, upon the request of the Council, activities in the Area".

² Articles 159(1) and 160(1) of UNCLOS.

³ Article 162 of UNCLOS.

⁴ Article 166(3) of UNCLOS.

⁵ Article 158(4) of UNCLOS.

- Article 165(2)(i): The Commission shall “recommend to the Council that proceedings be instituted on behalf of the Authority before the Seabed Disputes Chamber”.
- Article 165(2)(k): The Commission shall “make recommendations to the Council to issue emergency orders, which may include orders for the suspension or adjustment of operations, to prevent serious harm to the marine environment arising out of activities in the Area”.
- Article 165(2)(m): The Commission shall “make recommendations to the Council regarding the direction and supervision of a staff of inspectors who shall inspect activities in the Area to determine whether the provisions of this Part, the rules, regulations and procedures of the Authority, and the terms and conditions of any contract with the Authority are being complied with”.

The Economic Planning Commission (not yet in operation) will be responsible to assist the Council with respect to proposing “measures to implement decisions relating to activities in the Area”.⁶

b) Assembly

The Assembly exercises oversight over all organs of the ISA and performs supervisory duties.

- Article 160(1): “The Assembly, as the sole organ of the Authority consisting of all the members, shall be considered the supreme organ of the Authority to which the other principal organs shall be accountable”.
- Article 162(2)(a): The Council shall “[...] invite the attention of the Assembly to cases of non-compliance”.
- Article 162(2)(h): The Council shall “present to the Assembly annual reports and such special reports as the Assembly may request”.

The Finance Committee, an advisory body to the Assembly and Council, also could play a limited role in supporting the work of those organs with respect to securing compliance over financial matters.⁷

c) Secretariat

UNCLOS establishes the role of the Secretariat as the one in charge of all administrative functions assigned to it by the Assembly and the Council as well as to assist all organs of the ISA in carrying out their functions. Neither UNCLOS nor the 1994 Agreement prescribes powers for the Secretariat to secure compliance on its own accord. However, it would seem that because the Council has not established yet a mechanism for enforcement and compliance, the Secretariat has included compliance functions into its responsibilities. The website of the ISA displays that the functions of the Secretariat include “ensuring compliance with plans of work for exploration and exploitation approved in the form of contracts”⁸, as does a recent Secretary-General’s bulletin from August 2021,⁹ (which was not requested, reviewed, approved or adopted by the Council or Assembly).

Current compliance practice at the ISA

The current practice of the ISA with respect to compliance lies mainly in the hands of the Secretariat and partially with the Legal and Technical Commission, given that the current practice of evaluating compliance is essentially determined from an assessment of the annual self-reporting documents submitted by exploration contractors without any independent verification.

⁶ Article 164(2)(a) of UNCLOS.

⁷ Section 9 to the Annex of the 1994 Implementing Agreement.

⁸ ISA, ‘The Secretariat’, at <https://www.isa.org.jm/secretariat>

⁹ Secretary-General’s Bulletin, ‘Organization of the secretariat of the International Seabed Authority’, 16 August 2021, ISBA/ST/SGB/2021/3.

A Secretariat bulletin from August 2021 describes a Compliance Assurance and Regulatory Management Unit (CARMU) that is situated within the Executive Office of the Secretary-General.¹⁰ This bulletin from August 2021 replaces a previous version from March 2020, which does not mention CARMU. According to paragraph 13 of the August 2021 bulletin, the functions of CARMU are as follows:

- (a) To act as the central administrative point of contact between contractors, sponsoring States and the secretariat;*
- (b) To process and undertake the preliminary evaluation of applications for the approval of plans of work for exploration or exploitation, as well as applications for the extension of related contracts, and develop standard operating procedures for processing and the preliminary evaluation of such applications;*
- (c) To draw up contracts for exploration or exploitation and develop standard operating procedures for drawing up such contracts;*
- (d) To account for and report on fees and charges paid by contractors and applicants for the approval of plans of work for exploration or exploitation, with assistance from the Office for Administrative Services;*
- (e) To develop and maintain the Seabed Mining Register and perform other functions related to it;*
- (f) To manage, in collaboration with the Office of Legal Affairs, the production and administration of regulatory standards, including standards and guidelines to support the regulatory regime and the relevant database;*
- (g) To maintain and promote sufficient communications, coordination and collaboration between contractors, sponsoring States and the secretariat and, where appropriate, improve the interface between contractors and the Legal and Technical Commission, including by organizing regular consultations and meetings on general or specific issues among contractors, sponsoring States and the secretariat;*
- (h) To develop, maintain and update the standardized management of information and data received from contractors, in particular by using the best technology available, including a central registry of contracts, in accordance with best international practice, and ensure the safe custody and confidentiality of all documents, data and information submitted in connection with such contracts and applications for the approval of plans of work;*
- (i) To develop risk management policy, including an organizational risk framework and risk register to help to assess and manage risks identified by or brought to the attention of the Authority in relation to its role as a regulator;*
- (j) To receive, process and undertake the preliminary evaluation of annual reports and periodic review reports from contractors, manage the reporting and periodic review process and develop relevant standard operating procedures, identify potential non-compliance issues, and develop a quality assurance and control system to verify the quality of data and information received from contractors;*
- (k) To act as a focal point for any questions from applicants and contractors arising in connection with the rules, regulations and procedures relating to prospecting, exploration and exploitation in the Area, including the standards and guidelines issued by the organs of the Authority, and assess the regulatory impact of those rules, regulations and procedures and make any recommendations for their revision; and draft administrative guidelines for contractors in relation to their activities and facilitate the development of standard operating procedures for specific processes in relation to those activities;*

¹⁰ Ibid.

(l) To collect statistics on world consumption, imports and exports of the commodities produced from the categories of minerals to be derived from the Area, as well as information on largest investments in preparation for and in the conduct of activities in the Area, and compile on a biennial basis indicative lists of members of the Authority qualified for election in each group of the Council".¹¹

The bulletin also stipulates that two other units of the Secretariat play a role in facilitating “the work of the other principal organs and subsidiary bodies in ensuring compliance by contractors with the terms of contracts for exploration or exploitation”,¹² namely, the Office of Legal Affairs (OLA) and the Office of Environmental Management and Mineral Resources (OEMMR).

UNCLOS provides the following: “each principal organ of the Authority [...] shall be responsible for exercising those powers and functions which are conferred upon it. In exercising such powers and functions each organ shall avoid taking any action which may derogate from or impede the exercise of specific powers and functions conferred upon another organ”.¹³ In order to not derogate from that provision, it seems appropriate for the Secretariat to retain and strengthen the administrative functions related with compliance, but instead to develop the bulk of the mechanism under Council, which is the appropriate organ according to UNCLOS. For instance, the above functions (b), (f), (i), (j) and (l) fall within the responsibilities of the Council, with support from the Legal and Technical Commission (see functions (b), (f), (i) and (j) and the Economic Planning Committee (see function (l)).

Examples of Compliance Committees elsewhere

Given that the ISA is currently working on the regulations to transition from exploration to exploitation, the creation of a Compliance Committee as a subsidiary body to the Council is timely and necessary for the Council to effectively discharge its responsibility to secure compliance with independence and greater accountability. The creation of a Compliance Committee can be done through the adoption of a formal decision of the Council. It is important to note that the ISA is a unique example of a multilateral body, whereby compliance is not only sought from member states (namely, sponsoring states) but also predominantly from the non-state entities (i.e. not parties of UNLCOS) that are actually conducting mining activities. Nevertheless, it would be useful to consider how other multilateral bodies have approached the topic of compliance. Some examples of other organizations or multilateral regimes that have established subsidiary bodies to investigate and report to political organs on matters of compliance include the following, with further details included as an Annex.

- a) *London Convention/Protocol on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter 1972/1996 (LC/LP)*
- b) *Protocol on Water and Health to the 1992 Convention on the Protection and Use of Transboundary Watercourses and International Lakes*
- c) *Aarhus Convention*

Apart from the above, there are numerous other examples of Compliance Committees, including from regional fisheries management organizations, the UNFCCC/Paris Agreement, as well as from the BBNJ Treaty negotiations, where a Compliance Committee has also been proposed. These regimes provide useful lessons and could shed some light on the creation of a Compliance Committee at the ISA.

Towards an ISA Compliance Committee

A Compliance Committee under the Council would be in charge of instances of non-compliance of contractual obligations, or when contractors have contravened the rules, regulations or procedures

¹¹ Ibid, paragraph 13.

¹² Ibid, paragraphs 17(i) and 21(c).

¹³ Article 158(4) of UNCLOS.

of the ISA, as well as any decisions, standards, guidelines, recommendations issued by the relevant organs of the ISA, or provisions of UNCLOS and the 1994 Agreement. The functions of the Compliance Committee could include, inter alia:

- *To issue recommendations on matters relating to compliance, including to clarify what constitutes non-compliance.*
- *To review the annual reports of contractors and consider any instances of non-compliance.*
- *To receive reports from the inspectorate (directly or through the LTC or inspectorate), and to consider any instances of non-compliance.*
- *To coordinate compliance matters with other relevant organs of the ISA that play a role ensuring compliance, including the LTC, inspectorate, Secretariat (especially CARMU).*
- *To receive complaints from member states, members of the LTC or the Secretariat, observers and other stakeholders on possible occurrences of contractor non-compliance.*
- *To request to CARMU to provide advice or assistance to contractors in cases of non-compliance to help bring them into compliance.*
- *To convene, together with CARMU, a process to liaise with contractors in cases of non-compliance or complaints, including to conduct a hearing where necessary.*
- *To recommend the issuance of compliance notices (i.e. formal notices to show cause and make rectifications, and warnings to contractors who are found to be in non-compliance).*
- *To produce reports and recommend the admonishment of contractors in cases of persistent non-compliance.*
- *To recommend the issuance of emergency orders or the establishment of proceedings at the Seabed Disputes Chambers in cases of serious or persistent non-compliance, where appropriate.*

It is important to note that compliance at the ISA sits closely with two other themes which are inspection and enforcement. Hence, the Compliance Committee will play an important and indispensable role, namely, by relying on results from inspections and providing an opportunity for a hearing or response, and by providing the necessary drive for enforcement action. All three themes fit squarely within the responsibilities of the Council. In terms of inspection, it is known that the Council is currently negotiating the modalities of how such a body of inspectors at the Council could look like. As such, this Non Paper would not discuss the details behind the inspectorate.¹⁴ Nevertheless, the establishment of a Compliance Committee within the Council would seem like a suitable avenue under which the inspectorate could be situated in order to ensure independence and a direct link to the Council. Academics have suggested routine and regular inspection to “check on the activities of contractors and verify the reports submitted by them” allows the “ISA to ascertain the levels of compliance by contractors and to justify taking enforcement measures against them”.¹⁵ Exercising oversight over inspection is a responsibility that the Compliance Committee could play an integral role in supporting the Council (alongside the Legal and Technical Commission and the Secretariat) in working towards ensuring compliance and taking enforcement action where necessary.

Regarding the establishment of an ISA Compliance Committee, there seems to be several options:

- 1) To delegate the functions of the Compliance Committee to the Bureau of the Council. This seems to be a feasible option but might not be the most effective one, since expertise and qualification would need to be provided by an advisory body of experts..

¹⁴ The topic of the inspectorate was discussed during the last IWG on inspection, compliance and enforcement in July 2022. Some initial ideas can be found in the following report from 2019: “ISA Inspections and ISA Inspectorate: What Will be Needed?”, Workshop Report, Kingston, 2019, accessible at <https://www.resolve.ngo/site-dsm/inspectionsandinspectorate.htm>.

¹⁵ Singh, P. “The two-year deadline to complete the International Seabed Authority’s Mining Code: Key outstanding matters that still need to be resolved”, 2021, Marine Policy 134, 104804.

- 2) To establish the Compliance Committee as a subsidiary body of the Council. In this respect, UNCLOS provides that “subsidiary organs as may be found necessary may be established”.¹⁶ Given that exploitation activities may soon commence, it seems useful to have a dedicated subsidiary body to ensure compliance.
- 3) To establish the Compliance Committee as a sub-unit in the Legal and Technical Committee (which shall have representatives from each regional group). This would make sense since the LTC will be 41-member strong starting from 2023. Transparency shall somehow be ensured, given the confidentiality that involves some of the LTC functions.
- 4) To establish a “hybrid” or mixture of the above, with the Compliance Committee being a subsidiary organ of the Council comprising of several members nominated by ISA Member States and several members from the LTC, which may or may not act together with the Bureau of the Council.

Following the examples of other organizations or regimes that have established a similar compliance body, the composition of a Compliance Committee at the ISA could consist of ten to fifteen members acting in their personal capacity. While the membership of such a Compliance Committee should be restricted, its meetings and hearings should be open to all parties and observers, unless confidentiality is required or when decisions are being taken. Meetings or hearings should take place through virtual means, in order to ensure that the Compliance Committee can meet under short notice and deal with urgent matters intersessionally and expeditiously. The Compliance Committee could issue provisional orders in urgent cases, subject to the later endorsement of the Council. An “on-call” system could be established at the Council for emergencies, with a small number of members being available around the clock for any given month or shorter duration. The Bureau of the Council could also play a role here. In any case, under these instances, the Council should be able to meet virtually to ratify the provisional measures ordered by the Compliance Committee. Reports and recommendations prepared by the Compliance Committee, shall be publicly available, should be comprehensive, and reflect any diverging views. The Council shall receive and consider these reports and recommendations in arriving at decisions relating to non-compliance. In the event compliance concerns an entity sponsored by a Member State that is also represented on the Compliance Committee, that member should not participate in closed discussions. The work of the Compliance Committee shall be facilitated and assisted by CARMU and the ISA Secretariat.

Concluding remarks

In order to establish and provide the requisite mandate to such a Compliance Committee, a decision of the Council would have to be taken in this respect. Text proposals to the current version of the Draft Exploitation Regulations to include the Compliance Committee are provided as an Annex. It is hoped that this Concept Note will initiate the discussion at the Council to place the topic of compliance into the hands of the Council, as anticipated by UNCLOS. Finally, the discussion on compliance also has a bearing on other related topics, such as access to and the confidentiality of data, which ideally should also be discussed at the same time.

¹⁶ Article 162(2)(d) of UNCLOS.

Annex I

Examples of Compliance Committees

London Convention/Protocol on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter 1972/1996 (LC/LP)

While the enabling instruments did not anticipate the creation of a compliance body, a set of Compliance Procedures and Mechanisms were adopted pursuant to Article 11 of the LP in November 2007 (revised in 2017).¹⁷ The 2017 Revised Compliance Procedure and Mechanisms document clarifies that the “objective of the compliance procedures and mechanisms is to assess and promote compliance with the 1996 Protocol to the London Convention 1972 (the Protocol) with a view to allowing for the full and open exchange of information, in a constructive manner”.¹⁸ While confirming that the Meeting of Contracting Parties shall retain overall responsibility for compliance matters, the Compliance Group was created as a subsidiary body comprising fifteen members to advise the Meeting of Contracting Parties on matters relating to compliance. The Compliance Group is empowered to investigate, afford an opportunity to be heard, and make recommendations with its findings and to propose from a range of potential measures to address any compliance issues, while the final decision will be left to the Meeting of the Contracting Parties.

Protocol on Water and Health to the 1992 Convention on the Protection and Use of Transboundary Watercourses and International Lakes

The Compliance Committee under the Protocol on Water and Health was established in 2007 to facilitate, promote and aim to secure compliance with the obligations under the Protocol.¹⁹ The Compliance Committee comprises nine members that will review compliance by the Parties with their obligations under the Protocol and report to the Meeting of the Parties to the Protocol. Nominations may come from contracting Parties as well as non-governmental organizations. The Compliance Committee can entertain submissions made by Parties, referrals from the Secretariat, as well as communications by the public. In investigating potential non-compliance, the Compliance Committee may undertake information-gathering activities and accord an opportunity to be heard. The Compliance Committee provides its recommendations, including recommendations on measures, and provide its reasoning thereto to the Meeting of the Parties, which will then take a decision.

¹⁷ The following commentary is instructive: “The objective of the compliance procedures and mechanisms is to assess and promote compliance with the Protocol with a view to allowing for the full and open exchange of information, in a constructive manner. The compliance decision established procedures and mechanisms on compliance, including a Compliance Group, whilst providing that the Meeting itself retains overall responsibility for compliance matters. Under the procedures, the Meeting of Contracting Parties may, inter alia, refer individual, systemic and other compliance issues to the Compliance Group, and offer advice, assistance or cooperation to Contracting Parties and non-Contracting Parties, review reports and, as appropriate, undertake other activities to promote compliance. A Party can raise an issue regarding individual situations of possible non-compliance regarding itself, or another Party when it has an interest that is affected or likely to be affected by the possible non-compliance. Under the procedures the Compliance Group may, inter alia, consider an individual Contracting Party's possible non-compliance, make recommendations on systemic compliance issues, make recommendations on other activities to promote compliance [...]”. See, Revised Guidance on the National Implementation of the London Protocol, LC 39/16/Add1 Annex 7, page 34.

¹⁸ Revised 2017 Compliance Procedures and Mechanisms, LC/39/Add1 Annex 5, page 1.

¹⁹ Report of the Meeting of the Parties to the Protocol on Water and Health to the Convention on the Protection and Use of Transboundary Watercourses and International Lakes, Addendum, ‘Decision on Review of Compliance’, ECE/MP.WH/2/Add.3.

Aarhus

The United Nations Economic Commission for Europe (UNECE) Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters was adopted in 1998 and entered into force in 2001. At its first meeting in 2002,²⁰ the Meeting of the Parties established an intricate compliance mechanism with a Compliance Committee as the main body for the review of compliance. The work of the Compliance Committee is activated in numerous ways,²¹ while the output involves reports and recommendations that are then placed before the Meeting of the Parties. It also serves as an interesting model, since most meetings and hearings of the Compliance Committee are generally open to state parties, communicants and members of the public (as observers). Expertise and advice from NGOs are specifically solicited, including the provision of information or evidence pertaining to implementation and compliance.²² The Compliance Committee consists of nine individuals, nominated by Parties or NGOs, and elected by the Meeting of the Parties.

²⁰ See, Decision I/7, Meeting of the Parties, 2002.

²¹ For instance, a Party may make a submission about compliance by another Party; a Party may make a submission concerning its own compliance; the secretariat may make a referral to the Committee; members of the public may make communications concerning a Party's compliance with the Convention; or the Meeting of the Parties may request the Committee to examine a Party's compliance with the Convention. In addition, Parties may also make requests for advice or assistance, while the Compliance Committee may examine compliance issues on its own initiative.

²² See, UNECE, Guide to the Aarhus Convention Compliance Committee, 2019 (2nd ed.), available at [https://unece.org/DAM/env/pp/Publications/Guide to the Compliance Committee second edition 2019 /English/Guide to the Aarhus Convention Compliance Committee 2019.pdf](https://unece.org/DAM/env/pp/Publications/Guide%20to%20the%20Compliance%20Committee%20second%20edition%202019/_English/Guide%20to%20the%20Aarhus%20Convention%20Compliance%20Committee%202019.pdf)