

A “mixed approach/model” proposal for the establishment of a compliance committee

There are numerous provisions under UNCLOS and the 1994 Implementing Agreement that clearly places the legal responsibility on member states of the ISA to exercise control over activities in the Area. This responsibility includes taking all necessary measures for the purposes of securing compliance with UNCLOS, the 1994 Implementing Agreement, rules, regulations and procedures of the Authority, and all approved plans of work. Both UNCLOS and the 1994 Implementing Agreement do anticipate the establishment of subsidiary bodies that the ISA may find necessary to carry out its functions under Part XI of UCLoS, and authorize the Assembly and the Council respectively with the powers to establish such bodies as necessary. Annexed to this non-paper is a compilation of these relevant provisions, which are instructive upon ISA member states (see Annex I).

Germany believes that ensuring compliance with UNCLOS, the 1994 Agreement, the rules, regulations and procedures of the ISA as well as any approved plans of work is one of the key cornerstone of the ISA regime, particularly when it comes to future exploitation activities. In Germany’s view, it is not enough to have a set of regulations and standards, guidelines for exploration and exploitation activities (i.e. the ISA Mining Code) as well as environmental instruments and measures that are robust, effective and ambitious. What is equally, if not more important, is the determination, ability and capacity of the ISA to secure compliance with them and to take enforcement measures against non-compliant operators carrying out activities in the Area.

While Germany remains open to other ideas and suggestions, it is Germany’s firm position that the member states must take direct responsibility for the purposes of securing compliance. To this end, Germany takes the view that the establishment of a subsidiary body of the Council with the task of securing compliance that directly reports to the Council is the ideal mechanism for member states to fulfil its responsibilities under UNCLOS and the 1994 Implementing Agreement. The establishment of such a body with a specifically tailored mandate to assist the Council in ensuring compliance is also timely as the ISA looks to transition from exploration to exploitation, which necessitates an even closer scrutiny over the activities carried out by operators in the Area.

Germany’s proposal, dubbed as the “mixed approach/model” is found in the consolidated draft of the regulations as DR 102 (formerly DR 96 bis, see Annex II). Essentially, Germany, like others have done before us, is proposing the establishment of a new subsidiary body of the Council called the “compliance committee”. The proposal differs from others in the sense that Germany disagrees with the position that the functions of such a compliance committee can be effectively carried out exclusively by the Secretariat and/or the Legal and Technical Commission. Moreover, while Germany agrees with the need for an independent inspection mechanism (that also must lie outside the Secretariat and/or the Legal and Technical Commission), Germany believes that securing compliance goes beyond inspection and it would be inappropriate to task the same mechanism for inspection with compliance responsibilities. As mentioned above, securing compliance is the task of the ISA member states, particularly of the Council.

That said, Germany believes that pre-existing compliance mechanisms are well placed to support such a “compliance committee”. This includes functions carried out by the Secretariat (e.g. through the Compliance Assurance and Regulation Management Unit, CARMU), the Legal and Technical Commission (e.g. consideration of contractor annual reports), as well as the inspection mechanism currently under negotiation (e.g. to carry out inspections on contractors). Hence, Germany proposes a “mixed approach/model” that creates a stand-alone compliance body reporting to the Council that also brings together all the above and further consolidates the ISA’s compliance capacity.

As noted in Germany textual proposal in the current Draft Regulation 102, the function of such a body is to assist the Council in dealing with instances of non-compliance. In essence, Germany envisions a committee with 15 members but is open to discussion on the ideal number of members. Under the proposal, each regional group can nominate two members while the remaining five members are designated by the Legal and Technical Commission from among their members with appropriate compliance expertise. The proposal ensures that that member states remain in control in cases of non-compliance but does not undermine the role of existing compliance mechanisms, particularly the functioning of the Legal and Technical Commission in this respect, by involving some of the members in the process where non-compliance has been identified. Whether or not the remaining five members designated by the Legal and Technical Commission should have the right to vote in decisions taken by the compliance committee is still an open question. Ideally, such members should be involved in the deliberations but excluded from voting since decisions relating to compliance should be taken by member states. Likewise, the Secretary-General and the Secretariat's compliance officer, as well as the head of the inspection mechanism should also be invited to deliberations without the right to vote.

Establishing a compliance committee as per the German proposal would send a strong message that the ISA and its member states take our responsibility under UNCLOS and the 1994 Implementing Agreement seriously. It provides our stakeholders and the public with the assurance that each instance of non-compliance will be given due consideration by the member states. It allows the ISA to function better as a regulator. It will also bring the ISA up to par with other international regimes that have environmental responsibilities, whereby the existence of a member state-led compliance committee is discernibly the trend. A stand-alone compliance body also helps alleviate concerns of conflict of interest, whereby it is not the same body that develops rules and regulations and recommends approval of plans of work (i.e. the Legal and Technical Commission) and the one that investigates compliance with these rules (i.e. the Compliance Committee).

The proposal on the table would allow the compliance committee to investigate such instances non-compliance, including giving the operator (and/or sponsoring state in question) the opportunity to present its case. A stand-alone body will also be useful in instances of whistle-blowing, which is a procedure currently also under negotiation at the Council, whereby certain allegations therein may implicate members of the Secretariat, the Legal and Technical Commission, or inspectors, and who obviously should not be the judge of their own cause.

Finally, Germany is of the view that such a compliance committee should comprise certain elements. Meetings or hearings should take place through virtual means, in order to ensure that the members can meet under short notice and deal with urgent matters intersessionally and expeditiously. Where possible, such meetings or hearings should be open, especially when facts are being established. The body should be empowered to issue provisional orders in urgent cases, subject to the later endorsement of the Council of any such orders or measures. A system should be in place 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 emergency instances and where needed, the Council should be able to convene virtually to ratify the provisional measures ordered by the compliance committee. All findings of the compliance committee (e.g. proceedings notes, reports and recommendations) shall be publicly available, comprehensive, and reflect any diverging views. The Council shall receive and consider these reports and recommendations when exercising functions to confirm or take decisions relating to non-compliance.

Annex I: Relevant provisions under UNCLOS and the 1994 Implement Agreement on compliance

Compliance: Mandate of the ISA

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”.

Article 158(3): “Such subsidiary organs as may be found necessary may be established in accordance with this Part.”

Article 160(2)(d): The Assembly shall “establish such subsidiary organs as it finds necessary for the exercise of its functions in accordance with this Part.”

Section 1, paragraph 2, Annex to the 1994 Agreement: “In order to minimize costs to States Parties, all organs and subsidiary bodies to be established under the Convention and this Agreement shall be cost-effective. This principle shall also apply to the frequency, duration and scheduling of meetings.”

Section 1, paragraph 3, Annex to the 1994 Agreement: “The setting up and the functioning of the organs and subsidiary bodies of the Authority shall be based on an evolutionary approach, taking into account the functional needs of the organs and subsidiary bodies concerned in order that they may discharge effectively their respective responsibilities at various stages of the development of activities in the Area.”

Compliance: Specific responsibilities of the 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)(d): The Council shall “establish, as appropriate, and with due regard to economy and efficiency, such subsidiary organs as it finds necessary for the exercise of its functions in accordance with this Part.”

Article 162(2)(h): The Council shall “present to the Assembly annual reports and such special reports as the Assembly may request”.

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”.

Annex II: The “mixed approach/model” proposal (as submitted by Germany and currently reflected in Draft Regulation 102 – numbering to be cross-checked against forthcoming consolidated text)

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 fifteen members. Each regional group shall designate two members from among Council members, who shall serve for a period of two years, with the possibility of extension. The remaining five 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) 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 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 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 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 the Chief Inspector or Secretary-General, 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 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.

Rationale for the proposal:

Germany has been participating in the intersessional work led by Norway and would like to record our appreciation for the progress in the working group. While we welcome the proposal to develop a “hybrid model” that assures impartiality and independence in terms of inspection, we would like to propose some modifications as we believe compliance and enforcement goes beyond inspection. Specifically, we believe a standalone body under the Council would be imperative for this purpose, but agree at the same time that existing institutional structures (notably the LTC) should be used where appropriate. We therefore propose that an arrangement be developed to function as an intermediary between the Commission and the Council for the purposes of inspection, compliance and enforcement. This arrangement would bring several benefits, including the possibility to conduct hearings in cases of non-compliance, as well as to ensure that compliance measures are driven by the Council and its member states. A separate intermediary body between the LTC and the Council can also deal with inspector reports and contractor annual reports submitted to the LTC that have identified instances of non-compliance, as well as to deal with other complaints relating to compliance. This allows the Council to take better and more effective enforcement measures. Consequently, at the last meeting, Germany proposed a “mixed approach” or “mixed model” for the Compliance Committee, where we foresee a mix composition between members nominated by states and several representatives from the LTC. Germany suggests that the version proposed above be used for the next round of negotiations in place of the current text. (We note that most items in paras 4-10 do not necessarily need to be in the regulations and can be moved to the rules of procedure of the Committee, which is anticipated to be developed pursuant to para 3, but suggest they be retained here for the time being while member states negotiate the appropriate model.)

We suggest renumbering this provision to DR102bis and to have a new Section 2 here with the heading “Compliance”. This would avoid confusion that the proposed compliance committee is only relevant to inspection by reason of it being placed in this section. This change acknowledges the division between inspection (section 1), compliance (new section 2) and enforcement (section 3). The sole provision in the current section 2 (DR102 on remote monitoring) may be moved elsewhere as some delegations suggested at the last meeting or kept in this new section 2. Several other provisions, namely the newly inserted DR 100bis, 101bis, and 104bis, which Germany supports, may be brought under the new section 2.

Germany is of the view that the remaining provisions under ICE as well other relevant provisions in the regulations relating to compliance and enforcement should be revisited once the member states have decided on an appropriate model for compliance. It remains a difficult task to make substantial comments without first having certainty on the compliance model. Germany retains the right to revisit these provisions at a later date and to make textual proposals accordingly.