

## **Implementing an Inspectorate: Inspection, compliance and enforcement under Part XI of UNCLOS**

### **Output of informal group relating to the implementation of an Inspectorate**

This note presents outcomes of discussions in an informal intersessional discussion group on the implementation of an ISA Inspectorate coordinated by Norway with participation from, amongst others, Canada, Germany, Nauru, the Netherlands and the Pew Charitable Trusts, for consideration by the Informal Working Group on Inspection, Compliance and Enforcement (ICE).

While there was not necessarily consensus on every point contained herein by every member of the discussion group, the note aims to establish and build on common ground with existing proposals and provide commentary on the suggested structure and functioning of an Inspectorate, and its interface with existing ISA organs.

Annex I offers suggested textual amendments to Part XI relating to an Inspectorate and the role and functioning of an Inspector-General.

### **1 Background**

1.1 This note discusses a way forward for the implementation of a suitable inspection, compliance and enforcement (ICE) governance mechanism as part of the Authority's duty to exercise such control (through the Council)<sup>1</sup> over activities in the Area. This is necessary for the purpose of securing contractor compliance with the relevant provisions of Part XI of UNCLOS and with the terms and conditions of its contract with Authority, as well as the right to take at any time any measures to secure compliance and the right to inspect installations.<sup>2</sup>

1.2 The two main provisions in UNCLOS relating specifically to inspection are: (i) 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 (Article 162 (2)(z)); and (ii) 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 (Article 165 (2)(m)).

1.3 Thus, the Council is required to design and put in place an appropriate inspection mechanism and the Commission is required to provide advice to the Council on the functioning of the mechanism.

1.4 The specifics for how actual inspections will be planned and conducted will need to be set out in due course, but should be in place before any mining operation commences.<sup>3</sup> Inspection planning and prioritisation should use a risk-based approach and consider environmental sensitivities, contractor performance history etc., and may include mandatory inspection requirements. In addition, the Council should adopt an overarching compliance assurance strategy or policy document - setting out the Authority's regulatory approach - with operational aspects (e.g., standard operating procedures) set out in say a standard or inspection manual to be approved by way of Council decision.

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<sup>1</sup> Articles 153(4) and 162(2)(1) UNCLOS.

<sup>2</sup> Article 153(5) UNCLOS.

<sup>3</sup> The mechanics can draw upon best practice and principles from the oil and gas sector and regional fisheries management organizations, such Convention on the Conservation of Antarctic Marine Living Resources (see document ISBA/25/C/5, *Implementing an inspection mechanism for activities in the Area*).

1.5 Any discussion on ICE must also reflect the role of States Parties sponsoring activities in the Area and their international obligation to assist the Authority and to take all necessary and appropriate measures to assist the Authority to ensure compliance.<sup>4</sup> Such sponsoring States or States may offer more timely or responsive compliance and enforcement solutions to complement the Authority's ICE mechanism. It will be important for the Inspectorate and sponsoring States to establish cooperation protocols and to avoid unnecessary duplication of administrative procedures and compliance requirements as contemplated by draft regulation 3(b) as well as to ensure that evidence collected by ISA Inspectors is done in a manner that aligns with enforcement at the national level. That said, having a dedicated ISA Inspectorate should ensure a consistent and fair approach to the regulation of a varied contractor base, namely States Parties, State-owned enterprises and commercial investors sponsored by States Parties and the Enterprise.

1.6 To date, instances of possible non-compliance have been considered by the Secretariat and the Commission as part of the contractor annual reporting process. Relevant matters are brought to the Council's attention through the Commission's Chair's report to the Council. While elements of a compliance assurance process are in place there are no documented compliance assurance processes and procedures.<sup>5</sup> The lack of a formalised and transparent process and mechanism thus far has perhaps challenged the required degree of trust and confidence in and between the Authority's applicable organs, as well as external stakeholders.

1.7 Nevertheless, this can be overcome by putting in place an inspectorate with adequately documented compliance assurance processes and procedures including a clear outline of roles and responsibilities, lines of reporting, accountability and decision-making consistent with UNCLOS.

## **2 Discussions in the Informal Working Group**

2.1 The text for regulations 96 to 105 of the draft exploitation regulations is currently under consideration by the Informal Working Group on Inspection, Compliance and Enforcement. There appears to be several areas of common agreement as to the components of ICE embodied in the draft regulatory text, including:<sup>6</sup>

- An independent inspectorate
- A code of conduct for inspectors
- Obligations on contractors during the conduct of an inspection
- Establishing a roster of inspectors by the Council on the Commission's recommendations
- Powers of inspectors, including the power to issue instructions
- Delivery of inspection reports
- Complaint mechanism
- Electronic monitoring mechanism
- Issue of compliance notices
- Power to take remedial measures.

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<sup>4</sup> Article 153 (4) and 139 UNCLOS.

<sup>5</sup> Compliance assurance includes: compliance promotion (supporting contractors in understanding of and compliance with regulatory requirements); compliance monitoring (inspections, analysis of data and information, third party verification etc.) and compliance enforcement (regulatory action taken to instances of non-compliance).

<sup>6</sup> This does not mean that the draft regulatory text is settled.

2.2 However, more detail is required when it comes to the structure and functioning of the appropriate governance mechanism and to carry out the above components in practice.

2.3 A few options have been discussed. Some have advocated giving the Secretary-General or an inspectorate body regulatory compliance and enforcement powers together with responsibility for the administration and management of an inspection programme. Others have advanced the establishment of a “Compliance Committee” to assist the Council in discharging its obligation to exercise control over activities in the Area through the oversight of an inspectorate and overall responsibility for matters relating to compliance.<sup>7</sup>

2.4. There appears to be much common ground between these approaches. The present proposal is an attempt at trying to unify the different models by incorporating the best elements from each model within one unit. As will be evident from the below sections, many of the core concepts of the Compliance Committee proposal have been incorporated into the present proposal, including the proposed Inspectorate’s mandate to (i) recommend the issuance of compliance notices and emergency orders; (ii) produce reports on non-compliance; and (iii) recommend the termination of contracts in cases of serious or persistent non-compliance. We look forward to further discussions on whether the current proposal captures the necessary aspects of delegations’ other proposals.

2.5 When contemplating the appropriate ICE governance mechanism system, the following basic concepts can serve as a starting point:

- (i) that all decision-making should be independent of inappropriate influence, political or otherwise. That is, decision-making relating to compliance and enforcement measures should be based on a structured evidence-based approach and conform to generally accepted best regulatory practice. As noted above (para 1.5), this is particularly important in ensuring a consistent approach to regulation (the so-called level playing field) across a broad range of contractor entities – States Parties, State enterprises and commercial investors sponsored by States Parties and the Enterprise;
- (ii) avoiding duplication of work carried out by other entities of the Authority, notably the Commission, the Secretariat and the Council;
- (iii) be transparent and accountable, and act with expertise and integrity;
- (iii)bis is responsive and able to take quick actions;
- (iv) ensure that the mechanism operates within the framework of the Convention particularly as to the specific powers and functions conferred upon the respective organs in compliance matters; and
- (v) proactive to provide guidance to contractors to promote compliance through an understanding of the regulatory requirements and promotion of best practices.

### **3 Core objectives**

3.1 As highlighted in para 2.3 above, a Compliance Committee is intended to provide oversight of an inspectorate as well as overall compliance and enforcement responsibilities, including the review of contractor annual reports (currently undertaken by the Secretariat and the Commission) and the issue of compliance notices (draft regulation 103 provides that either the Secretary-General or Inspectorate would issue compliance notices).

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<sup>7</sup> See joint submission of Brazil, Chile and Costa Rica, cosponsored by the Federated States of Micronesia, New Zealand and Panama, to the Informal Working Group on Inspection, Compliance and Enforcement for the establishment of a Compliance Committee, 27th Session of the Council.

3.2 There is clear merit in the concept of a Compliance Committee and its proposed functions and responsibilities. To a large degree the difference between an Inspectorate and Compliance Committee is one of terminology. Most of the functions and responsibilities of a Compliance Committee could be within the remit of an inspectorate, via for example a senior board or management level. That is, if an inspectorate is considered a broader body than one simply housing a “staff of inspectors” that would have compliance and enforcement decision-making powers and capabilities.

3.3 To this end, and if understood correctly, a proposed Compliance Committee and a proposed inspectorate may be largely the same in concept and functioning. The question then is where such an inspectorate (preferred term) would sit, how it would be resourced and its interface with other organs of the Authority (see Recommendations below).

3.4 A point of departure for an inspectorate is that it should be staffed by competent experts with objectives and a mandate that secures its independent functioning.

3.5 Equally, there is a need for an efficient mechanism, sufficiently resourced to examine technical information with clear functioning, reporting and cooperation protocols. Any overly bureaucratic structure will be counterproductive to an efficient ICE mechanism. Indeed, a dedicated inspectorate will be operationally more responsive in its functioning and ability to take prompt regulatory action compared to a body that is required to convene meetings.

3.6 When considering a suitable governance mechanism relating to ICE, its functioning and resourcing, in addition to inspections, instances of alleged non-compliance warranting investigation may also arise from or through: -

- Evaluation of contractor annual reports
- Periodic review meetings between contractors and the Secretary-General
- Assessment of electronic, remote monitoring data and information
- Self-monitoring and reporting by contractors
- Whistleblowing mechanisms
- Sponsoring State or State
- Flag States
- Coastal States
- Knowledge obtained by organs of the Authority, including through third party allegations or complaints
- Independent / third party verification or auditing

## **4 Recommendations**

4.1 It is suggested that the Council considers the following:

- The Council establishes a seabed mining Inspectorate as an independently functioning organ of the Council (draft regulation 96) in line with UNCLOS 162 (2) (d).<sup>8</sup>
- The Council creates the position of an Inspector-General who will have authority for the Inspectorate.

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<sup>8</sup> Not “shall establish” but “hereby establishes”.

- The Council approves a roster of inspectors based on recommendations from the Commission.
- Duties and responsibilities of the Inspectorate / Inspector-General can be established in a separate regulation drawing on the functions set out in the joint submission on a Compliance Committee and establishing an all-important line of operational accountability and reporting to the Council.
- In accordance with DR 99 an Inspector has the power to issue instructions, including time limited suspensions. The power to issue a compliance notice under DR 103 is delegated to the Inspector-General. The Council in turn has the power to suspend or terminate a contract under DR 103 (5).
- Reflecting a targeted evolutionary approach to setting up the Inspectorate, the Council can empower the Secretary-General to perform the administrative functions of the Inspector-General (operationally through the CARMU) until such time that the Inspectorate can operate independently (and an Inspector-General be appointed) with adequate resourcing commensurate with the ICE requirements, and prior to the start of the first mining operation.
- An independent review mechanism for the Inspectorate. For example, every 5 years or as the Council decides otherwise, the role and functioning of the Inspectorate could be reviewed by an independent third party to ensure that it remains operationally fit-for-purpose and accords to best regulatory practice.

4.2 The role of the Commission will also need to be clarified on an interim basis (interface with the Secretary-General and Council) and in due course its interface with the Inspectorate and the Council.<sup>9</sup> The Commission remains an important independent source of legal and technical expertise from which the Council can seek advice and recommendations on ICE, including the review of annual reports provided by the Inspector-General on activities undertaken during the year, and possible review of any compliance decisions made by the Inspectorate if requested by the Council.

4.3 Equally, the Commission would continue its review of annual contractor reports and other documentation and may identify and bring any possible instances of non-compliance to the attention of the Inspectorate for investigation.

4.4 Staffing considerations would need to be addressed as an Inspectorate evolves. Such considerations will also be influenced by the Authority's approach to regulation as set out in a compliance assurance strategy or policy document (paragraph 1.4 above). Once the Inspector-General is appointed, the Secretariat can continue to provide administrative support to the Inspectorate as well as expert input from the Office of Legal Affairs and the Office of Environmental Management and Mineral Resources (OEMMR).

4.5 Special consideration will need to be given to how data and information received through remote monitoring technologies will be reviewed and assessed and interface with the Inspectorate. It may be that the monitoring of such data and information is outsourced, or additional resources are recruited to the Inspectorate.

4.6 Finally, the Council is ultimately responsible for exercising control over activities in the Area, including for ensuring that all entities comply with the rules and regulations of the Authority. Only the Council can suspend or terminate exploitation contracts pursuant to regulation 103 (5).

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<sup>9</sup> Under article 165(2)(k) UNCLOS, the Commission is responsible for making recommendations to the Council to issue emergency orders.