

Statement by the German delegation on document ISBA/25/C/6
ISA Council, 26 February 2019

Thank you, Madame President, for giving me the floor. Good morning colleagues.

The delegation from Germany would like to thank the Secretariat for the preparation of this document on the decision-making of the Authority. It is a thorough, comprehensive document encapsulating a lot of different aspects in relation to the delegation of functions by the Council and, more generally, regulatory efficiency. In the view of Germany, it is an important document serving as a good starting point for discussing our way forward, in particular with regard to the foreseeable growth of the Authority— and whether we manage to move ahead in an efficient, smooth and intelligent manner.

Germany notes that this document primarily concentrates on the role and responsibility of the Secretary-General. We assume that this results from the discussion we witnessed at the end of the first part of the 24th annual session. However, Germany would like to emphasize that the competences of the Secretary-General have to be considered in a broader framework, including the provisions of UNCLOS and the 1994 IA, and taking into account the adjacent roles of other important stakeholders such as flag states, port states, and sponsoring states. We therefore are looking forward to receiving the matrix of responsibilities as announced by the Secretariat and to discussing this issue further in the second part of the 25th annual session.

The issues addressed in this document partly relate to ideas to facilitate the work of the Authority, which we proposed in a paper submitted to the Council session in last July. We are glad to see that this has been taken up by the Secretariat.

That being said, my delegation wants to point out different aspects with regard to issues described in doc. ISBA/25/C/6:

It is our view, first of all, that the delegation of powers and competences within the ISA system always has to comply with the legal framework established by UNCLOS and the 1994 Implementation Agreement.

In addition, we would like to state that transparency and accountability as well as public participation, as far as feasible under this legal framework, should be made a vital part of good governance.

With regard to the assessed need for the Authority to react in real time to matters of urgency, it is Germany's view that there are two options to strike a balance between the limited number of Council sessions per year and the multitude of competences of the Secretary-General:

- EITHER to allow for remote meetings of the Council on short notice;
- OR to establish a Council sub-committee on a rotating membership basis, thereby bridging the gap between regular Council sessions.

We noted with particular satisfaction the ideas brought forward in para. 11. Setting up a comprehensive, but at the same time pragmatic structure of types of decisions which may be

delegated sounds like an easy and straight-forward idea, but it is far more difficult than that. Providing clear guidance is of imminent importance here. Aspects such as obligations of Sponsoring States and their delimitation from ISA obligations have to be taken into account as well. We are willing and eager to support the Secretariat in developing this issue further. At the same time, Germany notes that there is a plethora of experience also in this regard with other competent international organizations such as the International Maritime Organization.

The approach suggested by the submission by the United Kingdom and referred to in para. 12 seems particularly noteworthy to us – Germany supports the proposed development of a specific policy on decision-making by the Secretary-General. While the Secretary-General should not be obliged to report each and every type of activity to the Council, he should do so in any case involving regulatory decisions. This reporting obligation should be implemented in a way that is not too burdensome for the Secretariat, while at the same time it should entail all kinds of information to properly inform the Council. Accordingly, this will be a balancing exercise, but it is Germany's view that it will be one of the easier ones we have to tackle.

With reference to the draft regulations mentioned in the Annex, we would like to submit further detailed comments to the Secretariat in writing (attached to this document).

On a different matter:

Germany would like to take the opportunity to inform the council about the beginning of the second phase of the Mining Impact research project. Mining Impact commenced last week on board of the German research vessel SONNE and is funded under the framework of JPI Oceans by National Research Ministries from Belgium, Germany, Norway, the Netherlands and Portugal. The research project will independently study and comprehensively monitor in real time the environmental impact of an industrial trial to collect manganese nodules at the seafloor which will be conducted simultaneously and independently by the Belgian contractor DEME-GSR in the Belgian and the German licence area in the Clarion-Clipperton-Zone. Germany would like to emphasize that Mining Impact is conducted independently of DEME-GSR activities. DEME-GSR is responsible for obtaining all necessary permissions for its operations and does not receive any funding from the Mining Impact project. Neither does the Mining Impact project receive any financial contributions from DEME-GSR. The monitoring program is not part of GSR's obligation to monitor their trial. All project data will be published in open-access databases (PANGAEA).

Thank you, Madame President.

Detailed comments to the list of provisions mentioned in the Annex of doc. ISBA/25/C/6	
DR 4 (3)	Germany agrees with the point taken by the Secretariat in relation to Draft Regulation 4. Guidance is needed here to ensure that the Secretary-General becomes the support needed to swiftly put this provision into reality (if needed), while at the same time this safeguards that the practice by the Secretary-General complies with the ideas and conviction the Council has in this regard. Aspects of relevance here include, but are not limited to, the question of what actually determines “clear grounds”.
DR 10	Germany considers the content of Draft Regulation 10 to be reasonable. By establishing an obligation for the Secretary-General to quickly review the application for completeness, the Legal and Technical Commission is put in a position to focus on those applications which at least seem to be comprehensive and complete at first sight. By means of stopping the application and notifying the applicant of a seemingly incomplete application, valuable time is saved for every person and every organ involved. Such a procedural step will increase the efficiency of the overall assessment and evaluation process.
DR 25 (2)	Germany agrees with the point put forward by the Secretariat in relation to Draft Regulation 25. Guidance is needed here to ensure that the Secretary-General becomes the support needed to swiftly put this provision into reality (if needed), while at the same time this safeguards that the practice by the Secretary-General complies with the ideas and conviction the Council has in this regard.
DR 26 (1)	Germany would like to reiterate a few points raised in last year’s submission: The duration between the approval of the initial PoW and the start of the commercial production will be several years. It is quite clear that both the general knowledge as well as the project specific knowledge will significantly increase. Germany therefore considers it essential that 1) the applicant submits a revised PoW 2) the public should be able to comment and 3) the decision making process is led by the Council. The approach that the Contractor in cooperation with the SG decides whether there is a material change appears inappropriate as it may interfere with the actual role of the SG which is a <i>facilitator</i> of the process. Germany considers the approach proposed in Draft 1 (as of August 2017) of the regulations was substantially more appropriate. Germany therefore agrees with the point put forward by the Secretariat in relation to Draft Regulation 26, i.e. that further guidance is needed in this respect.
DR 30 (6)	No comment.
DR 31 (3)	Germany agrees with the points mentioned in relation to Draft Regulation 31, i.e., it is unclear whether the draft regulation, as currently drafted, is sufficient and appropriate. It also seems that the Legal and Technical Commission is the better equipped body for any such evaluation.
DR 35 (2) (c)	No comment.
DR 38 (3)	Germany agrees with the points mentioned in the note in relation to Draft Regulation 38, i.e., given the fundamental significance of sufficient coverage and existing insurance in the context of exploitation activities, the Council should be informed directly of any material issues in this regard. By this means, contractors also have an incentive not to risk their insurance policies.
DR 45 (4)	No comment.

DR 55 (2)	With regard to Draft Regulation 55, Germany would like to reiterate a few points raised in our written submission: Such a far reaching decision should not be within the competence of the Secretary-General solely. We propose an addition to this paragraph in order to involve the Council in this process: <i>“If the Secretary-General determines that there is no Material Change he/she should provide a report on the main reasons to the Commission. If the Commission disagrees with the determination of the Secretary-General, the Commission should inform the Council and provide a recommendation to the Council to take the final decision.”</i> An alternative to this proposed addition would be to allow for a sub-committee of the Council to cooperate with the Secretary-General in this respect. In the event the sub-committee and the Secretary-General reach a decision by consensus on whether or not the modification of the proposed Plan of Work constitutes a Material Change, the Secretary-General may proceed as currently envisaged by the Draft Regulation. In the event such a consensus cannot be achieved, the issue should be brought to the attention of the Commission to examine the issue at hand and provide a recommendation to the Council to be discussed and decided at the next regular session of the Council.
DR 55 (4)	Germany agrees with the point mentioned in the note in relation to Draft Regulation 55, i.e., that a balanced solution to this issue would also need to take into account that the contractor was not outside the legal framework of his contract and, even more precisely, there is no issue of non-compliance on his part. Accordingly, the possibility of changes to be applied to the existing and valid contract should be limited.
DR 56 (1)	Germany agrees with the point put forward by the Secretariat in relation to Draft Regulation 56. Further guidance is needed here. In the context of material changes to a contract, the Council should play an active role.
DR 63	See comments to DR 93.
DR 74 (3)	No comment.
DR 75	No comment.
DR 76 (2)	In terms of the administration of royalty returns, as currently foreseen in Draft Regulation 76 (2), Germany concurs with the comment that it is absolutely necessary for the Secretariat to be staffed by appropriately qualified persons.
DR 78	Germany agrees with the point put forward by the Secretariat in relation to Draft Regulation 78. The Council should have an active role in establishing specifics and guidance with the aim of both assisting and directing the Secretary-General with regard to the imposition of monetary penalties.
DR 87 (2) (d)	With regard to Draft Regulation 87, Germany considers it important that the decision by a contractor to designate specific data and information as confidential is not taken as granted automatically, but that this designation is up for review. Any review by the Secretary-General should take into account guidance by the Council, if available. Germany would also like to reiterate a point raised in last year’s submission: The authority may decide to establish a sub-committee of the Council to decide upon the confidentiality of information submitted by contractors.
DR 93 (1)	Also with regard to Draft Regulation 93, Germany would like to refer to its 2018 submission. Without mentioning it here in detail, Germany suggests to formulate the regulation in a way which more closely reflects doc. ISBA/24/LTC/6. Germany does not have any concerns regarding the mere fact that guidance documents are drafted by the Secretary-General, as long as these are put forward for adoption by the Council.
DR 94 (4) (f)	No comment.
DR 97 (3)	No comment.

DR 99 (2)	Germany agrees with the point put forward by the Secretariat in relation to Draft Regulation 99, i.e. that further guidance is needed here.
DR 100 (3)	Germany agrees with the point put forward by the Secretariat. Just like in the other cases in the context of Draft Regulation 101, the Council should be informed afterwards.
DR 101 (1)	Similarly to our deliberations with regard to paragraph 10 of this document, Germany concurs with the assessment in relation to Draft Regulation 101 that there is a need for the Authority to react in real time to matters of urgency. It is again necessary to strike a balance between the limited number of Council sessions per year and the hesitance with regard to increasing the competences of the Secretary-General. The options mentioned above, i.e., <u>EITHER</u> to allow for remote meetings of the Council on short notice <u>OR</u> to establish a Council sub-committee on a rotating membership basis, are equally valid here. With regard to the questions mentioned: – <i>Is the issuance of a compliance notice without a recommendation of the Commission or decision of the Council within the remit of the Secretary-General's administrative functions?</i> Under certain conditions, with clear regulatory guidance by Commission and/or Council: yes. – <i>What obligations should be placed on the Secretary-General to report to the Council in respect of any compliance notices issued, and what should the method and frequency of such reporting be?</i> Depends on the nature of the compliance notices issued; a report which is presented to the Council (at least) annually. – <i>What of any administrative review in respect of compliance notices issued by the Secretary-General? Given that a compliance notice constitutes a warning by the Authority, should the Council be given the opportunity to withdraw a compliance notice issued by the Secretary-General?</i> If the conditions under which the Secretary-General may issue such compliance notices are clearly formulated and set out, an administrative review procedure should not be necessary. However, as reality may yield to situations where a compliance notice may in fact be necessary without clear regulatory provisions in place, a fall-back provision entitling the Secretary-General to issue compliance notice in serious or grave situations other than those explicitly mentioned may be necessary. Administrative review in respect of the latter would be both reasonable and appropriate. Still, it does not seem to be reasonable to postpone the initiation of the administrative review process to the next regular session of the Commission and/or the Council. The two options mentioned above (i.e., remote sessions of the Council or a Council sub-committee dealing with critical issues which are of timely nature) may be a solution here as well.
DR 23	Germany is of the opinion that clear guidance by Commission/Council should provide a sufficient basis for the Secretary-General to act upon in a timely manner. A review process for administratively remedying any decision taken, e.g. by means of remote Council sessions on short notice or a Council sub-committee, could complement this system.
DR 24	See above.