

ISA-23 HIGHLIGHTS: MONDAY, 14 AUGUST 2017

On Monday, 14 August, the Council exchanged preliminary views on the draft exploitation regulations, considered a draft decision on future elections of LTC members, and adopted a decision on the summary report of the LTC Chair, including a submission from the Netherlands on a tentative approval process of environmentally responsible mining technologies.

COUNCIL

EXPLOITATION REGULATIONS: Secretary-General Lodge introduced the consolidated draft exploitation regulations (ISBA/23/LTC/CRP.3), which had been presented by the Secretariat to the LTC for its consideration; and a Secretariat note announcing that the draft is open for consultation (ISBA/23/C/12), indicating 17 November 2017 as a closing date for comments, and outlining general and specific questions to guide submissions. The AFRICAN GROUP, supported by many, requested an extension of the deadline to end December 2017. Several countries indicated that they can only provide preliminary comments at this stage, without prejudice to future submissions on this draft.

Noting progress in developing the “skeletal framework” received by the Council in 2015 into the current 107-page draft, TONGA recommended: excluding from confidentiality rules, information on the marine environment and the protection of human health; providing time-bound regulations to ensure contractors’ compliance, including to take swift action to protect the marine environment; and avoiding overlaps in use among the Environmental Liability Trust Fund, the Seabed Mining Sustainability Fund, the Endowment Fund and the Voluntary Trust Fund. TONGA also emphasized the ISA’s primary role in enforcement, calling for further clarification of sponsoring states’ responsibility and cooperation between the ISA and sponsoring states in monitoring and sharing information from contractors.

CANADA called for a clear fiscal regime and environmental regulations to allow for investors’ effective and timely decision-making. CHILE considered adequate royalties as a compensation towards the international community for the deterioration of the common heritage that should not be used to finance the ISA, arguing for objective regulations that consider the interests of the entire international community.

BRAZIL, CANADA, TONGA, FRANCE, GRULAC and others highlighted the need for transparency. WWF called for a two-way stakeholder communication strategy. GREENPEACE called for: an open-ended definition of “stakeholders,” objecting to a narrow definition of “interested person” in relation to common heritage; access to information, with opportunity for comments at each stage, and for review procedures; and an independent scientific assessment.

Structure: SINGAPORE welcomed a single, consolidated version incorporating provisions on environmental protection, noting that part of the previous separate draft on environmental

issues had not been incorporated, although that material is still useful for contractors. NEW ZEALAND, supported by DSSC and WWF, expressed concern about the lack of inclusion in the consolidated draft of earlier references to a clear environmental impact assessment process, environmental objectives and ways to operationalize the precautionary approach. IUCN stressed that the results from the Berlin workshop on an environmental management strategy for the Area and the LTC comments had not been incorporated. Considering the revised draft regulations an “excellent working document,” FRANCE favored the Secretariat publishing stakeholders’ comments.

Balance: SINGAPORE stressed that various interests on exploitation need to be balanced, in line with international law and ensuring a level-playing field for contractors. TONGA called for a better balance between economic development and environmental protection, noting the need to establish ecological objectives, goals, targets and measures. JAMAICA recommended: providing a commercially viable environment that encourages sustainable seabed mining; paying attention to ecosystems’ fragility and vulnerability; and establishing a standard of “serious harm” as a necessary first step. JAPAN cautioned against excessive regulation, balancing exploitation and environmental protection in a manner comparable to the regulation of offshore oil development.

CHINA suggested that the regulations: be accompanied by best practices, including from land-based activities within national jurisdiction; be based on social, economic, scientific and legal realities; be developed gradually; balance rights and obligations of different actors; supported by DSSC, deal with environmental protection systematically, including impact management pre-, during and post-exploitation, using targeted measures on different categories of resources; and take into consideration the payment regime and benefit-sharing mechanism, to be decided upon by consensus and in line with UNCLOS.

Protection of the marine environment: Noting, with MEXICO, INDONESIA and GREENPEACE, that the development of exploitation regulations cannot be rushed at the expense of the prevention of harmful effects on the marine environment, AUSTRALIA called for: including the precautionary approach; reviewing contractors’ compliance, including consequences for breaches; stopping work if environmental harm arises; and taking emergency action. NEW ZEALAND recommended including: strategic environmental assessments; regional environmental management plans, supported by DSSC; impact assessments’ specification; and monitoring plans. MEXICO noted the need to strengthen: contractors’ responsibility to prevent harm to the marine environment, as well as to provide information and reports; and the ISA to ensure environmental protection.

CHILE, supported by MEXICO, called for: additional scientific research; supported by WWF, compatibility of regulations governing activities in the Area with adjacent states’ domestic legislation; avoidance of adverse impacts on fisheries; the creation of MPAs; responsibility for effective ocean management;

and account of obligations arising from binding international conventions, including the BBNJ international instrument under negotiation.

FIJI noted that further work is needed on sustainable development without adding to the deterioration of the oceans, in line with the UN Ocean Conference and the BBNJ process, emphasizing SDG 14. POLAND called for a systematic impact analysis, underscoring the importance of scientific information “before putting directives in practice.” CHILE underscored the need for: a comparative study of national legislation; comprehensive regulations before any exploitation activity takes place; and a comprehensive study of environmental impacts, as well as the necessary institutional structure, technical expertise and financial resources to monitor environmental impacts prior to the exploitation phase.

Encouraging the incorporation of a global environmental strategy and regional environmental plans including goals, objectives, targets and indicators, IUCN noted that acceptable definitions of “effective protection,” “harmful effects” and “serious harm” will require improved scientific knowledge. FISH REEF PROJECT supported reference to “mitigation” in the draft regulations. Calling for further discussion on the role and feasibility of biodiversity offsets, IUCN considered offsetting the deep-seabed biodiversity loss by building reef balls in waters under national jurisdiction, scientifically and legally questionable.

Dispute settlement: TONGA, supported by GREENPEACE, called for further clarification on the relationship between relevant UNCLOS dispute settlement provisions and: the draft regulation providing that contractors failing to prevent and respond to incidents will be brought to the attention of sponsoring states by the Secretariat; and the draft regulation on an administrative review mechanism for technical disputes that could be determined by an expert panel. AUSTRALIA, supported by ARGENTINA, cautioned against developing dispute mechanisms under the regulations on matters of UNCLOS interpretation. GREENPEACE recommended effective and accessible mechanisms, such as the Aarhus Convention Compliance Committee and the Espoo Convention Implementation Committee, cautioning that expensive and confidential arbitration is incompatible with the common heritage principle.

Roadmap: SINGAPORE lamented low participation during the previous consultations stage, urging especially Council members to provide inputs; called, with TONGA and GREENPEACE, for broad participation in intersessional workshops and working groups; and queried, supported by WWF, how the design criteria for impact reference zones will fit into the roadmap. The NETHERLANDS, supported by the UK, recommended that the Council meet before the LTC to consider drafts in which LTC comments have been incorporated. GERMANY recommended that: other members submit comments on the draft; the ISA continue with intersessional workshops; and the roadmap provide adequate time for submissions at each step of the drafting process. NEW ZEALAND stressed the need for sufficient time for stakeholder engagement, both in terms of submissions and discussions in the Council. GRULAC urged the ISA to make all documents from intersessional activities, including workshops, available to member states as soon as possible.

APPROVAL FOR MINING TECHNOLOGIES: Secretary-General Lodge introduced a submission from the Netherlands on a tentative approval process of environmentally responsible mining technologies (ISBA/23/C/5). GRULAC supported the proposal. President Fernández proposed including reference to the proposal in the decision on the LTC Chair’s report.

FUTURE ELECTIONS OF LTC MEMBERS: Delegates continued consideration of a draft decision on future elections of LTC members, introduced on Friday, 11 August, by the African Group and GRULAC. The AFRICAN GROUP reiterated equitable geographical representation, noting the draft decision does not address the LTC size. GRULAC stressed the need for predictability for regional groups to be better positioned to nominate experts. UGANDA clarified that issues of equitable geographical representation do not exclude expertise and efficiency considerations.

The ASIA-PACIFIC GROUP, supported by CANADA, questioned the need for a decision before the 25th session, and suggested that the Secretariat reassess the LTC present composition and expertise. INDIA highlighted UNCLOS Article 163 (organs of the Council) as the guiding principle, noting that, in two years, the issue must be settled “once and for all.” SINGAPORE stressed that the LTC size has to be balanced, taking into account the LTC’s increasing workload and the strains on the Voluntary Trust Fund.

President Fernández suggested, and delegates agreed, that the Council will consider the proposal at the next session.

LTC REPORT: AUSTRALIA introduced a draft decision based on extensive informal consultations, which was circulated at lunchtime. A revised version was circulated during the afternoon session. CHILE questioned the reference to “monopolization” and “abuse of dominant position” as priority issues requiring adequate time and resources for LTC consideration. ARGENTINA recalled that these were among the matters already referred by the Council to the LTC, which could not be addressed at this session. INDIA underscored that these matters are outstanding since 2015. GERMANY provided the example of contractors that accumulate multiple areas for exploration. GREENPEACE suggested requesting LTC open sessions when discussing the draft exploitation regulations.

EBSAs: SPAIN, supported by WWF and DSSC, cautioned against approving contracts concerning EBSAs in the future, including in the context of future exploitation, and called for the Council to request the LTC to include the CBD in a checklist of bodies and conventions that contractors should consult during the application approval process, clarifying that the proposal refers to requests for future contracts. ARGENTINA opposed, cautioning against incorporating *a priori* criteria from other international instruments or involve bodies under international treaties other than UNCLOS, calling for more analysis of the proposal. Following the distribution of a revised draft decision, GRULAC indicated that his concern had been taken into account.

Delegates adopted the revised draft decision without amendments.

CLOSING PLENARY: President Fernández indicated that, due to the pending discussion in the Assembly about a revised schedule of meetings, the dates for Council’s future meetings will be communicated in due course. He commended the substantive work done by the Council at this session, noting efficiency, effectiveness, and the need for more political dialogue among regional groups, and gavelled the meeting to a close at 5:30 pm.

IN THE BREEZEWAYS

With the Council wrapping up its deliberations for the 23rd session, some delegates experienced “the melancholy of the final whistle,” lamenting insufficient time for further deliberations. “What has not been discussed seems equally important to what has,” a participant reflected, hinting at the silent disposal of a paragraph between the first and the revised draft decision on the LTC report, whereby the Council would have requested the Commission to consider EBSAs or VMEs for any new contract application.

Another participant regretted the missed opportunity for the Netherlands to introduce a proposal on an approval process of environmentally responsible mining technologies: “This could have encouraged more member states to make submissions, which is one way to play an influential role in the process,” a delegate commented. An observer was equally disappointed about not having had a chance to share some words of caution on the challenges of assessing the environmental impacts of equipment without sufficient environmental baselines, taking a trial-and-error approach in unique deep-seabed ecosystems, or monitoring compliance regarding equipment lifecycle on the basis of lessons learnt under the IMO type-approval system.

Exiting the Council room into the warm Caribbean evening air, several delegates looked forward to the Assembly’s imminent work on revisiting the ISA meeting modalities, with a view to exploring opportunities for more in-depth, well-prepared and open discussion during and in between sessions.