

ISA-25 Part 1 Highlights: Thursday, 28 February 2019

On Thursday, the Council of the International Seabed Authority (ISA) addressed issues related to the Enterprise, an organ foreseen in the UN Convention on the Law of the Sea (UNCLOS) as ISA's own mining arm. Delegates discussed the operationalization of the Enterprise, a draft joint venture proposal with Poland, and a draft decision on the terms of reference for the Special Representative for the Enterprise.

Credentials

The Council took note of the oral report by Alfonso Ascencio-Herrera, ISA Legal Counsel and Deputy to the Secretary-General, that credentials had been received from 32 Council members.

The Enterprise

Eden Charles (Trinidad and Tobago), Special Representative for the Enterprise, introduced document ISBA/25/C/7, which contains: his report on the Government of Poland's proposal for a joint venture with the Enterprise, including two drafts for the joint venture. He requested members focus on the second draft, explaining that the current framework is still under review by Poland and that text lacking agreement remains in brackets.

On his responsibilities, he highlighted, *inter alia*: liaising with representatives from Poland on forming a joint venture with the Enterprise; conducting an independent assessment of Poland's proposal, including analyzing if it corresponds to sound commercial principles; and preparing a report on his activities.

On specific terms of the draft agreement, he highlighted, *inter alia*: commercial terms for the joint venture; areas of operation and duration; a business proposal covering a work programme over a 15-year period; and development of national legislation governing activities in the Area.

Special Representative Charles outlined in addition: the need for an enabling environment to ensure the Enterprise is able to directly engage in mining activities in the Area; phasing of the proposed programme of work; potential triggers that would make the Enterprise independent; potential factors outlining sound commercial principles; and the need for a representative of the Enterprise to participate in Assembly and Council meetings.

He described potential Council actions, including, *inter alia*: extending the time frame for negotiating a business proposal; agreeing the proposal should comply with the provisions of section II of the annex to the 1994 Agreement; extending the contract and

renewal of the Special Representative; and initiating a discussion on amendments to the rules of procedure to consider participation of the Enterprise.

Operationalization of the Enterprise: Many delegates commended the Special Representative for his work. CAMEROON, TONGA, JAMAICA, and others supported the continuation of the work of the Special Representative for the Enterprise.

CHINA stressed that the Enterprise is an important manifestation of the common heritage principle. TONGA emphasized the need to ensure inclusiveness and transparency. The HOLY SEE said operationalization of the Enterprise "is not an option, it's a duty." The UK called "too forward leaning" language stating "any failure to operationalize the Enterprise would affect the direct implementation of the principle of the common heritage, which is a preemptory norm of international law." The NETHERLANDS said more information and analysis is needed to clarify requirements under the Convention on operationalization.

Algeria, on behalf of the AFRICAN GROUP, underlined the two trigger events required to operationalize the Enterprise: the application for a joint venture or grant of exploitation contract. He queried if any consideration had been given to the 11 exploration contracts whose contractors have chosen the option of giving an equity interest to the Enterprise in a joint venture in any future exploitation contract. He pointed out the importance of having an independently-functioning Enterprise and that, as an organ of the Authority, the Enterprise should not be left behind in the draft exploitation regulations.

The AFRICAN GROUP, Brazil for GRULAC, JAMAICA, and CHINA noted current gaps in the implementation of the Enterprise, recalling relevant obligations under UNCLOS. BELGIUM requested further clarification on the timing and different steps of the Enterprise's inception, as well as related costs.

POLAND reiterated that the Enterprise is a unique entity established in international law to engage in exploration and commercial activities in the Area. He underscored that the proposal creates an opportunity for developing countries to participate in activities in the Area.

SPAIN suggested that the decision on the Special Representative mandate be delayed until the next Council's session. SPAIN and FRANCE inquired on potential budget implications, to which the AFRICAN GROUP responded that the proposal bears no extra burden for the regular budget, as it will be financed by voluntary contributions. FRANCE suggested greater involvement of the Finance Committee.

CHINA requested clarification on the terms of reference for the Special Representative, noting the mandate is not clear enough, remarking that the Council's rules of procedure may need to be amended to widen the mandate. Regarding the Special Representative, NORWAY queried: whether his mandate is time-specific; the content of the terms of reference, noting the Council's lack of familiarity with them; and his legal status regarding the work of the Authority. AUSTRALIA requested clarification on the terms of reference related to barriers to the Enterprise's participation in the development of the draft exploitation regulations.

FIJI, INDIA, JAMAICA, ARGENTINA, and others called for appointing, without delay, an interim director of the Enterprise, noting that such an appointment has been pending since 2013.

Joint venture with Poland: NAURU underlined the importance of ensuring that the joint venture is in compliance with relevant law and based on sound commercial principles. He observed the terms of the joint venture are still incomplete.

The AFRICAN GROUP highlighted that the use of "ISA" in the agreement could be confusing since the relevant party to a joint venture agreement should rather be "the Enterprise." He drew attention, supported by CHINA, to the fact that the relationship between any joint venture that includes the Enterprise and the ISA, should be under an application for a plan of work and contract following general regulations and standard contract terms rather than an individually negotiated contract. He further suggested, supported by GRULAC, informal consultations on a draft decision by the Council regarding future actions, aiming at a full proposal for a joint venture for consideration at the next Council session.

JAPAN queried: which provision of the draft joint venture deals with liability, calling for stipulating the relevant share of liability for the Enterprise; and, with CHINA, whether the terms and conditions in the draft joint venture will set a precedent for other joint ventures. CHINA emphasized that there are no clear rules on a variety of issues, including the share of the Enterprise in the joint venture, applicable law, and dispute settlement. He suggested the Council consider the development of substantial and procedural requirements, including for joint ventures.

The DEEP SEA CONSERVATION COALITION shared concerns in relation to the applicable law, the lack of reference to the protection of the environment, and transparency in arbitration used as a dispute settlement mechanism. PEW CHARITABLE TRUSTS queried the rationale for and ramifications regarding: the proposed 95/5 share split between Poland and the Authority; and Poland's reserved right "not to disclose the research methods used," unless required by international law.

INDIA called for: an independent assessment of the Enterprise and the joint venture suggested by Poland; additional clarity on the rules and regulations regarding joint ventures, noting that the process is currently obfuscated; and the development of terms of reference for the Special Representative to create the enabling conditions for the Authority to fulfill its mandate.

Responding to comments, Secretary-General Lodge recalled that, in July 2018, the Council took note of an Assembly decision (Article 154 on the periodic review), which concluded it was not necessary or appropriate to appoint an interim Director-General; outlined potential staffing and work allocation impacts if the interim Director-General role was to be substantive; informed delegates that the study on the legal, administrative, financial, and technical operations of the Enterprise would be presented in draft form to the Legal and Technical Commission (LTC) next week and in final

form during the second part of ISA-25 in July 2019; noted the expiration of the terms of reference for the Special Representative and the absence of any budget provision for his retention; and noted the Council may invite others to participate in informal sessions, stressing that amendments to the rules of procedure need to be carefully considered.

JAMAICA requested clarification about the Assembly decision "tying the hands" of the Secretariat, commenting that the Council cannot act contrary to the Convention and that an Assembly decision precluding something mandated by the Convention would be beyond its power.

Draft decision on the Special Representative: The AFRICAN GROUP tabled a draft decision related to the Special Representative, which, *inter alia*, requests the Secretariat to: extend the time frame for the negotiation of the draft proposal for a joint venture, with the expectation to have a full proposal in the Council's agenda in 2019; extend the contract and renew the terms of reference for the Special Representative, as well as to provide the requisite funds related to this work; invite the Special Representative to participate in the negotiations for the draft exploitation regulations; and establish a voluntary trust fund to support the Special Representative's work.

INDIA and CAMEROON supported the draft decision. GERMANY supported the extension of the Special Representative's contract, but opposed the expansion in scope. He further stated that, until the Enterprise starts operating independently, the interim Director-General has to be appointed from within the Secretariat staff. AUSTRALIA expressed the need to further clarify parts of the draft.

Special Representative Charles highlighted the need for the Council to decide on certain matters, notably related to the preservation of the marine environment, voluntary financial contributions, and modalities of the joint venture with Poland.

President Yengeni suspended deliberations to allow for further informal consultations. ALGERIA reported back that discussions on the proposal by the African Group were fruitful and that revised text was available online to resume negotiations on Friday.

In the Breezeways

On the penultimate day of the meeting, the Enterprise loomed large. Delegates exchanged views on draft terms of a proposal by Poland for a possible joint venture with the Enterprise, with some questioning the benefit-sharing approach, level of transparency, liability terms, and the inclusion of environmental protection in the proposed agreement. Delegates remarked on whether information gaps had been sufficiently addressed to proceed with operationalization of the Enterprise, with one observer lamenting the "resolution is not within sight at present."

There seemed to be confusion regarding the legal basis for whether the Enterprise could or could not participate in the development of the draft exploitation regulations. With the clock running out on the contract with the Special Representative for the Enterprise, many delegates agreed that either an extension and renewal of his mandate or the hiring of an interim Director-General for the Enterprise would be essential to keep moving forward on behalf of the common heritage. Delegates left with the hope that the next draft text, following input from informal consultations in the afternoon, would set the tone for positive steps ahead.

The *Earth Negotiations Bulletin* summary and analysis of the 1st Part of the 25th Annual Session of the International Seabed Authority will be available on Monday, 4 March 2019 at <http://enb.iisd.org/oceans/isa/2019-1/>