

Twenty-fifth Annual Session of the International Seabed Authority (Second Part): Tuesday, 16 July 2019

On Tuesday, the Council of the International Seabed Authority (ISA) continued its deliberations on the draft regulations for exploitation of mineral resources in the Area, focusing on: use of terms and scope; fundamental policies and principles; duty to cooperate and exchange of information; coastal States' rights; and elements around applications for approval of Plans of Work in the form of contracts.

Draft Regulations for Exploitation of Mineral Resources in the Area

Council President Yengeni opened the session. Making general comments, GERMANY, JAMAICA, TONGA, FRANCE, NAURU, and others requested additional opportunities to submit written comments on the draft exploitation guidelines, and for the next version to contain track changes, supported by the UK, NORWAY, CHINA, FRANCE, and others. NAURU cautioned that the written submission process must follow a strict timetable. Noting, with GERMANY and others, that substantive suggestions from their written submission were missing from the draft, JAMAICA further called for a formal discussion on the best way to proceed with future iterations of the draft regulations, stressing, with POLAND, the need for the draft regulations to be in conformity with UNCLOS.

The AFRICAN GROUP called for more open meetings of the Legal and Technical Commission (LTC) to increase transparency and promote progress. INDIA called for a compilation of submissions to be made available on the ISA website.

Secretary-General Lodge stressed that: the draft exploitation regulations are intended to implement the Convention's provisions; the Council's preference was to proceed with the development of standards and guidelines in parallel with the development of the exploitation regulations; and the LTC has finalized the draft exploitation regulations and the Council should decide on the way forward.

JAMAICA stressed that, according to the LTC note, the Commission has a lot to contribute to the regulations, stressing the need to decide on the way forward and cautioning that, at the current pace, "we will stay here until Christmas." BANGLADESH recalled lessons learned while adopting the exploration regulations, urging delegates to find a way forward.

Preamble: NORWAY, opposed by CHINA, suggested reference to the UN Fish Stocks Agreement. The Institute for Advanced Sustainable Studies (IASS) proposed referring to Part XII of UNCLOS on the protection and preservation of the marine environment. IUCN noted that the draft regulations were missing important marine conservation safeguards.

Introduction: Use of terms and scope: The RUSSIAN FEDERATION suggested noting that the regulations apply to all three types of deep-sea minerals. CHINA acknowledged the proposal, cautioning against doing so based on concurrent development of financial models for polymetallic nodules.

GERMANY called for clearly specifying "legally binding standards" and "non-binding guidelines." CHILE emphasized that, prior to the approval of the exploitation regulations, their legal nature, as well as relevant standards and guidelines, have to be defined. TONGA queried whether market-based instruments related to the polluter pays principle could be included under the scope.

Fundamental policies and principles: CANADA highlighted the need for an effective separation of activities between the regulator and the operator to avoid potential conflicts of interest.

CHILE stressed that the polluter pays principle "does not have unequivocal interpretation." ITALY underscored that it should not be founded solely in market-based instruments. Regarding the same principle, JAPAN, ITALY, CANADA, and CHINA requested reference to the Rio Declaration.

GERMANY, with FSM, NEW ZEALAND, FRANCE, and IUCN, underlined the importance of ensuring regional environmental management plans (REMPs) are adopted before exploitation is permitted. MEXICO proposed including a precept to specify reparation and rehabilitation as an environmental obligation. CHINA expressed caution, considering the varied stages of development of REMPs.

FSM called for inclusion of traditional and local knowledge in decision making. JAMAICA underlined that ongoing negotiations related to biodiversity beyond areas of national jurisdiction (BBNJ) must respect the ISA's mandate.

BRAZIL suggested clarifying the term "harmful effects" and adding reference to the Economic Planning Commission. The AFRICAN GROUP emphasized transparency. CHILE, supported by NAURU, the US, CHINA, NEW ZEALAND, and others, stressed that principles and policies should not be mixed as they differ in nature and application, requesting, with MEXICO, clarification of their legal scope. POLAND proposed a general list of elements, without denoting whether they are principles, approaches, or policies. FSM, IUCN, and IASS supported a standalone regulation on fundamental principles.

The PEW CHARITABLE TRUSTS called for: clarifying "ecosystem approach," supported by the UK, and the polluter pays principle; and including in the regulations the need for "accountability and transparency in all aspects of ISA governance."

Duty to cooperate and exchange information: JAMAICA, TONGA, NEW ZEALAND, NAURU, the UK, and others stressed that Member States and contractors have a clear obligation to cooperate with the Authority, rather than "use their best endeavors" to do so. The INTERNATIONAL MARINE MINERALS SOCIETY expressed concern relating to access to information from contractors, which may impinge on anti-trust regulations.

Protection measures in respect of coastal States: DEEP OCEAN STEWARDSHIP INITIATIVE (DOSI), with the PEW CHARITABLE TRUSTS, emphasized the importance of determining what causes and constitutes “Serious Harm to the Marine Environment,” calling for an LTC-coordinated working group to develop binding standards.

FSM noted that the threshold of Serious Harm was too high for the coastal State, proposing, supported by TONGA and NEW ZEALAND, a two-step process, which includes a likely harm trigger and a serious harm trigger. IUCN stressed that the burden of Serious Harm should be placed on the contractor.

TONGA called for including a requirement to consult small island developing States (SIDS) and relevant States before exploitation is permitted. CHILE emphasized the “legitimate interests” of coastal States in addition to their rights. INDONESIA called for mechanisms for coastal States to request timely inspections in the event of an occurrence of visible pollution resulting in potential loss.

Applications for approval of Plans of Work in the form of contracts: Qualified applicants: AUSTRALIA emphasized transparency in the application process. GERMANY proposed requirements for applicants pertinent to their ability to comply with environmental policies, and ITALY suggested inclusion of the operator’s economic capacity.

Certificate of sponsorship: The AFRICAN GROUP and others noted the need to define “effective control,” and POLAND, with the REPUBLIC OF KOREA, called for legal clarity around the term.

Form of applications and information to accompany a Plan of Work: The AFRICAN GROUP stressed the need to take into account, in addition to application-specific criteria, external factors that may be relevant to the final decision. COSTA RICA emphasized that applicants should also comply with ISA standards, in addition to rules, regulations, and procedures.

GERMANY noted that prerequisites for Plans of Work should include successful test mining and a social impact statement, with BRAZIL adding a requirement for a feasibility plan, along with a declaration by the operator that exploitation activities are not interfering with other activities in the marine environment.

Receipt, acknowledgement and safe custody of applications: The AFRICAN GROUP, supported by BRAZIL, invited the LTC to reflect on the consistency of references to the Commission throughout the regulations. The UK noted that all relevant information on applications, other than of confidential nature, should be circulated by the Secretariat.

Preliminary review of application by the Secretary-General: JAPAN questioned whether operators who have not conducted exploration would qualify to submit exploitation Plans of Work. POLAND requested clarification on what constitutes “satisfactory” performance.

BRAZIL proposed that the power to determine preference and priority of applicants be given to the Council, rather than the Secretary-General. CHINA opined that the LTC should have such power, while JAMAICA opted for either the Council or the LTC.

Publication and review of the Environmental Plans: GERMANY and the UK noted that all relevant information, in addition to the Environmental Plans, should be placed on the ISA website. ITALY encouraged increasing the timeframe devoted to consultation as well as the response period for the applicants.

AUSTRALIA and COSTA RICA supported the Belgian proposal to include independent experts to advise the Commission. SPAIN noted that independent experts can ensure greater impartiality and promote legal certainty. AUSTRALIA called for a cost-effective approach, which avoids conflicts of interest, while ARGENTINA called for a mechanism for choosing experts, including from specialized organizations and bodies. CHINA requested clarification on the role of independent experts, querying whether a dual review process is envisaged. GERMANY, the UK, and others suggested an in-depth discussion on the role of independent experts at a later stage during the meeting.

General aspects of consideration of applications by the LTC: COSTA RICA emphasized that the Plans of Work should “contribute to the benefit of humankind,” and that principles should not merely be taken into consideration, but should be observed and respected. CHINA clarified that the Commission should account for relevant or related reports from the Secretary-General.

Assessment of applicants: COSTA RICA emphasized the need for clear criteria and for the procedure to follow specific standards and guidelines, including REMP-related standards. CANADA noted that the contractor would be in best position to assess economic viability.

AUSTRALIA, supported by SINGAPORE, FRANCE, TONGA, and NAURU, emphasized reasonable regard and due diligence for submarine cables and pipelines. Concurring, the INTERNATIONAL CABLE PROTECTION COMMITTEE (ICPC) noted that sufficient safeguards in the draft regulations will minimize instances of damage and thus liability rules.

NEW ZEALAND stressed the need to expand on marine protection criteria for work plans. The PEW CHARITABLE TRUSTS and FSM welcomed reference to best available techniques and best environmental practices. GERMANY proposed an additional regulation on the assessment of applications and JAMAICA an additional criterion on assessing the history of operation of the contractor. JAPAN queried whether proposed guidelines on reasonable regard would apply to the assessment of applicants.

LTC’s recommendation for the approval of a Plan of Work: BRAZIL requested clarity on which entity would assess the monopolization of marine activities, querying whether the Council, LTC, or Economic Planning Commission would be charged with this. The UK suggested compliance with REMPs as a condition for approval as well as the inclusion of Areas of Particular Environmental Interest.

FSM supported not approving plans where there is evidence of risk of Serious Harm, calling for this to be standardized in all relevant regulations. CHILE called for clarification for cases in which impacts that have not been provided for in the current formulation are discovered.

Consideration and approval of Plans of Work: COSTA RICA underscored that approval of an extension of a Plan of Work should not be automatic, calling for rigorous steps for applicants fulfilling a list of requirements.

In the Breezeways

On day two, some delegates were concerned by the pace of negotiations, as consideration of the draft exploitation regulations went into full swing. “It is fiction to think that we can complete a review of the draft regulations in the current meeting format,” stated Jamaica, pointing to the snail’s pace in which the Council seemed to be going through the 117-page document. “At this rate, you are welcome to stay until Christmas,” she jested. While some countries sought to locate the substantive parts of written proposals they had submitted previously, one seasoned observer opined that delegates should place their trust in the expertise of the LTC and only address the most pressing concerns that still remain in the draft. Others, however, were satisfied with the pace, with one stating that “putting the brakes” on the draft regulations at this stage will allow countries to “really get it right,” with the “it” referring to the new frontier of seabed mining.

Another intriguing thread emerging yet again was what one participant referred to as “clashing mandates.” With the negotiations on biodiversity beyond areas of national jurisdiction (BBNJ) entering a crucial stage, some delegations were worried about the space for seabed mining given an increasing focus on marine conservation. Commenting on this, one delegate stressed that it is the “duty of the Authority to craft balanced regulations,” noting that these should take into account the “rights of mining contractors as well as the need to protect and conserve the marine environment.”