

ISA-26 Part 1 Highlights: Tuesday, 18 February 2020

On Tuesday, the Council of the International Seabed Authority convened for the second day of the first part of its 26th annual session (ISA-26) in Kingston, Jamaica. Delegates discussed the report of the Open-Ended Working Group (OEWG) on the financial model, and agreed on the way forward on this issue. They held an informal session to discuss the procedures for addressing the draft exploitation regulations. Delegates then started substantive consideration of the draft, in an informal session of plenary.

Issues Relating to the Election of LTC Members

In the morning, Council President Kula announced that an informal consultation would take place over lunch, led by Council Vice-President Vladislav Kurbatskiy (Russian Federation), to work on a proposal to be considered in plenary on Wednesday afternoon.

Draft Exploitation Regulations

Report of the OEWG on the Financial Model: Council President Kula requested comments on the OEWG report (ISBA/26/C/8). The AFRICAN GROUP expressed concern that the consultants from Massachusetts Institute of Technology (MIT) had not considered his group's submissions. He said the payment regime rates should ensure that deep sea mining only occurs if it: is demonstrably beneficial to humankind; results in rates of payment in the range of those prevailing for land-based mining; and results in high enough revenues to the Authority to compensate land-based miners for any loss of revenue from lower metal prices. He called for transparency, requesting that all sponsoring states and contractors publish their contracts, including details of taxes, fees, and royalties.

SOUTH AFRICA said a profit-sharing model should continue to be considered, and took issue with the report's suggestion that an *ad valorem* model is fair without a specified royalty rate. He said a royalty rate should be in the 40-70% range, and that a range of 2-6% is not acceptable. CANADA recognized that the models are not perfect, and said a simple fixed rate *ad valorem* royalty mechanism would help accrue benefits for humankind.

NAURU, AUSTRALIA, and ITALY expressed a preference for an *ad valorem* only model, rather than a profit-based system, and noted the need for further refinement of the models. SPAIN, SINGAPORE, and the UK supported a progressive *ad valorem* system.

The RUSSIAN FEDERATION, NIGERIA, and JAPAN said it is not appropriate to delete any payment options and, with CHINA, BRAZIL, the UK, GERMANY, and others, supported a fourth meeting of the OEWG before the second part of ISA-26.

CHINA identified a lack of comprehensive studies on the payment modalities. Calling for equitable sharing of financial and other economic benefits, TRINIDAD AND TOBAGO said the parameters must be clearly articulated before a model is adopted.

GERMANY, with ITALY, highlighted the need for more consideration of environmental costs in the models. COSTA RICA called for any financial model to ensure that royalty rates and returns provide "genuine and fair" compensation for damage to the common heritage of humankind. Stating that the environment is "undervalued" in the MIT models, the DEEP SEA CONSERVATION COALITION (DSCC) questioned the current economic viability of deep sea mining in light of the risks to biodiversity, marine genetic resources, and intergenerational equity.

Many welcomed a comparative study of land-based and deep sea mining. Noting the need for a payment model that is fair to contractors, INDIA supported a recommendation to compile information on contractors' financial liability. The REPUBLIC OF KOREA recalled that, under the Annex related to UNCLOS Part XI, payment systems can be revised through agreement between the Authority and the contractor.

SENEGAL called for greater transparency and fairness in benefit-sharing discussions. The SPECIAL REPRESENTATIVE OF THE SECRETARY-GENERAL FOR THE ENTERPRISE Eden Charles suggested learning from best practices in financial contracts from other international organizations, such as the World Bank.

MINING STANDARDS INTERNATIONAL (MSI) noted, *inter alia*, the need to consider that the development of deep sea minerals provides a critical economic benefit to humankind and opportunities for developing countries, through its role in supporting the green transition.

The Council agreed to: convene a fourth meeting of the OEWG, preferably before the second part of ISA-26 to further advance work on the payment mechanisms for polymetallic nodules as a priority; invite all stakeholders to submit comments to the Secretariat to further refine the model's assumptions; request the Secretariat to prepare a report to further refine the two-stage fixed *ad valorem* royalty and the two-stage progressive *ad valorem* royalty; and request the Secretariat to prepare a comparative analysis of seabed and land-based mining to be circulated at least 14 days before the next meeting.

Working Method: Council President Kula invited participants to focus discussions on a working method to proceed on the draft regulations in an informal setting. He also invited comments on a briefing note by ISA-25 Council President Lumka Yengeni (South Africa) containing a proposal to establish additional working groups to facilitate the negotiation of more complex issues.

Discussions focused on, *inter alia*: themes that might be addressed by working groups; whether to work intersessionally, and if so, how; and, if working in thematic groups, how to consider the regulations as a coherent whole, including together with proposals for regional environmental management plans (REMPs), and standards and guidelines.

Delegates expressed broad agreement with the proposal for establishing thematic working groups for the draft exploitation regulations, with many favoring the designation of a facilitator for each working group to ensure continuity beyond ISA-26. Several agreed that parallel sessions of working groups should be avoided.

Some supported the working groups continuing intersessionally, with some considering meetings outside Kingston, and others advising virtual engagement. Several recommended the Council first address: working group procedures, such as terms of reference for stakeholder participation; establishing a timeframe for the working groups; and determining next steps after the groups have provided recommendations. Several advised against creating too many working groups, in light of concerns about inclusiveness and participation.

A number of delegates supported working remotely through online meeting platforms, while others expressed concern about possible technical and organizational issues. Many others preferred that work only be conducted at, or back-to-back with, Council meetings. Secretary-General Michael Lodge noted the Secretariat's limited resources to support additional travel and meeting services outside Kingston. Some delegates stressed the need for inclusiveness in the working groups, especially for non-Council members and observers.

In the afternoon, the Council considered three options for progressing on the agenda: first having an informal working group on issues related to LTC elections, then turning to the draft exploitation regulations on Wednesday; turning immediately to an informal plenary discussion on the draft exploitation regulations; or convening a working group on the protection of the marine environment, after establishing three working groups on the draft regulations with facilitators appointed by the Bureau. Following some discussion, Council President Kula noted that most delegates supported turning immediately to the draft regulations and maintaining the informal setting in plenary.

Protection and Preservation of the Marine Environment:

Secretary-General Lodge introduced the relevant documents, noting that the main document under discussion is the draft exploitation regulations prepared by the LTC (ISBA/25/C/WP.1), supplemented by the collation of drafting suggestions (ISBA/26/C/CRP.1).

Countries then exchanged views on draft regulations on: general obligations, including an additional paragraph on the development of REMPs; an environmental management system and impact statement; and an environmental management and monitoring plan.

A number of delegates queried how the discussions would be captured, given the absence of a facilitator, with some proposing projecting the document on a screen to facilitate a drafting exercise. One underscored that “nothing is agreed until everything is agreed.” Chair Kula said that the Secretariat was recording the interventions and would prepare a new document to reflect discussions. Several delegates raised concerns that comments from non-Council members were not included in the text, with some querying whether and how these could be incorporated in the draft.

On **general obligations**, delegates expressed different preferences regarding whether to refer to the precautionary “approach,” as set out in the Rio Declaration, or the precautionary “principle” as a legally-binding concept. Some delegates indicated it was not necessary to add references to protection and preservation or

to specific ecosystems, since they are already addressed elsewhere. Views also diverged on whether to refer to the assessment and management of risk of harm as the “protection and preservation” or as the “protection, conservation and, where applicable, restoration” of the marine environment.

Many welcomed references to stakeholder engagement in promoting or ensuring accountability and transparency, although some cautioned that stakeholder engagement must be defined more clearly. Several speakers called for clarifying the actors to whom the obligations apply, with one noting there are different duties and rights accorded to different bodies. Some discussion considered the need to include specific references to the Enterprise, given its role in the ISA.

A number of delegates saw value in an additional provision on mandatory **regional environmental management plans** (REMPs), with one suggesting this could address inequity and others asking to include reference to “best available scientific information.”

On the **environmental management system and impact statement**, one delegate noted similarities among the different systems and plans, calling for clarifications across the proposals.

On proposed additional language for the **environmental management and monitoring plan**, concerning a requirement for test mining in two stages, delegates disagreed. A few welcomed further discussions on the issue but noted that any test mining should be considered as mining and, therefore, subject to an environmental impact assessment (EIA) process.

Deliberations will continue on Wednesday.

In the Breezeways

After a delayed start on Monday, delegates came to the venue on Tuesday focused on progress. Still, their discussions were slowed down by lengthy procedural debates. Delegates began technical discussions on the proposed mining code, starting with comments on the report of the OEWG on the financial model. Along with the core issue of which payment model would be best, many delegates raised other substantive issues. Key among these was the question of benefits to humankind, and how to define and distribute these. Views diverged, with some seeing the need for traditional profit-sharing models used in many extractive industry settings, while others articulated non-traditional ways of looking at benefit-sharing, including making reference to ecosystem services.

Stepping outside of the meeting room, conversations turned to the question of the role of deep-sea minerals in the transition to a greener economy. Delegates had differing views on the use of the rare Earth minerals contained in polymetallic nodules. “These mining endeavors should be considered as an implicit benefit to all humankind because their use will support the fight against climate change, which affects us all” opined one. “But where is the place of fairness and equity in the distribution of benefits?” queried another. Yet another pointed to potential environmental impacts associated with mining rare Earth minerals, from their extraction to their disposal.

Back in the meeting room, participants broke into informal discussions to debate the working method to address the draft exploitation regulations. As with issues for the election of the LTC, positions were not too far apart, but delegates still could not figure out the exact approach. They continued procedural discussions deep into the afternoon. Even as delegates finally dove into substantive discussions of the proposed environmental regulations within the broader proposed exploitation regulations, they were still left with unresolved questions about how the outcomes would be recorded, and how to move the negotiating process forward in a meaningful way.