

Summary of the Twenty-sixth Annual Session of the International Seabed Authority (First Part): 17-21 February 2020

At the first part of the 26th annual session of the International Seabed Authority (ISA-26), the Council addressed issues of both procedure and substance, with substantive discussions focusing on the draft regulations for the exploitation of mineral resources in the Area (the draft exploitation regulations). “The Area” is defined as the seabed and subsoil beyond the limits of national jurisdiction, and its “resources” as all solid, liquid, or gaseous mineral resources *in situ* in the Area at or beneath the seabed. These regulations, once concluded, will govern future activities in the Area, and will need to ensure environmental protection while balancing stakeholders’ interests. Delegates engaged in discussions over new proposals on regional environmental management plans (REMPs), which ISA Secretary-General Michael Lodge described as “one of the most important work streams of the ISA over the last two years.” They also discussed the financial model for mineral exploitation in the Area, agreeing to convene a fourth meeting of the Open-Ended Working Group (OEWG) to further this work.

The procedural discussions focused on developing a working method to address the draft exploitation regulations in a meaningful manner. The Council adopted a decision to establish informal working groups responsible for issues related to:

- the preservation and protection of the marine environment;
- inspection, compliance, and enforcement; and
- institutional matters.

Several delegations welcomed the establishment of the informal working groups, facilitated by representatives from regional groups, which will meet during Council sessions but also may work over the intersessional period so as to make progress on the draft exploitation regulations.

Delegates also engaged in procedural discussions on how best to address the composition of members of the Legal and Technical Commission (LTC), an issue that has been on the agenda since the last election of members of the Commission. The Council adopted a decision charting a path forward to enable a final decision to be taken at its next meeting in July 2020.

Although much of the time was spent in procedural debates, many said that these discussions were important in furthering the substantive discussions on the draft exploitation regulations, and in ensuring trust in the organs of the Authority. As a result, most discussions were conducted in informal plenary meetings that many supported as these facilitated more candid exchanges.

During this session, the Council continued discussions on the draft exploitation regulations submitted by the LTC with comments from Council members, addressing provisions on, *inter alia*:

- protection and preservation of the marine environment, particularly REMPs;
- review and modification of plans of work; and
- closure plans.

Although many observers noted that their comments had not been included in the document, most agreed that the draft presented, with collated suggestions from Council members, was a good basis for discussion.

The ISA Council met from 17-21 February 2020, in Kingston, Jamaica, with the LTC scheduled to meet from 24 February - 6 March 2020. The Council meeting was preceded by a meeting of the OEWG on the Financial Model from 13-14 February 2020.

A Brief History of the ISA

Origins of the International Seabed Authority

The 1982 United Nations Convention on the Law of the Sea (UNCLOS), which entered into force on 16 November 1994, sets forth the rights and obligations of states regarding the use of the oceans, their resources, and the protection of the marine and

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coastal environment. UNCLOS established that the Area and its resources are the common heritage of humankind.

Polymetallic nodules were detected for the first time on the deep seabed by the HMS Challenger expedition in 1873. They are distributed on the surface or half-buried across the seabed, principally in the Clarion-Clipperton Zone beneath the Pacific Ocean. They contain nickel, copper, cobalt, and manganese, among other metals. Other minerals have since been discovered in the Area: cobalt-rich ferromanganese crusts, which are mineral accumulations on seamounts and contain cobalt, nickel, copper, molybdenum, and rare earth elements; and polymetallic sulphides, which are formed through chemical reactions around hydrothermal vent sites, and contain copper, zinc, lead, silver, and gold.

Under the common heritage regime, UNCLOS provides that: no state can claim or exercise sovereignty or sovereign rights over any part of the Area or its resources; activities in the Area must be carried out for the benefit of humankind as a whole, irrespective of the geographical location of states, taking into particular consideration developing states' interests and needs; the Area and its resources are open to use exclusively for peaceful purposes by all states, whether coastal or land-locked, without discrimination; and financial and other economic benefits derived from activities in the Area must be equitably shared, on a non-discriminatory basis.

To address certain difficulties raised by developed countries with the UNCLOS regime for the Area, the Agreement relating to the implementation of UNCLOS Part XI (the Area) was adopted on 28 July 1994 and entered into force on 28 July 1996. The Agreement addresses fiscal arrangements and costs to state parties, institutional arrangements, the ISA decision-making mechanisms, and future amendments of UNCLOS.

The ISA was established as an autonomous institution under UNCLOS Part XI and the 1994 Implementing Agreement to organize and control activities in the Area, particularly with a view to administering the resources of the Area. The Authority, based in Kingston, Jamaica, came into existence on 16 November 1994 and became fully operational in 1996. Among other things, the ISA is mandated to provide for the necessary measures to ensure the effective protection for the marine environment from harmful effects, which may arise from mining activities in the Area.

The ISA organs include the Assembly, the Council, the Finance Committee, the LTC, and the Secretariat. The Assembly consists of all ISA members and has the power to: establish general policies; set the budgets of the Authority; approve the rules, regulations, and procedures governing prospecting, exploration, and exploitation in the Area, following their adoption by the Council; and examine annual reports by the Secretary-General on the work of the Authority, which provides an opportunity for members to comment and make relevant proposals.

The Council consists of 36 members elected by the Assembly, representing: state parties that are consumers or net importers of the commodities produced from the categories of minerals to be derived from the Area (Group A); state parties that made the largest investments in preparation for, and in the conduct of, activities in the Area, either directly or through their nationals (Group B); state parties that are major net exporters of the categories of minerals to be derived from the Area, including at least two developing states whose exports of such minerals have a substantial bearing upon their economies (Group C); developing state parties, representing special interests (Group D); as well as members elected according to the principle of equitable geographical distribution in the Council as a whole

(Group E). The Council is mandated to establish specific policies in conformity with UNCLOS and the general policies set by the Assembly, and supervise and coordinate implementation of the Area regime.

The LTC is an organ of the Council and currently consists of 30 members elected by the Council on the basis of personal qualifications relevant to the exploration, exploitation, and processing of mineral resources, oceanography, and economic and/or legal matters relating to ocean mining. The LTC reviews applications for plans of work, supervises exploration or mining activities, assesses the environmental impact of such activities, and provides advice to the Assembly and Council on all matters relating to exploration and exploitation.

The ISA has been developing a mining code, which is a set of rules, regulations, and procedures to regulate prospecting, exploration, and exploitation of marine minerals in the Area. To date, the Authority has issued: Regulations on Prospecting and Exploration for Polymetallic Nodules (adopted on 13 July 2000, updated on 25 July 2013); Regulations on Prospecting and Exploration for Polymetallic Sulphides (adopted on 7 May 2010); and Regulations on Prospecting and Exploration for Cobalt-Rich Ferromanganese Crusts (adopted on 27 July 2012). The ISA is in the process of developing exploitation regulations.

Recent ISA Sessions

23rd Session: At its 23rd session (8-15 August 2017), the Assembly discussed the final report of the first periodic review of the ISA and adopted decisions addressing transparency and environmental issues. The Council considered the first report of the Secretary-General on the implementation of the Council's decision adopted in 2016, and draft exploitation regulations. The draft exploitation regulations were open for stakeholder comment on the basis of a series of general and specific questions proposed by the Secretariat. The Council also adopted a decision on a revised meeting schedule to engender a mutually responsive dialogue between the LTC and the Council on the draft exploitation regulations.

24th Session: The 24th session of the ISA was held in two parts. The first part consisted of a meeting of the Council (5-9 March 2018), followed by a meeting of the LTC (12-23 March). The second part consisted of meetings of the Council (16-20 July 2018) and the Assembly (23-26 July), preceded by meetings of the LTC (2-13 July) and the Finance Committee (9-12 July). The Council considered issues related to the draft exploitation regulations, including: models for a financial payment system; the role of the sponsoring state; the role and legal status of standards; the LTC's recommendations and guidelines; and broader environmental policy and regulations on exploitation. The Assembly adopted the Strategic Plan for 2019-2023, which consists of a mission statement, context and challenges, strategic directions, and expected outcomes.

The Council further addressed the possible operationalization of the Enterprise and contractors' non-compliance issues. The Enterprise, as envisioned under UNCLOS, is the commercial arm of the Authority, mandated to conduct its own mining, initially through joint ventures with other entities. Until seabed mining becomes a commercial reality, the functions of the Enterprise are to be carried out by the Secretariat.

25th Session: The first part of the 25th Session of the ISA Council was held from 25 February to 1 March 2019, followed by a meeting of the LTC (4-15 March). The second part included meetings of the Council and Assembly (15-26 July), preceded by meetings of the LTC (1-12 July) and the Finance Committee (8-10 July). The Council made progress on the draft exploitation

regulations, addressing, *inter alia*: standards, guidelines, and terms; decision-making; REMPs; and the inspection mechanism. At the end of the second part, Council members requested more time to submit comments on the draft regulations in order to ensure a balance between commercial interests and environmental protection. The Council further considered a report on matters relating to the Enterprise, deciding to extend and expand the mandate of the Special Representative of the Secretary-General of the ISA for the Enterprise for a limited time. At this meeting, which marked the ISA's 25th anniversary, the Assembly oversaw the operationalization of the Authority's first Strategic Plan, with delegates also deliberating on enhancing participation and transparency through the admission of observers.

ISA-26 (Part I) Report

On Monday, 17 February, Luis del Solar (Argentina), Acting Council President of ISA-25, opened the meeting. ISA Secretary-General Michael Lodge noted a "heavy agenda and limited time," pointing to the need for progress on the mining code. Quoting former Assembly President Peter Thomson (Fiji), he described work since ISA-17 as "a new phase in the life" of the Authority, highlighting transparency and stakeholder engagement throughout the process, and calling on the Council to facilitate the adoption of the code. Lodge provided an update on the work of the LTC during the intersessional period and for the upcoming meeting beginning Monday, 24 February. He welcomed the recent contributions to the Voluntary Trust Fund.

In plenary on Friday morning, Secretary-General Lodge updated the Council on financial matters of the ISA, including the status of trust funds and conference reporting services. He appealed for contributions to the Voluntary Trust Fund for the Financial Committee and the LTC, noting that in spite of recent contributions, the Fund was again in deficit. He explained that an additional USD 75,000-80,000 would be needed to support members for the July 2020 meetings. He also called for support for the Voluntary Trust Fund for the Enterprise, pointing to its "limited resources." On the Voluntary Trust Fund for the Council, he noted a remaining credit, which would support Council members in July 2020. On the escalating costs of conference services, he noted there was insufficient funding from the ISA Secretariat for the *Earth Negotiations Bulletin* (ENB) coverage in July 2020, suggesting interested delegations could make contributions through the Authority or directly to ENB.

Secretary-General Lodge reminded the Council of its obligation to provide the Assembly with a report on the High-Level Action Plan on the ISA and Priorities for the 2019-2023 Period (ISBA/25/A/6), noting the Secretariat would work closely with the Bureau to prepare a draft report for the Council's consideration in July 2020.

Adoption of the Agenda and Election of Officers: On Monday, the Council adopted the agenda (ISBA/26/C/L.1). Bangladesh, for the Asia-Pacific Group, proposed, and delegates agreed, to elect Taaniela Kula (Tonga) as ISA-26 Council President. The Council also elected four Vice-Presidents: Nigeria, for the African Group; the Russian Federation, for the Eastern European Group; Jamaica, for the Latin American and Caribbean Group (GRULAC); and Canada, for the Western European and Others Group.

On Wednesday, ISA-26 Vice President Kathy-Ann Brown (Jamaica) was designated as Acting President when Council President Kula had to step down unexpectedly for personal reasons. She explained that she had been designated as Acting President until the Asia-Pacific region nominates another Council President.

Credentials of Council Members: On Thursday, Secretary-General Lodge informed the Council that, as of 20 February 2020, formal credentials had been submitted by 28 states. He added that Argentina, Cameroon, India, and Nigeria had also communicated information concerning the appointment of their representatives.

Issues Relating to the Election of LTC Members

On Monday, the Council considered two proposals relating to the election of members of the LTC. The first (ISBA/25/C/L.2) was proposed at ISA-25 by the African Group and GRULAC and had been tabled for this session. The second (ISBA/26/C/L.2) was an amendment to the African Group/GRULAC proposal submitted for this session by Australia, Canada, France, Germany, Italy, Norway, Spain, and the UK. Council President Kula urged delegates to take a decision at this session.

The recommendations from the African Group/GRULAC proposal were that the Council decides, *inter alia*: that equitable geographical representation, as well as special interests and appropriate fields of expertise, shall guide the process of election of members of the Commission; and the number of vacancies allotted to each regional group at the next election be determined in the light of equitable geographical representation.

The amendments from the second proposal were to decide that the Council, *inter alia*: confirms that appropriate qualifications in relevant fields of expertise, equitable geographical representation, and representation of special interests shall guide the process of election of members of the Commission; and requests that the Secretary-General provide, in consultation with the LTC and no later than 15 months before an election, a report for consideration by the ISA Council identifying the ideal size of the next Commission to be elected and the composition of the expertise among its members.

On Monday, Brazil, for GRULAC, and Ghana, for the African Group, spoke to the first proposal, noting the "delicate, complex discussions on LTC composition" and encouraging the Council to make a decision by consensus. The UK spoke to the second proposal, highlighting that the proposed amendments aimed to maintain the "structure and integrity" of the African Group/GRULAC proposal, while ensuring that geographical distribution is not elevated over other factors, including topical expertise, and that the criteria are in conformity with UNCLOS. Delegates then discussed geographical representation, diversity in expertise, and the representation of special interests.

Jamaica, supported by Argentina, outlined the past composition of the LTC, noting that despite an increase in the number of members, expertise had not become more diverse. Emphasizing that equitable geographical representation is a guiding principle in the UN system, Costa Rica underscored that geographical and gender considerations do not compromise diversity in expertise. Belgium, supporting the second proposal, recalled his country's 2018 proposal on strengthening environmental and scientific expertise on the LTC (ISBA/25/C/22). Germany noted that expertise related to oceanology and protection of the marine environment is underrepresented in the current LTC. Both suggested convening a small working group to discuss the issue.

India, supported by China, urged delegates to take a decision balancing geographical representation and expertise. GRULAC stressed that the group's concerns regarding regional representation must be taken seriously to ensure confidence in the LTC's recommendations. Trinidad and Tobago indicated that priority should be given to the optimal size of the LTC, taking into consideration both expertise and the "universally accepted concept of equitable geographical distribution." China suggested that the proposal should be developed by the LTC before it comes

to the Council and stressed that any outcome should be cost effective.

Council President Kula, supported by the African Group, suggested continuing in an informal session to enable the Council to reach agreement. Following these informal discussions, delegates agreed to return to this issue later, basing their deliberations on a new document outlining the differences between the two proposals. On Tuesday, Council President Kula announced that informal consultations would take place during the day, facilitated by Council Vice-President Vladislav Kurbatskiy (Russian Federation), to work on a proposal to be considered in plenary.

On Wednesday in an informal plenary, Facilitator Kurbatskiy reported on the group's outcome, indicating areas of agreement, including that there should be 25 LTC members and that the Secretary-General should seek the views of the LTC on future areas of expertise required. However, he said the informal group could not agree on the issue of equitable geographical balance, indicating that some insisted on a fixed distribution while others preferred more flexibility. He expressed readiness to prepare a working paper to propose a possible mechanism going forward.

In the ensuing discussion, the representatives of two regional groups suggested putting aside all discussions on the draft exploitation regulations that relate to the work of the LTC. Acting Council President Brown said it would be difficult to distinguish which parts of the draft regulations relate to the LTC, noting the entire document might be related since the Commission reviews the work plan. Another participant sought to clarify that since the current LTC is properly constituted, with issues related to the LTC relevant only for its election in 2021, ongoing disputes should not affect the current agenda. One of the regional representatives explained that his group was not comfortable with references to the LTC without knowledge about its future composition. Pointing out that the issue had already been postponed by the ISA Council at past sessions, Acting Council President Brown asked Facilitator Kurbatskiy to resume informal discussions on how the Council might proceed.

On Thursday, Acting Council President Brown invited delegates to review a draft Council decision relating to the 2021 election of LTC members (ISBA/26/C/CRP.3) and a Facilitator's "working paper" on the same. After further regional consultations on the two documents, Facilitator Kurbatskiy noted his proposal that detailed work be carried out intersessionally in accordance with the working paper, towards a common understanding on the issue by the second part of ISA-26.

In discussions, two regional groups proposed referring to equitable geographical "distribution" instead of "balance," noting the former is in line with UNCLOS and other regimes. They stressed the need for the Facilitator's working paper to be an integral part of the decision, calling for it to be included as an annex to the decision. One suggested that if reaching consensus on a more permanent solution proved challenging, a provisional agreement for the 2021 election would be acceptable.

In light of additional comments in the informal discussions in plenary, Facilitator Kurbatskiy said he would amend the documents to include language on the representation of special interests in the provision on equitable geographical representation, and to delete the word "next" so as to encompass elections beyond 2021. On timelines for providing a draft mechanism for the election of LTC members for consideration intersessionally, Kurbatskiy explained that he could only specify a timeline once there was agreement on the number of experts to be included in the Commission, and noted that he expected this to be possible

by the end of March 2020. Delegates agreed to the revised draft decision and working paper, incorporating the requested changes.

Final Decision: In its decision relating to the election in 2021 of members of the LTC (ISBA/26/C/CRP.3), the Council, *inter alia*, expresses understanding for the increase in complexity of the matter of the election of LTC members and a desire to continue the Council's work in a constructive manner, and:

- requests the Secretary-General to seek the LTC's views regarding its assessment of the current and future needs for specific areas of expertise at the Commission's next meeting and to prepare a report for the Council's consideration at its next meeting in July 2020;
- decides to further discuss the process governing the elections of LTC members on the basis of a working paper presented on 20 February 2020 by the Facilitator, as an annex and integral part of the decision, as the starting point to reach a consensus on this matter; and
- decides that the question of the Commission's composition shall be considered as a matter of priority at the Council's next meeting with a view to taking a decision at that meeting.

The annexed Facilitator's working paper proposes, as a starting basis for further discussions that, *inter alia*:

- the overall number of LTC members should not be less than 25 but not exceed 30;
- the LTC provide its views and clear guidance on the Commission's composition regarding needs for expertise at the earliest possibility;
- the Council elaborate a clear mechanism for the next election of LTC members on the basis of equitable geographical distribution, the representation of special interests, and the LTC's assessment of the need for specific areas of expertise, among others;
- the Facilitator provide a first draft of the mechanism by the end of March 2020, followed by an exchange of written comments and proposals sent to the Secretariat within three weeks, and the Facilitator amending the text within three weeks; and
- a decision be adopted on the mechanism to govern the elections of LTC members during the Council's meeting in July 2020.

Election to Fill a Vacancy on the LTC

On Monday, delegates elected Carsten Rühlemann (Germany) to replace Christian Jürgen Reichert (Germany) on the LTC (ISBA/26/C/5). Council President Kula thanked the latter for his service, including as LTC Chair.

Status of Exploration Contracts and Related Matters

On Monday, Council President Kula introduced the document (ISBA/26/C/4), pointing to an annex on the status of contracts for exploration. He drew delegates' attention to the draft recommendation, which the Council endorsed without amendment.

Outcome: The Council agreed to take note of: the status of contracts for exploration; information on the periodic reviews of the implementation of approved plans of work; and proposed development of guidance for contractors on the content, format, and structure of periodic reports.

Report on the Implementation of the 2019 Council Decision on the Reports of the LTC Chair

On Monday, Council President Kula invited delegates to take note of the report (ISBA/26/C/3), adding that the item would

remain open, given that additional reports will be submitted during the second part of ISA-26.

Australia noted the importance of transparency in the development of the draft exploitation regulations, and said it is critical to conclude the regulations and legally binding standards as a package. Jamaica noted an increased use of consultants in the development of standards and guidelines for activities in the Area, encouraging transparency in this regard.

GRULAC and India commended the report's finding that no issues of alleged non-compliance by contractors had been identified.

The African Group appealed to Member States and international organizations to contribute to the Voluntary Trust Fund for developing country participation. Brazil announced the country could self-fund its Council member's participation at the next Council meeting. India identified an urgent need to develop a REMP for the Indian Ocean.

The Pew Charitable Trusts commended the launch of the DeepData database and called for improved processes for the working groups on standards and guidelines, noting time pressures and a lack of transparency in appointments.

The Deep Ocean Stewardship Initiative emphasized the need for a standardized mechanism to develop REMPs and called for the adoption of best practices for interoperability and accessibility for DeepData.

The Deep Sea Conservation Coalition (DSCC) suggested recognizing that the 2020 target date for the completion of standards and guidelines is not viable, stressing the need for transparency and high-quality outputs, and noting that REMPs take time to develop.

Responding to an inquiry about the consideration of matters relating to the Enterprise by Eden Charles, the Secretary-General's Special Representative for the Enterprise, Secretary-General Lodge noted this item would be taken up at the second part of ISA-26. He further noted that, while the report was compiled in December 2019, work on standards and guidelines had progressed since then under the supervision of the LTC. He said the work would be reviewed by the LTC at its next meeting, and clarified that the work was being done in accordance with the process and timelines agreed at the last session of the Council (ISBA/25/C/19/Add.1). The Council then took note of the report.

Draft Regulations for Exploitation of Mineral Resources in the Area

The draft exploitation regulations were discussed throughout the week, focusing on both the procedure and the substantive issues contained in the draft. With regards to procedure, delegates engaged in informal discussions on how best to advance work given the extensive nature of the draft exploitation regulations. The substantive discussions, based on a collation by the Secretariat of Council members' suggestions on the draft exploitation regulations (ISBA/26/C/CRP.1), considered three parts: protection and preservation of the marine environment (Part IV); review and modification of plan of work (Part V); and closure plans (Part VI), as well as related annexes (IV, VII and VIII). In addition, the Council also discussed two new submissions related to REMPs (ISBA/26/C/6 and 7).

Working Method: On Monday, Council President Kula invited participants to focus discussions, in an informal setting, on a working method to proceed on the draft exploitation regulations. 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 with proposals for REMPs, and standards and guidelines.

Delegates expressed broad agreement with the proposal for establishing thematic working groups, 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 suggesting 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. Some advised against creating too many working groups, in light of concerns about inclusiveness and participation. A number supported working remotely through online meeting platforms, while others expressed concern about possible technical and organizational issues. Many preferred that work only be conducted at, or back-to-back with, Council meetings.

Secretary-General 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.

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 later in the week;
- 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 the informal setting in plenary. On Wednesday, Kula reported on ongoing consultations within regional groups on nominating facilitators for three informal working groups on aspects of the draft exploitation regulations.

On Thursday, recalling the process adopted to draft UNCLOS through working groups with clear mandates and procedures, Acting Council President Brown announced that ISA-26 Council Vice-President Kenneth Wong (Canada) would facilitate an informal, open working group on the working method. Reporting from the group, Facilitator Wong presented a draft document, which proposed the establishment of informal working groups on three thematic areas, noting that these would convene sequentially during Council sessions. He underscored the need for facilitators to proactively build consensus in these groups. In discussions, two delegates called for specifying the Enterprise as separate from other observers participating in the informal working group proceedings.

On Friday morning, Acting Council President Brown presented a draft decision on working methods to advance discussions on the draft regulations on exploitation. The Council adopted the decision.

Regional groups volunteered to facilitate informal working groups, as follows: the African Group on inspection, compliance, and enforcement; GRULAC on institutional matters; and the Asia-Pacific Group on the protection and preservation of the

marine environment. The Eastern European Group noted that the group was already facilitating discussions related to the LTC composition.

Final Decision: In its decision concerning working methods to advance discussions on the draft regulations on exploitation of mineral resources in the Area (ISBA/26/C/CRP.5), the Council:

- decides to establish three informal working groups with the mandate and working modalities set out in an annex to the decision;
- decides to appoint individuals to be designated by the regional groups; and
- requests the facilitators to report on the progress in their work during the Council's meeting in July 2020.

The annex outlines the mandate and working modalities for the informal working groups and the mandate of the facilitators, including that:

- the three working groups will focus on: protection and preservation of the marine environment; inspection, compliance, and enforcement; and institutional matters, including the role and responsibilities of the various organs of the Authority, timelines, recourse to independent expertise, and stakeholder participation;
- the groups will be open to observers and other stakeholders and shall be held in public unless otherwise decided and will meet during Council sessions, with no meetings held in parallel;
- the facilitators will moderate discussions in Council sessions and, as necessary, use best efforts to communicate with their respective groups' participants through electronic means during the intersessional period;
- the task of the facilitators will be to identify and build consensus;
- the facilitators will apply an inclusive approach, including by reaching out to Council members, other member states of the Authority, the Secretary-General's Special Representative for the Enterprise, observers, and other stakeholders to ensure that all views are taken into account, as appropriate;
- the facilitators will provide guidance to the Secretariat in compiling comments on the draft text, with a view to preparing a revised text, under their responsibility, for the Council's consideration;
- the facilitators will consult regularly with each other and the Secretariat to align the groups' work methods; and
- the facilitators will report on the work of their respective groups to the Council plenary.

Financial Model: This issue was discussed in a formal plenary on Monday and Tuesday. Council President Kula introduced discussions on the draft exploitation regulations. He noted that the report of the OEWG on the Financial Model was currently available in English (ISBA/25/C/8).

OEWG Chair Olav Myklebust (Norway) reported on the outcomes of the Group's third meeting, held from 13-14 February 2020, reminding the Council that the Group's second meeting had considered three payment mechanisms and had agreed to explore a fourth option, to be developed with support from the Massachusetts Institute of Technology (MIT). He outlined the four options:

- a fixed rate *ad valorem* only royalty mechanism;
- a two-stage *ad valorem* only royalty mechanism;
- a combined *ad valorem* royalty and profit-based system; and
- a progressive *ad valorem* royalty system.

Chair Myklebust highlighted the report's recommendations and noted the Working Group had not fully endorsed or discarded any of the four options. He said the report's recommendations

included a request to the Secretariat to further refine the two-stage *ad valorem* only royalty mechanism and the progressive *ad valorem* royalty system. He added that the recommendations also included a request to the Secretariat to provide a comparative study of seabed mining and land-based mining.

The African Group expressed concern that the consultants from 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 range of 40-70%, 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 stressed that no payment options should be removed at this time 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 models developed by MIT, DSCC questioned the current economic viability of deep sea mining in light of the risks to biodiversity, marine genetic resources, and intergenerational equity. Senegal called for greater transparency and fairness in benefit-sharing discussions.

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.

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 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.

Outcome: Following the recommendations contained in ISBA/25/C/8, 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 by 23 March 2020 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.

Protection and Preservation of the Marine Environment

(Part IV and Annex IV): This issue was discussed in informal plenary sessions from Tuesday to Friday. Secretary-General Lodge introduced the relevant documents, noting that the main document under discussion was the draft exploitation regulations prepared by the LTC (ISBA/25/C/WP.1), supplemented by the draft regulations with a collation of Council member drafting suggestions (ISBA/26/C/CRP.1).

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. A number of delegates queried how the discussions at this session would be captured, given the absence of a facilitator, with some proposing projecting the document on a screen to facilitate drafting. One underscored that “nothing is agreed until everything is agreed.” Council President Kula explained that the Secretariat was recording the interventions. On Friday, one delegation asked how input into draft regulations would be communicated to the newly established informal working groups. Acting Council President Brown clarified that she would work with the Secretariat to convey inputs from discussions on the protection and preservation of the marine environment to the Asia-Pacific Group facilitator.

On **general obligations**, delegates expressed different preferences regarding whether to refer to the precautionary “approach,” as set out in the Rio Declaration (1992), 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 delegates identified the need to include specific references to the Enterprise, given its role in the ISA.

The issue of **REMPs** was considered from Wednesday to Friday. On a proposed additional paragraph on REMPs in Part IV of the draft exploitation regulations, Council President Kula suggested that delegates simultaneously consider two proposals submitted by Germany and the Netherlands, and co-sponsored by Costa Rica, on a procedure for the development, approval and review of REMPs (ISBA/26/C/6) and on a template with minimum requirements for REMPs (ISBA/26/C/7).

Introducing the proposals and describing REMPs as an essential pillar of the mining code, Germany explained that the two submissions were based on a REMPs workshop in November 2019 in Hamburg, Germany. He said the proposed procedure and

template: build on the ISA's work, while ensuring stewardship by the Council and the LTC; and are aligned with the LTC's mandate to establish small, non-permanent *ad hoc* groups of experts to convene under clear terms of reference for limited periods of time to assist the LTC's work.

As co-proponent, the Netherlands explained that the proposals should be understood as part of the overarching environmental policy of the ISA and are aimed at strengthening existing guidance prepared by the ISA Secretariat. As co-sponsor, Costa Rica emphasized a need for a standardized approach for all REMPs.

There was widespread agreement on the importance of REMPs. Many, but not all, agreed with creating standardized processes for developing, approving, and reviewing REMPs. Some delegates pointed to the existing regulatory framework for establishing REMPs. One preferred to follow the current process taken by the ISA to develop REMPs through regional workshops led by the LTC. Some asked for clarification about how the proposals relate to ongoing work by the Secretariat on REMPs, raising concern that these proposals could prejudice the outcomes of other existing efforts.

Several expressed support for the rationale behind the two proposals, stressing the importance of adopting a standardized approach to REMPs. Some suggested annexing the template to the exploitation regulations. Others supported the adoption of a standardized approach to REMPs as part of the Authority's environmental policy rather than only of the exploitation regulations.

Some supported the proposals in principle, but had questions and suggestions on specific provisions, including on minimum requirements. Many called for REMPs to be mandatory and legally-binding, and several said they should be in place before granting exploitation contracts. Delegates suggested that the REMPs include: area-based management tools; provisions to catalogue for species in a region to develop adequate baselines; and mandates that mining be managed to prevent biodiversity loss.

Many delegates noted that a standardized process is key to ensuring a replicable, transparent, and inclusive pathway for designing REMPs, and for good governance and transparency in the protection of the marine environment.

Some stressed that the operationalization of the Enterprise and the Economic Planning Commission should be prioritized. Several spoke to a reference on the establishment of expert committees on REMPs. One said that this proposal raises legal questions about REMPs' status, creation, and accountability. Some preferred language referring to “informal groups” or “working groups” of experts, and another called into question the need for “additional bureaucracy” in the development of the mining code.

One advised that any costs for the Secretariat associated with these plans would need to be considered by the Finance Committee. Others pointed to the additional cost implications related to the establishment of expert committees.

On the template, one called for further operationalizing and quantifying the overarching goals listed in the document. Another stressed connectivity of marine ecosystems and species of cultural significance to indigenous peoples and local communities. One other lauded the inclusion of language on carrying capacity in the proposal, noting this should be added to the annexed template.

Some noted that efforts on REMPs under the ISA should be developed in accordance and in collaboration with the ongoing negotiations on a legally binding instrument on the conservation and sustainable use of marine biological diversity of areas beyond

national jurisdiction (BBNJ). One highlighted, in particular, the role of regional fisheries management organizations and cumulative impacts in environmental impact assessments (EIAs).

Some delegations enquired about transition arrangements for existing REMPs, if the new procedure and template were to apply to all REMPs. Other delegations suggested the Council “take note” of the proposals and continue discussions at a future Council session. On the proposed regulation of REMPs, some delegates said they would submit written suggestions.

Calling REMPs an essential tool to address regional specificities and carrying capacities, one delegate urged that no exploitation take place until REMPs are in place.

In response to questions, Secretary-General Lodge said the LTC is developing the process for working on REMPs and added that delegates could consider questions of Council oversight.

The Council designated a small group, led by Germany, to work on this matter with a view to return to this in plenary. On Thursday, Germany reported that a draft decision (ISBA/26/C/CRP.4) on further work on the issue had been circulated.

Noting broad support for the proposals, one regional group, supported by many, requested deleting a reference to “as appropriate,” with regard to a paragraph referencing the LTC taking into account the proposals in further developing REMPs guidance. Some other delegates asked to retain “as appropriate” so as to give the LTC more discretion on how to consider the proposals. Another delegate proposed clarifying that the various elements listed in the provision are to be taken into account by the LTC in developing a standardized approach. One observer, with broad support from delegates, urged that the LTC base its discussions on these proposals, and that these discussions be held in an open session. Some delegations indicated they required further instructions from capitals.

On Friday morning, delegates agreed to adopt the draft decision on REMPs as initially proposed, without amendment.

Final Decision: In its decision (ISBA/26/C/CRP.4), the Council, noting it has considered proposals on a procedure for the development, approval, and review of REMPs (ISBA/26/C/6) and on a template with minimum requirements for REMPs (ISBA/26/C/7):

- requests the LTC, in consultation with the Financial Committee if necessary, to further develop the “Guidance to facilitate the development of REMPs,” in accordance with UNCLOS, the Agreement relating to the implementation of Part XI of UNCLOS, as well as the rules, regulations, and procedures of the ISA, and taking into account, as appropriate, these proposals with a view to recommending to the Council a standardized approach including a template with indicative elements; and
- requests the LTC to report on the progress made in its work on this issue at the next Council meeting in July 2020.

On proposed additional language for the **environmental management and monitoring plan (EMMP)**, concerning a requirement for test mining in two stages, delegates expressed diverging views. A few welcomed further discussions on the issue but noted that any test mining should be considered as mining and, therefore, subject to an EIA process. One delegate suggested referring to “legally binding” standards and guidelines. Another suggested that the regulations specify contractor responsibilities for expenses related to EMMPs. He also proposed incorporating mechanisms for review and control, to ensure the improvement of these plans over time, in keeping with mechanisms for environmental monitoring. A third stressed that monitoring programmes must be mandated for the life of a project, not only its first seven years.

On the related annex, one delegation stressed the need for clear expectations regarding the duration of monitoring. Others stressed cross-references to REMPs, including to ensure consistency and comparability of environmental data. On language, one delegation enquired about the meaning of “official language of the Authority” and the Authority’s translating capacity. Secretary-General Lodge clarified that the official languages are the six UN languages, whereas the Authority’s Secretariat has two working languages (English and French).

On a paragraph on the **development of environmental standards**, a number of delegates supported an indicative list proposing to include the term “*inter alia*,” noting that new technologies and scientific knowledge might expand options for environmental standards. One stressed that the ISA should not approve new exploitation activities unless environmental standards are adopted. Another underscored that environmental protections should be included as binding standards, and supported mandating environmental standards prior to approving exploitation activities, also supporting the inclusion of reference to contaminants and toxicity.

On a paragraph on the **environmental management system (EMS)**, one participant recommended clarifying and defining: the components of an EMS; who would establish such a system; and who would be entrusted with independent auditing. Another advised that the Authority be tasked with developing a document specifying minimum standards for an EMS, adding contractors would then be mandated to implement and maintain an EMS in compliance with those standards.

On a paragraph on the **environmental impact statements (EIS)**, participants’ views diverged on whether to specify EIS or EIA processes. One group called for: standards and guidelines for EIAs to be prepared as a matter of priority; clear EIA timelines; and inclusion in EIAs of independent scientific assessment and open hearing processes. Calling for conceptual clarity between the EIA and an EIA decision, some delegates asked to clarify the roles of the contractor and the ISA as the regulator. One advised that text be added to acknowledge that not all environmental impacts can be mitigated, and that EIAs “identify residual effects.” A few underscored the need to specify that an EIA or EIS have measures that can comply with REMPs. One other supported making EIA processes mandatory, noting the likelihood of harm to the marine environment. She stressed that baseline data are needed to underpin EIAs, and called for the processes to be “vigorous, transparent, and consultative.” A regional group and one other delegation preferred that the text specify that coastal states in close proximity to mining areas must be represented during the EIA process, rather than only consulted, with the group stressing there should not be a “need to wait until the damage is done.”

Raising concern about the insufficiency of definitions, one delegate encouraged the inclusion of an annex with clear explanations of screening, scoping, and other terms. One underlined that EIAs must be mandatory for all exploitation activities in the Area, and another urged coordination between the draft regulations in the ISA and ongoing BBNJ negotiations. Another delegate asked to distinguish between the different phases of the EIA process and noted that additional assessments could be required at later times or for different sites. A number of observers called for redesigning the steps in the EIA process.

On Friday afternoon, Acting Council President Brown opened informal discussions of Annex IV on the EIS. A number of delegations asked to entitle the annex “EIA.” One preferred reference to “environmental impact system” instead. Reminding delegates that this template relates to the proposed

EIS regulations, one delegate called for consistency with ongoing work on EIAs and EMMPs, with another noting that the template may therefore need to be updated accordingly. Many welcomed references to REMPs, and some called for preparing the EIS and EIA in accordance with applicable REMPs.

Discussions centered on whether use of the template should be mandatory and standardized, and in particular whether contractors should be required to complete all or only a minimum number of specific parts of the template. Several delegates supported this, with many stressing that a set template ensures consistency and comparability. One said contractors could be given the flexibility to not complete inapplicable parts, with another suggesting contractors should provide a written justification if they leave an area incomplete.

Some cautioned against being too prescriptive, suggesting a fixed template would be too complex and thus beyond the capacity of contractors. Others responded that lack of expertise should not be “an excuse to fail to comply” and contractors could seek the necessary expertise externally.

One opposed a reference to a specific period of monitoring, describing 15 years as “arbitrary,” noting this could lead to a significant delay without adding to meaningful environmental protection. He called instead for referring to “data reflecting best international practice.”

Many noted that current references in the text to “guidance” signaled that the template would not be legally binding. One delegate indicated that neither guidelines nor REMPs are legally binding and questioned the reference to compliance.

Two delegates called for “clear conservation metrics,” with one calling for clarity on how contractors will obtain information regarding impacts, what constitutes an impact, and under what circumstances mitigation would be required. Some stressed that this kind of information is necessary if the Authority is to obtain sufficient information upon which to base its assessment. Another called for establishing how much loss of resilience or biodiversity would be permissible.

In a section on applicable international and regional agreements, a number of delegates asked to include reference to additional relevant international agreements. Some asked for a reference to the BBNJ negotiations, although this addition was opposed by one representative who noted that ongoing negotiations means that BBNJ does not yet constitute an international agreement.

Another participant welcomed inclusion of text on “animal communities in the water column,” indicating that this should include those that move into and out of the water column, including into the waters of adjacent coastal states.

With regard to assessment of impacts, a number of delegates welcomed inclusion of, *inter alia*, greenhouse gas emissions and cumulative impacts, with some suggesting including climate change as a crosscutting issue in the EIS, including through information on projected emissions produced by the contractors.

On socio-economic issues, one delegate proposed to include a new section on submarine cables and other existing uses, indicating that any operator who has a cable should be recognized in the assessment process.

On the EMMP relating to **test mining**, delegates exchanged several views on a proposed additional regulation. A number of delegations stressed that test mining is still mining and should be fully regulated under the draft exploitation regulations, whereas some others indicated that it should be considered as part of exploration. While recognizing potential information gained prior to engaging in a commercial activity, a delegate said that engaging in early-stage test mining should not obviate

the need for an EIA. Delegates suggested various ways to define test mining, such as: duration or scale of operations, including whether operations are sustained; quantity of materials extracted; size of the area or distance at which operations take place; or disturbance caused to an area. One delegate suggested requiring an EIA prior to obtaining an exploitation license. Another pointed to the ISA’s prospecting and exploration regulations, which refer to “testing of collecting systems and processing operations.” One participant indicated that the operational tests under the EIA should be sufficient to meet requirements and that test mining could be expensive, bureaucratic, and cause delays. One supported the inclusion of regulations to prevent and mitigate serious harm, and opposed a requirement for test mining for each project, noting that test mining itself can cause serious harm and so should be limited in scale.

On **pollution control**, one participant, supported by others, urged the inclusion of references to marine litter and underwater noise. Acting Council President Brown recalled earlier discussions on coherence and consistency across the ISA and BBNJ processes. On the ISA’s relationship with other relevant international conventions such as the International Convention for the Prevention of Pollution from Ships (MARPOL) and the London Convention on the Prevention of Marine Pollution, she reminded participants of a 2019 ISA paper on the “Competencies of the International Seabed Authority and International Maritime Organization in the context of activities in the Area.” A large number of delegates pointed to the importance of following and aligning with the work on BBNJ, with one delegate suggesting that whichever process finishes first will define things for the other. Another emphasized the need for an integrated oceans policy.

On **restrictions on mining discharges**, on text that the regulation of discharges shall not apply to dumping for safety of vessels or human life, providing that all reasonable measures are taken to minimize the likelihood of “serious harm” to the marine environment, a regional group and other delegates requested to instead refer to “any harm.” One delegate requested reference that this work be done in accordance with REMPs, with another delegate indicating that such specification would not be needed if REMPs are legally binding, as implied by the reference. Several participants discussed consistency and provisions in the International Maritime Organization and London Convention on issues included in this draft regulation, including on the definition of pollution. One delegation asked to include an additional paragraph to provide further guidance on unauthorized discharge.

Regarding **performance assessments of the EMMP**, a number of participants said these should be conducted by the Authority, not the contractor, with some suggesting this work could be also conducted by the LTC, an expert group, or an independent third party. One called for opening the report to public comment and conducting the review annually. Noting that the previous frequency of no less than 24 months for performance assessments had been omitted, one party suggested returning to the two-year timeframe, whereas another suggested annual performance reviews.

One regional group urged that schedule of performance assessments be set out in the regulations, rather than by contractors. The group also requested that the ISA be tasked with performance assessments and be empowered to request *ad hoc* assessments, if necessary. A few requested that this work be done in accordance with REMPs, with one stressing that REMPs should be legally binding.

On an emergency response and contingency plan, a number of delegates asked for clarification of the term “relevant adjacent coastal states.” Some suggested the use of another term to refer to states who might be affected, although views diverged on whether to refer to “relevant adjacent coastal states,” “affected coastal states,” “neighboring states,” or “states with close proximity.”

Delegates asked questions about the operation and prescribed percentage of a proposed **environmental compensation fund**. One delegate welcomed the reference to vulnerable communities, and asked to refer specifically to Indigenous Peoples and local communities residing in adjacent coastal states and likely to be impacted. A regional group called for clear rules of governance, including: how the fund might be financed; how interest will be managed; reimbursement modalities; processes for accessing the fund; the standard of proof required; and types of damages covered. One delegation asked to have the fund “up and running” by the commencement of exploitation activities, and to include a deadline for establishment of the rules and procedures of the fund.

Many participants indicated that the fund should focus on compensation and liability gaps, with a number of delegates suggesting that another fund could be set up to deal with some of the other proposed issues, including mitigation. Many pointed to a proposal to establish an environmental research and education fund, with several indicating that this, if established separately, should not take away funding from the environmental compensation fund or diminish its importance. One delegation, opposed by a regional group, suggested deleting a reference to education and training programmes from a list of purposes of the fund.

A number of delegates suggested that the broader purposes articulated go beyond the proposed environmental compensation fund. One delegate, supported by many, suggested setting up a second fund that could be referred to as a “sustainability fund” to address the broader objectives. Another said that such a fund’s scope could include impacts beyond the ones identified in plans of work. Another delegate indicated that restoration should be dealt with under each project’s plan, pointing to the responsibility of the contractor.

On the purpose of the environmental compensation fund, one delegate requested clarification on whether, *inter alia*: the fund is based on a polluter pays principle; funds are to be paid at the outset or assessed during mining; and affected coastal states will be involved in decisions on how to use the funds.

Discussions also focused on language to require remediation of, as well as limiting, damage arising from activities in the Area, and on financing research into and monitoring of cumulative effects. Another delegation said it would be submitting a non-paper for the July 2020 Council session on an offset compensation mechanism.

Regarding **funding**, a number of delegates stressed that it was important to indicate that the funding will come from the activities of contractors. Some expressed concern that raising funds from ongoing activities might lead to underfunding, with two highlighting that the quantification, mechanics, and design of the fund will take time. One offered a rationale for not pooling the fund’s resources, explaining that this would avoid drawing down on the fund for one incident, and suggested considering whether contractors could recover funds they have contributed if they operate responsibly.

Review and modification of a plan of work (Part V and Annex VII): A number of delegations called for oversight by the Council and LTC of modifications of plans of work, noting that this should not be left solely to the Secretary-General, and proposed a notification procedure to guide this process.

One suggested that the Secretary-General inform the Council of any plan of work modifications. Others also stressed that material changes in plans of work should be guided by legally binding standards, as opposed to guidelines. Some noted that the Authority should also be allowed to modify plans of work. Several others supported references to cumulative impacts, with some suggesting including a specific reference to climate change and ocean acidification; and many supporting reference to adjacent coastal states.

Closure Plans (Part VI and Annex VIII): One delegation supported mandating public participation in the development of closure plans, noting also that the proposed timeline of 12 months may need to be revised. On the annex, one delegate welcomed the text and its approach to establishing the closure process. Referring to references to restoration and remediation, one observer asked to specify that this only be required when justified by applicable environmental science.

Next Steps and Closure of the Meeting

On Friday afternoon, one delegate asked the Secretariat to provide a marked-up version of the draft exploitation regulations with all the comments with attributions. Acting Council President Brown recognized that it would have been helpful to have had a marked-up version of the text with all the comments, including those from non-Council members and observers. Pointing to the newly established informal working groups, one delegate asked how the outcome of these discussions would be passed on to the informal working group on the protection and preservation of the marine environment, noting that some proposed additions had been endorsed and explained, while others had not been discussed, questioning whether those contributions would be considered as equivalent.

Acting Council President Brown indicated that the Secretariat had taken detailed notes and would generate a new text synthesizing the discussions working together with the respective facilitators, once appointed. Another delegate encouraged the timely provision of updated drafts to ensure informed participation. Brown expressed readiness to work together with other Bureau members to ensure a smooth transition and that documentation is provided in a timely manner.

Acknowledging her particular role in conference services and the smooth operations of the Authority, the Council recognized outgoing Secretariat member Ena Harvey for her 21 years of service to the ISA.

Jamaica thanked the Acting Council President for her able leadership noting that the Council had adopted three decisions that enable work to proceed, including between sessions. She also thanked the Secretariat, meeting services, and all participants, welcoming delegates back to the country for the second part of ISA-26 in July 2020. Brown then gavelled the meeting to a close at 4:41 pm.

A Brief Analysis of the First Part of ISA-26

“Time is of the essence,” emphasized Council President Taaniela Kula on Wednesday morning, at the midpoint of the first part of the 26th session of the International Seabed Authority (ISA-26). His comment was both an inspiration and a warning, reminding delegates of the delicate balance in ISA negotiations between speed and caution. With this year’s self-imposed deadline for completing the exploitation regulations, the ISA Council is under pressure to agree on a mining code. Further, while the commercial viability of exploitation of minerals from the deep sea depends on many factors, from technology to

mineral prices, contractors and sponsoring states are eager for the clarity that a regulatory code would provide. However, some members and observers have long warned against moving ahead without adequate time for marine scientific research and adequate stakeholder engagement to ensure environmental protection and conservation.

This brief analysis assesses the progress made and challenges still facing the ISA in developing a robust, yet implementable, set of governing regulations for the seabed. This analysis also considers how the delay in the start of substantive discussions at ISA-26 demonstrated the crucial role that procedural issues can play in the substantive work of the ISA. Assessing how well delegates managed their time to advance substantive work toward a looming deadline, this analysis concludes by evaluating whether decisions taken at this meeting will enable the Council to develop a comprehensive set of regulations that leaves no one, and no deep sea ecosystem, behind.

Legitimacy and Representation: Foundations of the ISA

Most participants expected to spend the week in Kingston, Jamaica, in detailed negotiations over a full draft of exploitation regulations referred to the Council by the Legal and Technical Commission (LTC). Instead, delegates found themselves mired in procedural debates, as issues relating to the election and composition of the LTC dominated the proceedings, along with questions of how to organize work on the draft regulations. While the Council initially tried to set aside those issues and delve into substantive negotiations, delegates repeatedly circled back to the unresolved procedural issues.

The discussions on the rules and criteria for electing LTC members that would both fairly represent regions and ensure relevant expertise, a long-standing issue for the Authority, revealed underlying concerns about participation and influence in the Commission. Not only does the LTC conduct substantive work, it is also procedurally powerful, with a two-thirds majority required in the Council to overturn any recommendation of the LTC.

Some viewed this procedural issue as secondary to the core work at this Council session, since new election rules will not influence the LTC this year, as the current members' term extends to 2021. Others, however, believed that delays were no longer acceptable and that confidence in a fair regional distribution of members is necessary to restore mutual trust and allow negotiations to go forward. According to these Authority members, primarily from the African Group and GRULAC, equitable geographical distribution is a priority. Some saw any criteria prioritizing expertise over geographical distribution as implying that certain regions might not have the necessary expertise needed on the Commission, and they noted this reflected an outdated view of the global distribution of legal and technical knowledge.

While delegates were unable to agree on a definitive model for the number of representatives and their allocation criteria, closed-door informal discussions resulted in a compromise that enabled substantive discussions to proceed. This agreement lays out both a process for designing a "mechanism" for the election and defines key parameters, including equitable geographical distribution. But some admitted the decision only bought the Council additional time, leaving underlying tensions about representation unresolved.

Getting the Royalties Right: Financial Models

At the core of ISA-26 is an agreement on the exploitation regulations. Rapid progress is a priority for many sponsoring states and others who look ahead to the expiration of some

exploration contracts in 2021, which have already been extended from their initial 15-year period. Some observers at ISA-26 highlighted provisions in the Annex to the 1994 Implementing Agreement that, in their understanding, allow for sponsoring states' nationals to apply for approval of an exploitation plan of work and go ahead after a two-year period even in the absence of commonly agreed draft regulations. While those concerned about the environmental impacts of deep seabed mining are wary of this scenario, others pointed out that some smaller mining companies at least would be unlikely to go ahead without the mining code in place, as a business case for mining requires regulatory certainty that only the regulations under discussion can provide. Regardless of position, most delegates acknowledged the certainty the draft regulations will provide when ultimately agreed.

Prior to the meeting, the Secretariat circulated a collation of comments on the LTC's draft exploitation regulations (ISBA/26/C/2). Early in the week, when delegates were discussing how to best tackle the workload, there was broad agreement that there are five core thematic areas in the draft regulations: financial models; responsibility and liability; protection and preservation of the marine environment; inspection, compliance and enforcement; and institutional matters. The first two areas have already been under consideration by various organs of the ISA, while, at the outset of ISA-26, the latter three still required a first full read-through. Although liability related to environmental damage was not a focus of this session, it continues to be addressed in closed-door LTC meetings, informed by a Legal Working Group on Liability for Environmental Harm from Activities in the Area. The most progress has been made on financial models, which had been the subject of contentious discussions in an Open-Ended Working Group (OEWG).

Establishing a financial model for exploitation has long been a priority for the ISA, with the aim of developing a straightforward, easy-to-understand, and transparent model. In 2014, a comparative study was released by the Secretariat as a working paper on developing financial terms for deep sea mining exploration. Consultants from the Massachusetts Institute of Technology (MIT) were then retained to elaborate on options for a financial mechanism for consideration by the OEWG. Initially, they were asked to explore three options: two royalty payment models were based on an *ad valorem* approach, where royalties are paid in proportion to the estimated value of the minerals, with the models differing in rates of return over time (fixed-rate and two-stage); while the other considered a joint *ad valorem* and profit-based approach. The MIT team was asked to outline a fourth option for consideration, presented to the last OEWG meeting, for an *ad valorem* model with a progressive royalty rate. At ISA-26 Part 1, the Council approved a draft decision to, among other things, convene another OEWG meeting and continue refining two of the proposed financial models. While delegates were unwilling to take any model off the table, with some still keen on hybrid profit-based models and fixed-rate *ad valorem* options, they nonetheless agreed that the Secretariat should focus its efforts on refining two variable *ad valorem* models involving two-stage and progressive options for payments. While delegates still seem to be far from reaching agreement on the financial model—including vast differences of perspectives on the scale of royalty rates that should accrue to the ISA (rather than sponsoring states)—they welcomed the fact that "the options are becoming clearer and cleaner," as more work is being mandated and agreed that the OEWG is the appropriate venue for these deliberations.

According to some delegates, the focus of the ISA on payment models reflects the “predominant” way in which the Authority has interpreted the concept of common heritage of humankind. To date, many feel that there has been more emphasis on deciding how to share financial returns from potential mining in the seabed, while the less quantifiable aspects of environmental and social sustainability have received less attention.

Lagging Behind but Catching Up: Environmental Protection

A number of delegates pointed out that, while the focus of the Authority’s work in the past had been on finance, they were encouraged by the Council turning its attention to environmental protection. The excitement in the room was palpable when delegates finally launched into a first reading of the regulation section on the protection and preservation of the marine environment. Some delegates said that these discussions on environmental protection revealed a shift to a broader understanding of common heritage, with the Authority urged by an increasing number of states and observers to interpret the principle in terms of a wider set of non-financial values, from biodiversity and ecosystem services to social and cultural elements.

Many recognized how environmental protection is becoming increasingly central in the Authority’s work, leading one senior participant to quip that “if these negotiations were to be moved into a ‘small group,’ it would be as big as the plenary.” At this session, however, plenary simply transformed into an informal setting, enabling both broad participation and candid exchanges. Once underway, the Council managed to review the entire section on regulations on the protection and preservation of the marine environment (Part IV), along with sections plans of work (Part V) and closure plans (Part VI) and their related annexes, in just over two days.

Many participants were delighted to see what they described as some of the “most productive discussions” at ISA-26 take place around regional environmental management plans (REMPs). Delegates engaged in substantive debate over proposals by Germany, the Netherlands, and Costa Rica for a more standardized approach to these plans, including a template for minimum requirements for REMPs. In informal plenary sessions, delegates expressed broad agreement on the importance of REMPs in general. However, diverging views emerged about the nature and form of these plans, especially on whether they should be legally binding and embedded in exploitation regulations, or whether they should take the form of guidelines. The outcome of this choice could have consequences for the timelines for finalizing the exploitation regulations, explained one delegate, and might unduly delay progress. Another, though, expressed the view that REMPs must be a mandatory condition for contractors to be granted exploitation permits, if the marine environment is to be adequately protected, noting that these are as central to any mining code as a financial payment model. The matter of REMPs was delegated to the LTC for further work, which, for some, again confirmed the importance of the composition of the LTC as it addresses significant regulatory concerns.

Decisions on a Path Forward: Informal Working Groups and ISA-26 Part II

There was no rush of delegates into the breezeways after the ISA Council came to a close on Friday afternoon, with a number staying on in Kingston for the LTC meeting that begins on Monday, 24 February, and others lingering to assess the work

ahead. A few optimistic delegates maintained their commitment to a 2020 decision on the mining code, but most believed that it will be important to spend the necessary time in substantive negotiations to “get to the bottom” of deep sea mining-related issues, including more robust environmental regulation among other thematic areas.

The three decisions taken at this meeting pave the way for further substantive work before and at the second session of ISA-26 in July 2020. First, the Council charted a path forward for their negotiations on the draft exploitation regulations, resolving some difficult questions about how to organize working groups on the remaining thematic areas, limiting electronic intersessional work and avoiding parallel meetings to enable wide participation. Second, as many pointed out, the Council’s decision on the LTC elections left key substantive issues unresolved. Expectations remained high that agreement on intersessional work on a draft mechanism for the LTC might enable a compromise between opposing positions and allow for a final decision to be taken in July. Others, though, worried that deferring this issue to the next session again undermined the centrality of the issue, which might still prove explosive in July. Third, some delegations expressed enthusiasm for the “positive outcomes” on the first reading of the environmental protection regulation, including on REMPs with work ahead for the LTC.

As seen in this first part of ISA-26, procedural issues can be both a major obstacle to, but also enable, productive substantive discussions. While many were disappointed that more substantive advances were not made, some delegates expressed relief that they had found a way forward on a method for their future work. The resolution of procedural concerns will help the Council advance on its mandate of governing the Area for the common heritage of humankind. Working groups led by regional group-nominated facilitators can further ensure continuity for the discussions on draft regulations.

Looking ahead to the second part of the Council session in July, several underscored the importance of setting aside sufficient time to continue work on the draft exploitation regulations. They recognized that while time may be of the essence, rushing forward without addressing procedural gaps will only lead to future delays, and may risk not only leaving some behind, but permanently losing biodiversity yet to be discovered.

Upcoming Meetings

52nd session of the Commission on the Limits of the Continental Shelf: The 52nd session of the Commission on the Limits of the Continental Shelf comprises the following meetings: sub-commissions, 27-31 January 2020; plenary, 3-7 February 2020; sub-commissions 10-28 February 2020; plenary, 2-6 March 2020; and sub-commissions, 9-13 March 2020. **dates:** 27 January to 13 March 2020 **location:** UN Headquarters, New York, US **www:** https://www.un.org/depts/los/reference_files/calendar_of_meetings.htm

ISA Legal and Technical Commission (LTC): The 26th session of the ISA Assembly and Council (Part I) will be followed by a meeting of the ISA LTC. The LTC will consider, *inter alia*, activities of contractors, applications for approvals for plans of work for exploration, and matters referred to the Commission by the Council. **dates:** 24 February - 6 March 2020 **location:** Kingston, Jamaica **www:** <https://www.isa.org.jm/sessions/26th-session-2020>

World Ocean Summit: The Economist Group’s World Ocean Initiative hosts an annual World Ocean Summit, bringing together policymakers, business and civil society leaders, investors,

scientists, and entrepreneurs. The 2020 Summit, on “The New Ocean Agenda,” will consider how to decouple economic growth from ocean degradation, with a focus on overfishing and plastic pollution. **dates:** 9-10 March 2020 **location:** Tokyo, Japan **www:** <https://www.woi.economist.com/world-ocean-summit/>

BBNJ IGC-4: The fourth session of the Intergovernmental Conference on an international legally binding instrument under the UN Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction will continue to address the elements of the 2011 package, based on revised negotiating text presented by IGC President Rena Lee (Singapore). **dates:** 23 March - 3 April 2020 **location:** UN Headquarters, New York **www:** <https://www.un.org/bbnj/>

10th Annual Deep Sea Mining Summit 2020: The Deep Sea Mining Summit 2020 will bring together a large array of solution providers, upcoming deep sea miners, members from the scientific community, and those within allied industries wanting to learn more about the opportunities within this emerging marketplace. **dates:** 13-14 May 2020 **location:** London, UK **www:** <https://www.deepsea-mining-summit.com/>

15th round of Informal Consultations of States Parties to the UN Fish Stocks Agreement (ICSP/15): This meeting will focus on the topic “Implementation of an ecosystem approach to fisheries management.” **dates:** 19-21 May 2020 **location:** UN Headquarters, New York **contact:** UN Division for Ocean Affairs and the Law of the Sea **www:** https://www.un.org/Depts/los/convention_agreements/fish_stocks_agreement_states_parties.htm

2020 UN Ocean Conference: Sustainable Development Goal (SDG) Goal 14 is to conserve and sustainably use the oceans, seas and marine resources for sustainable development. The Governments of Kenya and Portugal will co-host a UN Conference to Support the Implementation of SDG Goal 14 (Ocean Conference), focused on the theme “Scaling up ocean action based on science and innovation for the implementation of Goal 14: stocktaking, partnerships and solutions.” The Conference, which is one of the milestones of the UN Secretary-General’s Decade of Action for the SDGs, will advance science-based innovative solutions for global ocean action. **dates:** 2-6 June 2020 **location:** Lisbon, Portugal **www:** <https://www.un.org/en/conferences/ocean2020>

World Oceans Day: World Oceans Day is uniting conservation action to grow the global movement calling on world leaders to protect 30% of “our blue planet by 2030,” or “30x30.” **date:** 8 June 2020 **location:** global **www:** <https://worldoceansday.org/>

Workshop on the Regional Environmental Management Plan (REMP) for the Area of Northern Mid-Atlantic Ridge (MAR) with a Focus on PMS Reports: The ISA, in collaboration with partners, will convene this workshop, which aims to: (i) describe the geographical scope and environmental goals and objectives for the draft REMP; (ii) identify possible elements to be included in the draft REMP for the Area of northern MAR with a focus on polymetallic sulphide (PMS) deposits; (iii) identify potential management approaches and measures; and (vi) discuss the framework for implementation. The report of this workshop will be presented to the LTC for its consideration in developing the REMP for the Area of northern MAR. **dates:** 15-19 June 2020 **location:** St Petersburg, Russian Federation **www:** <https://www.isa.org.jm/workshop/workshop-regional-environmental-management-plan-area-northern-mid-atlantic-ridge-focus-pms>

30th Meeting of States Parties to the 1982 UNCLOS: The Meeting of the States Parties is convened in accordance with UNCLOS, which provides, that the Secretary-General “shall convene necessary meetings of States Parties in accordance with this Convention.” Among other things, the Meeting elects the members of the International Tribunal for the Law of the Sea and the members of the Commission on the Limits of the Continental Shelf. It also considers the report of the Tribunal and deals with its budgetary and administrative matters and receives information provided by the Secretary-General of the ISA and the Chairman of the Commission on the Limits of the Continental Shelf on the activities of these bodies. **dates:** 15-19 June 2020 **location:** UN Headquarters, New York, US **www:** https://www.un.org/depts/los/meeting_states_parties/meeting_states_parties.htm

21st meeting of the UN Open-ended Informal Consultative Process on Ocean and the Law of the Sea: The Consultative Process has the objective of facilitating the annual review by the UN General Assembly of developments in ocean affairs and the law of the sea by considering the report of the Secretary-General on oceans and the law of the sea and by suggesting particular issues to be considered by it, with an emphasis on identifying areas where coordination and cooperation at the intergovernmental and inter-agency levels should be enhanced. **dates:** 22-26 June 2020 **location:** UN Headquarters, New York, US **www:** https://www.un.org/Depts/los/consultative_process/consultative_process.htm

26th Session of the ISA Assembly and the ISA Council (Part II): The ISA Assembly and Council will continue discussions on, *inter alia*, the payment mechanism and the draft exploitation regulations. The Council and Assembly meetings will be preceded by a meeting of the LTC (6-17 July) and the Finance Committee (13-17 July). **dates:** 20-31 July 2020 **location:** Kingston, Jamaica **www:** <https://www.isa.org.jm/sessions/26th-session-2020>

For additional upcoming events, see <http://sdg.iisd.org/>

Glossary

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| Area | Seabed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction |
| BBNJ | Biodiversity of areas beyond national jurisdiction |
| DSCC | Deep Sea Conservation Coalition |
| EIA | Environmental impact assessment |
| EIS | Environmental impact statement |
| EMMP | Environmental management and monitoring plan |
| EMS | Environmental management system |
| GRULAC | Latin American and Caribbean Group |
| ISA | International Seabed Authority |
| LTC | Legal and Technical Commission |
| OEWG | Open-Ended Working Group |
| REMP | Regional environmental management plan |
| UNCLOS | UN Convention on the Law of the Sea |