



## Council

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### Twenty-fifth session

Council session, part I

Kingston, 25 February–1 March 2019

## Statement by the President of the Council on the work of the Council during the first part of the twenty-fifth session

### I. Opening of the session

1. The twenty-fifth session of the Council is being held in two parts.<sup>1</sup> For the first part, the Council held 10 meetings from 25 February to 1 March 2019, at the headquarters of the Authority in Kingston, immediately prior to the two-week session of the Legal and Technical Commission. The second part of the session will be held from 15 to 19 July 2019, after the meetings of the Commission and before the meetings of the Assembly.

### II. Adoption of the agenda

2. At its 245th meeting, on 25 February 2019, the Council adopted the agenda for its twenty-fifth session ([ISBA/25/C/1](#)).

### III. Election of the President and Vice-Presidents of the Council

3. At the same meeting, the Council elected Lumka Yengeni (South Africa) as President of the Council for the twenty-fifth session. Subsequently, following consultations among the regional groups, the Council elected the representatives of Tonga (Asia-Pacific States), Poland (Eastern European States), Argentina (Latin American and Caribbean States) and Germany (Western European and other States) as Vice-Presidents.

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<sup>1</sup> In 2017, acting on the recommendation of the Committee established by the Assembly to carry out a periodic review of the international regime of the Area pursuant to article 154 of the United Nations Convention on the Law of the Sea, the Assembly endorsed the revised schedule of meetings for 2018 and 2019 ([ISBA/23/A/13](#), sect. D, para. 1), owing to the increased workload of the Authority.



#### **IV. Report of the Secretary-General on the credentials of members of the Council**

4. At the 248th meeting, on 26 February 2019, the Deputy to the Secretary-General and Legal Counsel, on behalf of the Secretary-General, indicated that, as at that date, credentials had been received from 34 members of the Council.

#### **V. Election to fill a vacancy on the Legal and Technical Commission**

5. At its 245th meeting, the Council elected Michael Gikuhi (Kenya) to fill the vacancy on the Legal and Technical Commission left by the resignation of Dorca Auma Achapa (Kenya), for the remainder of her term until 31 December 2021 (see [ISBA/25/C/14](#)).

#### **VI. Report of the Secretary-General on the status of contracts for exploration and related matters**

6. At its 246th meeting, on the same day, the Council took note of the report of the Secretary-General on the status of contracts for exploration and related matters, including information on the periodic review of the implementation of approved plans of work for exploration ([ISBA/25/C/9](#)).

#### **VII. Reports of the Secretary-General on the implementation of the decision of the Council relating to the reports of the Chair of the Legal and Technical Commission, and on implementation of the Authority's strategy for the development of regional environmental management plans for the Area**

7. At the same meeting, the Council took note of two reports of the Secretary-General ([ISBA/25/C/12](#) and [ISBA/25/C/13](#)). The Council also took note that supplementary reports would be presented at the second part of its session, in July 2019.

#### **VIII. Draft regulations on the exploitation of mineral resources in the Area**

8. Since the previous session of the Council, in July 2018, the developments below had taken place in relation to the draft regulations on the exploitation of mineral resources in the Area ([ISBA/24/LTC/WP.1/REV.1](#)). In response to the request by the Council at its July meetings ([ISBA/24/C/8/Add.1](#)), the secretariat had received by 30 September 2018 some 42 submissions from members of the Authority and other stakeholders on the revised draft regulations. These had been posted on the Authority's website. In addition, the Secretariat had prepared an overview of the main thematic issues raised in the written submissions ([ISBA/25/C/2](#)) to supplement the comments the Council had made in July 2018 ([ISBA/24/C/8/Add.1](#), annex I).

9. From 25 to 27 February 2019, the Council had continued its consideration in an informal setting of the draft exploitation regulations, as contained in

[ISBA/24/LTC/WP.1/Rev.1](#), as a matter of priority. The Council had focused its consideration on the matters identified in the overview, with a view to providing further direction and guidance to the Commission as it continued its review of the draft regulations.

## **A. Developments regarding the financial and payment mechanism**

10. On 25 February 2019, the Chair of the open-ended working group of the Council in respect of the development and negotiation of the financial terms of a contract under article 13, paragraph 1, of annex III to the United Nations Convention on the Law of the Sea and section 8 of the annex to the Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982, Olav Myklebust (Norway) presented his report on the outcome of the first meeting of the working group, which had been convened on 21 and 22 February 2019 (see [ISBA/25/C/15](#)).

11. The Council expressed its appreciation of the work by Massachusetts Institute of Technology and of the progress made by the working group. The Council decided to convene a second meeting of the working group to make further progress on the payment mechanism. The Council also stressed the need for a broad participation of member States of the Authority in the second meeting and for that purpose agreed to the use of the voluntary trust fund to support the participation of members of the Council from developing States.

12. The Council requested the Secretariat to prepare two or three options regarding the payment mechanism on the basis of the discussions of the working group, including a proposed regulatory text for its consideration at its next meeting, preferably to be convened before the second part of the twenty-fifth session of the Council. In that regard, consideration should be given to the nature of the payment mechanism, to ensuring that the rate of payment maximized returns to the Authority, also to ensuring that mining was commercially viable, and to a trigger or triggers for a review of the payment mechanism. Clarification was also expected as to whether the same payment mechanism would apply to polymetallic nodules and also to polymetallic sulphides and cobalt-rich ferromanganese crusts.

13. On 25 February 2019, several comments were made regarding the development of the financial model, for which the starting point should be the principles set out in the Convention and the Agreement. It was requested that the Secretariat produce a list of all payments and fees, including insurance that a contractor would be obliged to pay, together with information on the purposes of each payment. The list would provide an overview of the fees and other payments that would be useful in considering royalty in the light of total costs to be borne by contractors. There were also discussions on the importance of factoring externalities into the model, including the provision of the costs of environmental monitoring.

## **B. Standards and guidelines and key concepts under the Authority's regulatory framework**

14. The Council expressed its appreciation for the note on the content and development of standards and guidelines for activities in the Area under the Authority's regulatory framework (see [ISBA/25/C/3](#)) and for the note on key terms: distinguishing the use of good industry practice and best practices under the draft exploitation regulations (see [ISBA/25/C/11](#)).

15. The Council welcomed the lists of standards and guidelines and their priority for development, as contained in the annex to document [ISBA/25/C/3](#), stressing that those lists were not exhaustive. The Commission was invited to pay heightened attention to identifying additional critical issues. Reference was also made to a possible third category of standards, i.e. environmental quality status. Moreover, guidelines for the preparation of training programmes and capacity-building might be efficiently developed from the recommendations for the guidance of contractors and sponsoring States relating to training programmes under plans of work for exploration ([ISBA/19/LTC/14](#)).

16. It was stated that standards and guidelines would bring the necessary flexibility to the regulations and respond to advances in industry, scientific understanding and technology. Guidelines needed to be consistent with the Convention and the Agreement and to contribute to achieving a high level of protection with respect to health and safety or the marine environment while not hindering the freedom of marine scientific research. The view was also expressed that they represented a minimum, i.e. a floor and not a ceiling, and they needed to be organized around clear objectives, targets and thresholds. Another view was expressed that the relevant standards and guidelines should be compatible with the current technical level and practical ability of deep seabed mining and should remain stable and avoid frequent changes in contents, so as not to increase arbitrarily the burden on contractors. In considering the relevant standards, an important distinction should be made between process and performance standards. Performance standards would be specific to the Authority and used to meet identified thresholds; they would derive from an appropriate assessment framework and would thus be mandatory. Their flexible character would encourage innovation and contribute to the development of best practices for activities in the Area. They would be supported by the delivery of process standards and guidelines.

17. Views were also expressed regarding the binding nature of standards and guidelines, and suggestions were made that binding guidelines and standards should form part of the annexes to the regulations. Inconsistency was noted in the use of terminology and in reference to guidelines in the regulations. The legal status of guidelines would be determined largely by their content and, in the regulations, references to guidelines, depending on their legal nature, should take account of this. For example, the view was expressed that compliance guidelines should be mandatory. If standards and guidelines had a binding nature, the point was made that they should be adopted by the Council on the recommendation of the Commission. If they were not binding, they should be issued by the Commission according to a procedure similar to the formulation of recommendations of a technical and administrative nature for the guidance of contractors engaged in exploration. The responsibility to issue guidelines on royalties should pertain to the Council.

18. Comments were made that standards and guidelines should be developed through a process that must be transparent and open to all stakeholders, including contractors, drawing where appropriate on respective national legislation on deep seabed mining. Such a process must be coordinated with the development of the regulations, taking into account the need to develop priority standards and guidelines that are needed for the application process and that need to be implemented upon the entry into force of the regulations, while standards or guidelines applicable to commercial production could be developed at a later stage. The development process must be clearly spelled out in the regulations. Words of caution were expressed to avoid duplication or fragmentation in the process of formulating standards and guidelines. Support was also expressed for the concept of establishing technical working groups to report their outcomes to the Commission for its review and recommendations to the Council. The Council also welcomed the workshop on

structuring further the process for the development of standards and guidelines, including a road map for that purpose, which would be hosted in Pretoria in May 2019.

19. A number of challenges existed in the setting of standards, in particular with regard to environmental performance standards and the establishment of benchmarks and overarching objectives, which needed to remain in the regulations.

20. Regarding the definitions, use and relationship of key terms, such as “good industry practice”, “best environmental practice” and “best available techniques”, comments were made on the dynamic nature of those concepts and on the need for the regulations to reflect their evolutionary character. As to the inclusion of best environmental practices into good industry practices, no strong preferences were articulated. If the two concepts were kept separate, best environmental practices needed to be properly reflected in the regulations. The operational and safety dimension of good industry practices also needed to be reflected in the regulations and guidelines.

### **C. Delegation of functions and regulatory efficiency**

21. The Council addressed the question of delegating and delegated authorities in the context of the day-to-day functioning of the secretariat and of emergent cases of implementation of the regulations in the light of document [ISBA/25/C/6](#) and its annex on possible delegation scenarios.

22. Several comments were made in relation to which matters could and should be delegated to facilitate effective decision-making, which matters should not be delegated, including the modification, suspension and termination of a contract as well as the issuance of compliance notices, and which should remain under the purview of the Council. The process for decision-making should be consistent with and considered under the whole framework of the Convention and the 1994 Agreement.

23. Comments were made that it was appropriate to have some elements of delegated authority, especially for decisions that were required in a timely manner, such as in case of emergency and to ensure continuity of action, given that the Council did not meet often, while ensuring transparency and accountability in decision-making. In that regard, it was mentioned that the delegation of functions should be grounded in legality, procedural fairness, accountability and rationality and that it was essential to avoid conflict of interest, or even perceived conflict of interest. It was felt that the annex to document [ISBA/25/C/6](#) was a useful compendium of possible delegations of functions and individual elements that should be looked at in more detail with the benefit of a matrix of responsibilities and duties of sponsoring States and the competent organs of the Authority. It was suggested that a policy document should be developed, with approval by the Council, to guide decision-making and function delegation and should be reviewed periodically, e.g. possibly after a five-year period. In that context, the measures taken by the Secretary-General should be temporary and subjected to a reporting process (either regularly or in real time) in order to keep the Council both informed and involved. Such reporting should cover the outcomes as well as potential challenges encountered in its implementation. The possibilities of remote/virtual meetings of the Council and of establishing a subcommittee of the Council for urgent matters were also raised.

## **D. Relationship between the draft exploitation regulations and regional environmental management plans**

24. The Council expressed its appreciation for the note on the relationship between the draft exploitation regulations and regional environmental management plans ([ISBA/25/C/4](#)). Comments were articulated on the status of such plans and on their compliance scope vis-à-vis environmental requirements to applicants and contractors in the regulations.

25. Comments were made as to whether the Council must impose a binding legal obligation on itself by way of the regulations, in order to develop regional environmental management plans. Noting that such plans were not legally binding instruments but policy measures, it was noted that the Council would remain empowered to set environmental policy, regardless of reference in the regulations to such plans. This approach would be consistent with the decision by the Council on the environmental management plan for the Clarion-Clipperton Fracture Zone, which had been made in the absence of any explicit provision for that purpose in the regulations on prospecting and exploration for polymetallic nodules in the Area.<sup>2</sup>

26. Nonetheless, the view was expressed that regional environmental management plans would make it possible for there to be broader environmental management of deep seabed mining and would increase certainty for contractors and the application of the precautionary approach. Transparency in collecting and sharing data was a paramount consideration. A view was also expressed that such plans acted as an important component in the application of adaptive management, whereby the best available scientific information could be used to update regional plans. Most of the views favoured removing the words “if any” from draft regulation 46 ter, (3) (b).

27. Comments were also made in relation to the assessment and revision, where necessary, of the environmental management and monitoring plans of contractors in the light of the objectives contained in the regional environmental management plans. In that regard, the regulations might need to reflect further on the requirements for contractors in relation to those plans.

28. There was the view that the existence of regional environmental management plans should be a precondition to mining. The view was also expressed that, given that such plans were a policy tool, they should not be an impediment to mining. A word of caution was also expressed that a situation should be avoided whereby the granting of contracts for exploitation could be prevented simply by blocking the further development and establishment of the respective plans. A suggestion was made that there should be standards and guidelines for the development of regional environmental management plans.

29. It was reiterated that regional environmental management plans should be established on the basis of robust scientific data, most of which was provided by contractors, and for all regions where contracts had been issued. While taking note of the road map and welcoming the efforts of the Authority to develop such plans (see [ISBA/25/C/13](#)), a practical approach was suggested to develop the plans where mining was expected to occur first.

30. Owing to the limited scientific knowledge available on most deep-sea habitats, there were views indicating that regional environmental management plans should be developed through a transparent and inclusive process, involving all relevant stakeholders, including coastal States neighbouring the spatial scope of proposed plans.

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<sup>2</sup> [ISBA/18/C/22](#).

## **E. Further implementation of the precautionary approach in the regulations**

31. The Council was presented with a note on further implementing the precautionary approach to activities in the Area ([ISBA/25/C/8](#)), the annex of which sets out a non-exhaustive list of potential procedural measures for implementation.

32. Several views were expressed that, at the present stage of regulatory development, the list was a good starting point and that, given that the focus should be on procedural measures that avoided paralysis in decision-making, a structured approach was of paramount importance.

33. It was mentioned that the precautionary approach should not be used to refrain from obtaining further scientific knowledge. The view was expressed that the implementation of the precautionary approach must be made consistently throughout the management cycle of the deep-sea mining regime, including in the determination of performance standards and the development of regional environmental management plans.

34. It was mentioned that a practical illustration of implementing the precautionary approach in the context of mining in the Area was the setting of performance standards and their associated thresholds, which must be reviewed regularly in the light of advancing scientific knowledge. In that regard, the observation was made that the difficulty was to strike a balance between a reasonable revision of standards and the legitimate expectation of stability for contractors and sponsoring States.

35. On the implementation of the precautionary approach, it was highlighted that what matters was the need for a level playing field with its consistent application.

36. In that regard, the imperative need was mentioned for the best scientific knowledge to be available to all stakeholders, as accessibility was often an issue for developing countries. The need was stressed for the early completion of the Authority's data management project and for capacity-building initiatives in order to ensure that all stakeholders could locate and assess the environmental data they needed, and that this would help to inform the reviews on the adequacy of the regulatory framework.

37. With respect to the cost-effectiveness of measures in the implementation of the precautionary approach, it was felt that there was a need for further discussion, in particular in ensuring that the implementation of measures met the requirement under the regulations on exploitation of mineral resources in the Area and achieved the objectives of article 145 of the Convention.

## **F. Mechanism and process for the independent review of environmental plans and performance assessments**

38. The Council expressed its appreciation for the note prepared by the Secretariat on consideration of a mechanism and process for the independent review of environmental plans and performance assessments under the regulations on exploitation of mineral resources in the Area ([ISBA/25/C/10](#)).

39. Comments were made in relation to the merit of an independent assessment of environmental plans and performance assessment, and relating to the set-up of a roster of external experts. The point was made that the Legal and Technical Commission already had the power to seek external views on the basis of articles 163 (13) and 165 (2) (e) of the Convention.

40. All views stressed that any independent assessment should comply with the Convention and the 1994 Agreement, and in particular should neither substitute nor undermine the role of the Commission in the decision-making process and discharge of its responsibilities.

41. The view was stated that it was essential for the Commission to determine what procedural safeguards were necessary in determining the review and how the review process would be incorporated into the Part XI legal regime. It was suggested that three issues might require further consideration. The first was whether the review should be a mandatory requirement under the regulations on exploitation or be triggered by members and observers of the Authority. The second was that consideration should be given not only to the most appropriate, transparent and efficient manner for the review to take place, but also to the likely costs to incur. The third was how the external assessment would affect advisory function and decision-making power of the Commission in processing applications in the Area. It was widely indicated that the scope and purpose of the review and the process must be clear.

42. There was a general support for setting up a roster of external experts, including reference to the Joint Group of Experts on the Scientific Aspects of Marine Environmental Protection and other bodies, but the opinion was expressed that the modalities required further consideration, including the parameters and objectives of the review. It was suggested that the list in annex VIII to the Convention should be followed, that the Authority could in addition develop a roster, including experts on deep seabed mining, nominated by member States, and that the Commission should exercise its discretion in selecting experts, including beyond the list, where necessary.

43. Concerns were also raised over formalizing the review process, as the Convention already provided for the Commission to seek for external advice when necessary. The selection process should allow for transparency, equal opportunities and equitable geographical distribution, including from Pacific small island developing States. The approach of engaging expert bodies should also allow for cost-effectiveness as well as the duty not to duplicate the functions of the Commission by creating a parallel structure. The selection process, possibly contained in an annex to the regulations, including guidance on the specific areas for expertise, should provide added value. The questions of timing and frequency of reviews also arose.

## **G. Implementing an inspection mechanism in the regulations**

44. Discussions were held on the implementation of an accountable, robust, independent and transparent inspection mechanism for activities in the Area in line with the Part XI regime, on the basis of a note prepared by the secretariat ([ISBA/25/C/5](#)). Comments were made in relation to the purpose of an inspection mechanism and schedule; criteria for triggering an inspection; a process for selecting inspectors; the scope of inspection, including to subcontractors; the decision-making process, including in case of emergency; as well as other key elements, such as the economic efficiency and independent functioning, to secure a level playing field for all contractors. The establishment of benchmarks of good practices for the implementation of inspection programmes was also suggested. Comments also were made regarding the appropriateness of using inspectors when needed, chosen from a roster, rather than setting up a permanent team of inspectors.

45. The views expressed broadly supported remote inspection, and it was suggested that the possibilities be further explored of remote real-time monitoring technology, their evolutionary nature and the administrative and operative costs it entails, as a priority.

46. A risk-based approach in implementing the inspectorate mechanism would be helpful to provide guidance on the scope of activities for inspection, particularly in the light of the potential costs involved. Emphasis was also placed on the importance of securing a cost-effective flow of information and full access to raw data for the Authority and sponsoring States for evaluation.

47. Reference was made to the *modus operandi* of the system of inspection under the Convention on the Conservation of Antarctic Marine Living Resources and to the necessary independence of an inspection mechanism for the exploitation of mineral resources in the Area. Reference was also made to the inspection systems of the Organization for the Prohibition of Chemical Weapons and of the International Atomic Energy Agency. It was suggested that experience could also be drawn from national inspectorate systems.

48. Comments were made regarding the interaction with sponsoring States' inspection mechanisms, the consent of flag States for the inspection of vessels, the certification entities, the role of States in reporting, cooperation among sponsoring States and interference with the regulations of the International Maritime Organization.

49. The point was made that an inspection manual and code of conduct for inspectors could be developed in due course, covering, *inter alia*, inspector safety and security.

## **IX. Cooperation with international organizations**

50. At its 247th meeting, on 27 February 2019, the Council was informed of the signing of the memorandum of understanding between the Asian-African Legal Consultative Organization and the International Seabed Authority during the annual session of the Organization in Tokyo, from 8 to 12 October 2018. The delegations of Algeria, on behalf of the African States Group, and of China, India and Japan expressed their appreciation and stressed the prospects for training and capacity-building projects under the framework of the memorandum of understanding.

## **X. Report on matters related to the Enterprise**

51. At its 248th, 249th and 250th meetings, on 28 February and 1 March 2019, the Council considered matters related to the Enterprise on the basis of the report of the Special Representative for the Enterprise, contained in the annex to document [ISBA/25/C/7](#). Following informal consultations in meetings on 28 February 2019 and on 1 March 2019, the Council was able to adopt a decision on this matter. The decision of the Council on the Special Representative for the Enterprise is contained in document [ISBA/25/C/16](#).

## **XI. Other matters**

52. At its 250th meeting, on 1 March 2019, the potential harassment of trainees on board research vessel was raised with concern by the delegation of the United Kingdom of Great Britain and Northern Ireland. It was recalled that the question was being considered by the Training Committee of the Commission. Recalling the importance of capacity-building in the remit of the Authority, the Training Committee was encouraged to request that contractors provide it with their policies relating to any form of harassment on their research vessels or on vessels chartered by them for

activities in the Area. The Secretary-General was requested to ensure that such information be made available to the Training Committee.

53. At the same meeting, the delegation of Chile stated that the development of regulations on exploitation must occur at a pace that enables the incorporation of important aspects, such as the highest applicable environmental standards and transparent and independent science-based decision-making. In addition, the delegation indicated that the draft regulations should be developed taking into account the other ocean governance processes.

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