

ISA-24 Part 2 Highlights: Wednesday, 18 July 2018

On Wednesday, 18 July, the Council of the International Seabed Authority (ISA) continued discussing the draft exploitation regulations, part by part, as well as focusing on overarching matters requiring the Council's direction that were identified by the Legal and Technical Commission (LTC). Discussions focused on:

- the overall balance of contractors' rights and obligations;
- the balance between certainty and flexibility;
- the balance of authority among ISA organs;
- protection of the marine environment; and
- confidentiality of information.

Draft Exploitation Regulations

Expressing concern about the remaining time available for Council debate at this session, President Myklebust proposed suspending the discussion of the draft regulations part by part, to concentrate on key matters requiring Council's strategic direction that were identified by the LTC (ISBA/24/C/20). Following discussions, delegates agreed to discuss the matters identified by the LTC first, and return to the part-by-part discussion, if time allowed. Delegates also agreed to a deadline of 30 September for submitting further written comments on the revised draft regulations.

The CONVENTION ON BIOLOGICAL DIVERSITY reported on a global process describing ecologically and biologically significant areas, and expressed willingness to cooperate with the ISA Secretariat on best scientific information. SENEGAL highlighted the efforts of the Fish Reef Project.

Contractors' Rights and Obligations: TONGA highlighted: security of tenure and due regard to other marine uses; balance of obligations of sponsoring states and contractors; and the need for the Council and sponsoring states to consent to the transfer of rights among contractors. The DEEP SEA CONSERVATION COALITION (DSCC) noted the proposed length of 30 years for contracts and underscored the need to: amend contracts in response to new science, information, technology or best practice; and consider impact areas larger than the contract or project area. The SARGASSO SEA COMMISSION recommended clarifying the applicability of international safety, labor and health rules and standards. The RUSSIAN FEDERATION cautioned against excessive financial burdens on contractors developing the plans of work. ITALY requested that contractors "minimize," rather than "reduce," risks of incidents. The AFRICAN GROUP recommended clarifying the division of responsibility between the ISA and contractors regarding, *inter alia*, information sharing and monitoring.

AUSTRALIA recommended clarifying contractors' obligations to protect submarine cables, with the INTERNATIONAL CABLE PROTECTION COMMITTEE, supported by FRANCE, requesting duly diligent coordination between contractors and submarine cable operators at the earliest stage of the process. JAPAN suggested listing all fees required from contractors and cautioned against leaving the decisions on terminating contracts solely to the Secretary-General's discretion.

The AFRICAN GROUP, ARGENTINA and NAURU called for defining the term "effective control" by sponsoring states. The AFRICAN GROUP asked for more detailed LTC reports to the Council prior to approving plans of work. JAMAICA noted the need for a swift system for reviewing decisions. AUSTRALIA and NEW ZEALAND recommended clarifying the transition from exploration to exploitation.

Balance between Certainty and Flexibility: The AFRICAN GROUP cautioned against inconsistent procedural rules on the termination of contracts, considering it premature to assess the overall balance before discussing the Enterprise. AUSTRALIA suggested providing specific timeframes for various stages of the contract, rather than referring to "promptly" and "as soon as possible." On contract suspension, CHINA suggested that contractors' payments to the ISA be reduced during this time. CHILE noted that the Secretary-General should be able to determine, on application, whether there can be a change of control of any contractor.

JAMAICA and AUSTRALIA stressed that the balance is dependent on standards and guidelines yet to be drafted by the LTC. SINGAPORE supported standards and guidelines, coupled with the best available science, to ensure the ISA's work is "capable of keeping up with the times."

NEW ZEALAND called for enhancing the ISA's capacity and authority in the review and compliance mechanisms. NAURU suggested including in the comparative study of national legislation any overlap with the draft regulations. NAURU supported the development of a matrix of duties and responsibilities for various actors and a stable and predictable financial framework. He further called for: greater certainty for contractors vis-à-vis possible future changes to the regulations; and clarity on the legal status of standards and guidelines, and on the power to initiate their review. In response to his suggestion to include a reference to a stability clause, JAMAICA pointed out that it is no longer acceptable practice, noting that emerging national regulations do not undermine contractual security.

Transparency: The AFRICAN GROUP called for transparency not only on environmental protection, but also other ISA functions and areas of public interest. The DSCC urged publishing and reviewing all contractors' environmental plans.

Protection of the Marine Environment: The AFRICAN GROUP supported reference to the “precautionary principle”; supported Belgium’s non-paper on strengthening the environmental expertise and capacity of the ISA; and favored establishing a contact group between the ISA and the process on marine biodiversity of areas beyond national jurisdiction (BBNJ). JAMAICA called for greater clarity on the LTC’s grounds for performance assessment of the environmental management and monitoring plan to ensure compliance. The UK proposed to add reference to the ecosystem approach.

CHILE, supported by NEW ZEALAND, urged for a clear definition of “effective protection” of the marine environment. NEW ZEALAND welcomed broad agreement on the need for more work on the environmental aspects of the draft regulations, emphasizing, *inter alia*, the importance of: an environmental performance guarantee; strengthened environmental expertise of the LTC; and integration of environmental protection in the criteria for accepting a plan of work. GERMANY stressed that the draft regulations do not effectively cover environmental protection, with environmental impact assessments (EIAs), closure plans, and regional environmental management plans (REMPs) needing significant improvement. AUSTRALIA suggested preventing contractors from “sponsor shopping,” strengthening the ISA’s liability and enforcement mechanisms, including through monetary penalties and the ability to immediately terminate an activity that fails to comply with environmental regulations. BANGLADESH suggested reference in the regulations to Articles 209 and 215 of the UN Convention on the Law of the Sea relating to the pollution from activities in the Area.

CHINA questioned the use of the term “reasonable grounds” as a criterion for the LTC to assess the performance of environmental management and monitoring plans. The UK suggested that environmental management and monitoring plans should be in accordance with “best available scientific evidence.” GERMANY stressed the need for: assessment criteria, including thresholds for determining harmful effects; and specific objectives that contractors should achieve, like spatial and mitigation measures. JAPAN suggested developing guidelines on mining discharges, taking into account stakeholders’ views. The DSCC suggested creating an environmental committee to ensure monitoring and implementation of REMPs and EIAs, emphasizing scientific reviews and public participation. The DEEP OCEAN STEWARDSHIP INITIATIVE (DOSI) recommended expanding scientific knowledge to adequately assess the performance of environmental management and monitoring plans, calling for the development of indicators. CANADA cautioned against excessive administrative burdens on contractors and the ISA. JAMAICA stressed the need to clarify the responsibilities of the ISA and contractors to protect the marine environment; and requested the LTC give guidance on incentives for contractors’ environmental performance. INDIA considered terms like “best environmental practice” and “best industry practice” vague.

Regional environmental management plans: NAURU called for clarifying the process, requirements and timelines for developing REMPs; and further work on transboundary impacts. GERMANY suggested that REMPs be made a prerequisite for the granting of an exploitation contract, and the ISA specify a process to develop them. The PEW CHARITABLE TRUSTS underscored broad support for REMPs, suggesting that they should include no-mining zones covering 50% of the Area to preserve ecosystem integrity in light of scientific uncertainty of the impacts of the deep-seabed mining.

Environmental impact assessments: INDIA stated that EIAs should not be an impediment to mining tests, potentially preventing exploitation. TONGA proposed: enhancing the balance of rights and obligations by making EIAs part of the contracts; and including in EIA guidelines the assessment of impacts on fishing communities,

pointing, with FIJI, to the social and environmental implications of the exploitation regulations for small island developing states and urgency in completing them.

Environmental liability trust fund: AUSTRALIA, supported by the DSCC, welcomed an environmental liability trust fund, indicating that it should have the purpose of addressing the liability gap. CHINA, followed by JAPAN and INDIA, questioned including education and training programs on the protection of the marine environment in the purpose of the fund.

Enterprise: CHINA, supported by BRAZIL and SENEGAL, called for more fully-developed language on the Enterprise, and emphasized cost-effectiveness, evolutionary approach and sound business principles. BRAZIL requested incorporating the African Group’s and Poland’s submissions into the LTC’s further work on the draft regulations.

Confidentiality: The UK prioritized clarifying conditions for confidentiality, favoring, with NEW ZEALAND and AUSTRALIA, that all information should be public unless stated otherwise. GERMANY stressed that environmental data should not be confidential, provided that contractors’ rights are respected. FRANCE stated that the rule should be non-confidentiality, notably regarding environmental data. TONGA favored developing a list of confidential information.

Review and Modification of a Plan of Work: The UK, supported by AUSTRALIA, raised concerns about the frequency of reviews and noted the need to take environmental concerns into account. INDIA noted the importance of the five-year period review for transparency. The DSCC called for independent assessment, publication and stakeholder comment in the reviews of plans of work.

Closure Plans: INDIA requested consideration of sound scientific basis and principles before cessation and suspension of production, suggesting land-based mining practices as a potential model. AUSTRALIA, supported by POLAND and the DSCC, suggested further determining the consequences of the environmental reviews in case of modifications of the plan of work.

Financial Terms: POLAND suggested an alternative method for calculating a royalty-based payment system that involves measuring the energy consumption of operating vessels, noting this may provide a solution to the technical challenges of several other measurement options. The UK, supported by CANADA, recommended providing a clear definition of “internationally accepted accounting principles”; and clarifying “special circumstances” justifying payment by installment.

In the Corridors

On Nelson Mandela International Day, a delegation quoted “It always seems impossible until it’s done” to reiterate the urgency of completing the draft regulations. Others, however, raised the issue that the draft regulations cannot be completed until the accompanying standards and guidelines are also developed. Despite concerns about excessively detailed, part-by-part discussions on the draft regulations, participants witnessed swift progress on overarching issues identified by the LTC, making time for further meticulous suggestions on specific parts of the regulations. As several delegations noted “broad agreement” on the need for further work on environmental issues, including regional environmental management plans and the content of environmental impact assessments, civil society recalled that Mandela also said “We must never forget that it is our duty to protect this environment.” Many started wondering about the next steps to tackle outstanding work on the draft regulations, particularly when they were reminded that the LTC will not meet again before the next meeting of the Council. Here again, according to a participant, Mandela’s words resound: “We must use time wisely and forever realize that the time is always ripe to do right.”