

ISA-25 Part 1 Highlights: Tuesday, 26 February 2019

On Tuesday, the Council of the International Seabed Authority (ISA) continued its deliberations on components of the draft regulations for exploitation of mineral resources in the Area, focusing on: regulatory efficiency; regional environmental management plans (REMPs); and implementation of the precautionary approach.

Draft Exploitation Regulations

Delegation of functions by the Council and regulatory efficiency: On Tuesday morning, the Secretariat introduced the document ISBA/25/C/6 on delegation of functions by the Council and regulatory efficiency, including an annex outlining the types of decisions for delegation.

Algeria, on behalf of the AFRICAN GROUP, noted that aspects of some of its previous submissions on the topic had yet to be addressed, describing as a “new element in the debate” the non-paper submitted by Belgium on strengthening ISA’s environmental capacity. JAMAICA acknowledged progress on building capacities within the Secretariat with recent staff additions; and highlighted the need for mechanisms to increase Council’s involvement.

In cases of emergency, GERMANY, supported by SINGAPORE, suggested allowing for remote meetings or establishing a sub-Council to bridge gaps between meetings, pointing towards relevant experience in other bodies, such as the International Maritime Organization. AUSTRALIA, supported by the FEDERATED STATES OF MICRONESIA (FSM), emphasized the importance of transparency and accountability in decision making, stressing the need for an effective division of power among the Authority’s institutions.

CHILE, the FSM, FIJI, and others called for consistency between the ISA and other international legal instruments. CHILE noted the need for further clarification on fundamental aspects, such as protection, preservation, commercial purposes, and environmental restoration. FRANCE called for greater clarity on the review mechanism to the mining workplan, where the resources are not being mined optimally, questioning whether this would entail a simple adjustment or a modification in the contracts.

JAPAN stressed that the Council and the Legal and Technical Commission (LTC) should be more involved in inspections and in cases of contractors’ non-compliance. TONGA suggested additional partnerships between the Secretary-General and the Council.

The NETHERLANDS questioned to what extent some functions may be delegated to the Secretary-General and drew attention to the importance of adopting effective and transparent regulations based on due process, good governance, and accountability. ITALY underlined that the responsibilities of the Secretary-General should be properly empowered, especially when there are clear risks for the marine environment. ITALY, SINGAPORE, and others stressed that the termination of contracts should remain in the exclusive power of the Council. SINGAPORE emphasized that UNCLOS

Article 162 clearly states that the Council is the executive organ of the Authority, noting that certain decisions could be delegated to increase efficiency.

INDIA called for careful consideration regarding the types of emergencies for which decision making would be delegated. NORWAY said decisions on “non-material matters” could be delegated, such as compliance notices. NAURU supported delegation of some decision-making authority, saying the LTC should develop proposals to authorize review and interventions to protect the environment or for operational safety under critical situations.

NORWAY, the UK, and AUSTRALIA supported development of a policy document for material decisions and, with the UK, for reporting on regulatory decisions, as soon as possible, to ensure accountability and transparency.

CHINA recommended that any delegation of power should be based on absolute necessity, especially when involving policies and regulations on exploitation, environmental protection, standards, and conditions related to compliance. The FSM stressed that “clarity will lead to efficiency,” supporting a matrix to clarify decision-making roles and responsibilities. He further underscored that “efficiency should not be a panacea,” noting that relevant activities, including stakeholder consultations, may take a considerable amount of time. FIJI stated that the burden of loose guidelines and standards should not be transferred to vulnerable Small Island Developing States (SIDS).

The HOLY SEE highlighted “inherent conflicts” in the objectives of the deep seabed mining regime and within the decision-making structure of the Secretariat, pointing to the example of the Deepwater Horizon oil spill, where separate agencies were created to avoid conflicts.

The PEW CHARITABLE TRUSTS called for a more careful division of power between the Secretariat and its subsidiary organs, emphasizing, with CHINA, that environmental protection necessarily implies a capacity to quickly intervene. The DEEP SEA CONSERVATION COALITION (DSCC) welcomed current accountability efforts and called for further specifying regulators’ responsibilities.

Secretary-General Lodge clarified that the Authority consists of its bodies and subsidiary organs, including, in particular, the Council, the Assembly, the LTC, and the Secretariat. Acknowledging an “evolutionary approach,” he suggested conceptualizing the role of the Secretariat and other bodies in the next 10-15 years, given the growing amount of work and responsibilities.

Relationship between the draft exploitation regulations and regional environmental management plans: The Secretariat introduced document ISBA/25/C/4, which addresses the relationship between the draft exploitation regulations and (REMPs).

Many delegates emphasized the importance of REMPs as an integral part of the regulations. FRANCE, with ITALY and the NETHERLANDS, said the Council has a role to set out REMPs under the Convention as a policy instrument for the environment, and supported including an obligation to assess management plans.

The AFRICAN GROUP queried whether a previous Council decision, not to allow mining in areas of particular environmental interest in the Clarion-Clipperton Zone, is legally binding. He supported the development of multiple REMPs, still underscoring the necessity of an overarching framework, as part of a standardized process. He further noted, supported by the NETHERLANDS, NORWAY, GERMANY, AUSTRALIA, and others, that REMPs must be in place before mining can take place.

SINGAPORE noted the usefulness of REMPs, despite not being legally binding *per se*. The AFRICAN GROUP stressed that individual parts of REMPs could have binding requirements. CHINA noted with concern that key issues, such as REMPs' legal standing, are not well defined. GERMANY, with BELGIUM, requested more information about the *ad hoc* advisory committee on the development of the programme of work for REMPs, and questioned whether developing a REMP is a pre-requisite for exploitation licenses. JAPAN said, if REMPs become legally binding, they should be negotiated as such, and that plans of work should not be submitted until all REMPs are in place.

ITALY called REMP development a "work in progress" for the Clarion-Clipperton Zone, noting limitations due to the lack of baseline data, and called for REMPs in areas where mining is likely to occur soon. The NETHERLANDS emphasized inclusion of information to assist decision making by sponsoring states. SPAIN supported enhancing the environmental capacity of the Secretariat and called for the consideration of independent mechanisms to verify the environmental effects of mining. The FSM called for the participation of traditional communities and indigenous peoples in the development of REMPs. TONGA emphasized engagement or consultation with coastal and adjacent states.

The UK, supported by NORWAY, said early and continuous engagement with contractors fosters compliance, even in the absence of legal obligations. The UK and others also supported continuing workshops on REMPs, underscoring the need to ensure inclusiveness and transparency.

BRAZIL, INDIA, and the NETHERLANDS stressed that development of REMPs is an ongoing process that may be improved with new data and information. BRAZIL further suggested taking into account lessons learned from the development of the Clarion-Clipperton Zone REMP. CANADA highlighted relevant national experience with strategic environmental assessments. MEXICO emphasized the importance of using best available evidence and the precautionary principle when developing REMPs.

JAMAICA emphasized that, if a binding rule to develop REMPs prior to any exploitation activity is agreed upon, sufficient funds should be made available to timely develop REMPs for all regions and mineral resources, to maintain a level playing field.

The PEW CHARITABLE TRUSTS noted that it is unlikely the REMP process will be completed before 2020. The DSCC highlighted that REMPs should be binding, querying whether additional exploration contracts should be awarded in areas where REMPs have not been adopted, and called for a broad evaluation of the species in a region to inform REMPs' development. IUCN suggested that REMPs should be based on global goals, mainstream biodiversity considerations, and include potentially affected states as co-partners. The Deep Ocean Stewardship Initiative (DOSI) said REMPs are an important component for adaptive management, where the best available information can be used to update regional plans.

Implementing the precautionary approach to activities in the Area: The Secretariat introduced the document ISBA/25/C/8, including an annex on existing and potential procedural measures to strengthen implementation of the precautionary approach.

Delegates debated terminology and whether to use precautionary "approach" or "principle." The terms were used interchangeably during the discussion. Many delegates stressed the need for the

precautionary approach to be applied throughout the work of the Authority. Acknowledging the annex as a useful summary, the AFRICAN GROUP suggested developing a similar table for the "protective", and "institutional" aspects, which could include items such as a competitive bid process for exploitation; only granting a small and time-limited pilot exploitation license; prioritizing large Areas of Particular Environmental Interest; and withholding exploitation contracts unless and until sufficient marine scientific research has occurred.

TONGA called for further discussion on references to cost effectiveness to ensure that measures are implemented according to UNCLOS Article 145 (protection of the marine environment). JAMAICA noted that the precautionary principle is customary international law and generates contractual obligations.

BELGIUM underscored the need for a legal framework to operationalize the precautionary approach. GERMANY said no principle should be interpreted or implemented in isolation, and stressed the need for a structured approach and consistent implementation throughout the entire production cycle. Calling for non-duplication of work, NORWAY emphasized tackling uncertainty and an inclusive approach when developing standards and guidelines.

AUSTRALIA highlighted the links between the precautionary approach and many topics already discussed such as: transparency; flexibility; adaptive management; and clear and robust regulations. INDIA called for a level playing field between contractors and states and noted that no preferential treatment should be given to any stakeholder during the operationalization of the exploitation phase. BRAZIL supported by ARGENTINA, defended use of the term "precautionary approach" rather than "precautionary principle," as used in the 1992 Rio Declaration.

The HOLY SEE recalled the need for coherence between ISA's language and the process on biodiversity beyond national jurisdiction (BBNJ), emphasizing sponsoring states' obligations towards environmental protection when issuing future contracts.

The DSCC underlined that the precautionary approach is far more than a procedural tool, noting there are also substantive and institutional steps for its implementation. IUCN highlighted relevant criteria used under the Convention on the Regulation of Antarctic Mineral Resource Activities, observing they provide a useful model. FIJI emphasized that risk management activities are underpinned by best scientific knowledge, noting that this knowledge must be readily available for all stakeholders, including SIDS. DOSI, supported by the PEW CHARITABLE TRUSTS, underscored the need to address ISA's institutional capacity to implement the precautionary approach, and stressed that interpretation by the International Tribunal for the Law of the Sea (ITLOS) of the precautionary approach, as part of the due diligence obligation, could be an acceptable standard for ISA.

In the Breezeways

The second day of the 25th session of the ISA began with Council President Lumka Yengeni stating how impressed she was with the progress already made and the Secretariat underlining its interest in seeing how the Council will address tricky issues, such as the distinction between binding and non-binding standards.

While examining the balance in administrative decision making and delegation of authority from the Council to the Secretary-General, some delegates spiced up the morning discussions declaring that the ISA "is like no other international organization, it is here to run an industry – the deep seabed mining industry." Many then called for transparency and a balance of power among ISA's governing bodies and member states. The afternoon evolved with semantic debates on the differences between the precautionary "principle" and precautionary "approach." Without the pressure to achieve a final decision, one delegate observed that this agenda item "can be difficult if we want it to be difficult."