

## **BRIEFING NOTE ON MONOPOLIZATION**

### **SUBMITTED BY TRINIDAD AND TOBAGO AS FRIEND OF THE PRESIDENT**

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#### **1) Introduction**

During the twenty-ninth and thirtieth session, members of the Council suggested that the draft Regulations do not satisfactorily cover the issue of Monopolization. This issue has therefore been identified by the Secretariat in its list (document ISBA/31/C/CRP.4).

The purpose of the present briefing note is to inform the discussion of the Council on the issue of Monopolization. Accordingly, following a brief analysis of the applicable provisions of the Convention and of the relevant regulations of the Further Revised Consolidated Text of the draft Exploitation Regulations, guiding questions are presented for consideration of delegations.

#### **2) Monopolization in the Convention**

The prevention of monopolization is one of the core objectives of Part XI of the Convention. Art. 150 UNCLOS provides that “*activities in the Area shall [...] be carried out [...] with a view to ensuring: [...] the enhancement of opportunities for all States Parties, irrespective of their social and economic systems or geographical location, to participate in the development of the resources of the Area and the prevention of monopolization of activities in the Area*”.

Prior to the adoption of the 1994 Agreement, the assessment of “*whether monopolization of activities in the Area has been prevented*” was also entrusted to the Review Conference to be convened under Art. 155 UNCLOS.

The Convention further contains substantive provisions on the prevention of monopolization in Art. 6, paragraphs 3(c) and 4 of Annex III. Paragraph 3(c) provides that the proposed plan of work shall be approved unless it has been submitted or sponsored by a

State Party which already holds: (i) plans of work for exploration and exploitation of polymetallic nodules in non-reserved areas that, together with either part of the area covered by the application for a plan of work, exceed in size 30 per cent of a circular area of 400,000 square kilometres surrounding the centre of either part of the area covered by the proposed plan of work; or (ii) plans of work for the exploration and exploitation of polymetallic nodules in non-reserved areas which, taken together, constitute 2 per cent of the total seabed area which is not reserved or disapproved for exploitation pursuant to article 162, paragraph (2)(x).

Paragraph 4 of the same Article further specifies that *“for the purpose of the standard set forth in paragraph 3(c), a plan of work submitted by a partnership or consortium shall be counted on a pro rata basis among the sponsoring States Parties involved in accordance with article 4, paragraph 3”* of Annex III.

Moreover, the same paragraph provides for a derogation from paragraph 3(c) by clarifying that *“the Authority may approve plans of work covered by paragraph 3(c) if it determines that such approval would not permit a State Party or entities sponsored by it to monopolize the conduct of activities in the Area or to preclude other States Parties from activities in the Area”*.

The last sentence of paragraph 4 seems to suggest that, even if one of the two situations envisaged in paragraph 3(c) occur, the Council may still consider that such situation does not amount to a case of monopolization. In other words, even if the two situations provided for in paragraph 3(c) may provide a basis for defining it, they do not constitute *per se* instances of monopolization.

Moreover, the overall wording of paragraph 4 appears to suggest that, in principle, two distinct actors could monopolize activities in the Area: on the one hand, a State Party – also in its capacity as Sponsoring State – and on the other hand its sponsored entities.

### **3) Monopolization in the relevant provisions of the Further Revised Consolidated Text**

The Further Revised Consolidated Text contains a definition of *“Monopolize”* in the Schedule, as *“the ability to control over 75 per cent of the estimated annual volume of similar*

*Mineral-bearing ore exploited, produced or removed from the Area after Commercial Production has occurred in respect of at least 2 Exploitation Contracts”.*

This definition appeared for the first time in the further revised draft text on Part VII, Appendix IV and draft Standard and Guidelines prepared by the Chair of the OEWG for the second part of the twenty-eight session ([ISBA/28/C/OEWG/CRP.4](#)). As explained in the comment box to the Schedule, the definition of “*Monopolize*”, together with other definitions, was proposed during the meetings of March 2023. As the explanation contained in the comment box to the Schedule clarifies, definitions therein included were not to meant definitive, as further discussion was expected to take place. However, since then the definition of “*Monopolize*” has not been subject to substantive discussion.

While it is suggested that the definition of “*Monopolize*” is the key element of this outstanding issue, a further matter for consideration of delegations might be the way in which such monopolization can be prevented within the Regulations.

In line with the comment box under draft regulation 13 of the Further Revised Consolidated Text, it is suggested that prevention of monopolization might be achieved at the stage of the evaluation of an application for a plan of work. Some delegations seemed to support this approach during the first part of the thirtieth session.

An additional element for consideration of the Council is the potential overlap with the outstanding issue of Effective Control. As mentioned in the previous section, the Convention requires prevention of monopolization from both Sponsoring States and sponsored entities. Two situations might therefore arise where monopolization occurs as a result of specific changes in the structure of a sponsored entity, namely in case of a change of control (addressed in draft regulation 23) and change of nationality (covered by new draft regulation 24bis).

### **Approach guiding submissions by delegations**

Based on the analysis carried out in the previous paragraphs, delegations are invited to submit specific language to address the issue of monopolization in the draft Regulations on

Exploitation. While all suggestions are welcome, proposals addressing the following points are especially encouraged:

- 1) The definition of “*Monopolize*” (or, as relevant, of “*Monopolization*”). Delegations are also welcome to indicate if they consider that the basis for this definition should be the language of paragraph 3(c) of the Convention, or another provision of UNCLOS, or if reference could be made to other relevant international legal instruments.
- 2) The manner in which monopolization should be prevented. Delegations are in particular encouraged to specify if – in line with the previous section of the present briefing note – they consider that this should be done by including the appropriate requirements in draft regulation 13. It is suggested that, if the relevant requirements are included in the definition of “*Monopolize*” (or “*Monopolization*”) itself, or in Standards and Guidelines, a new paragraph 2(g) might simply be added to draft regulation 13, providing that the Commission shall determine whether “*the approval of the Plan of Work would not allow the Applicant to Monopolize activities in the Area[, in accordance with the applicable Standards and taking into account Guidelines]*”. The provision would then be implemented through current paragraph 3(a) of draft regulation 15. Delegations are invited to express their views on this proposal.
- 3) The manner in which monopolization resulting from changes of control and changes of nationality of applicants should be prevented. Delegations are in particular invited to submit language for draft regulations 23 and 24bis.