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REPORT OF THE ISA COUNCIL MEETINGS

25th Session, First Part
25 February - 1 March 2019
Kingston, Jamaica

Klaas Willaert

MONDAY 25 FEBRUARY 2019

• Opening of the session and administrative formalities

The morning meeting started with welcome speeches by the outgoing Norwegian Council president Olav Myklebust, who took the opportunity to say goodbye and thank the delegates for their cooperation during the 24th Session, and Secretary-General Michael Lodge, providing an overview of the current situation and challenges and dubbing the envisioned exploitation regulations as the most innovative legal regime ever designed by humankind for the equitable and sustainable use of natural resources. These speeches were followed by a brief review and the subsequent adoption of the agenda. Lumka Yengeni of South Africa, nominated by the African Group, was elected as the President for the 25th Session of the Council. Her inaugural speech paid attention to the protection of the marine environment and she then outlined the indicative programme of work. The election of the Vice-Presidents was partly deferred to the afternoon meeting, but resulted in the appointment of Argentina (Latin American and Caribbean Group), Poland (Eastern European Group), Germany (Western European and Others Group) and Tonga (Asia-Pacific Group). Finally, a vacancy on the Legal and Technical Commission, due to the resignation of Kenyan representative Dorca Auma Achapa, was filled by her fellow countryman Michael Gikui¹.

• Discussions on the financial model of the Draft Exploitation Regulations

After completing the aforementioned formalities, the delegates started discussing the financial terms of exploitation contracts². Consultations were held on the basis of the report of an open-ended informal working group of the Council, which specifically discussed this issue before the start of the Council's 25th Session and took into account the comparative study of the Massachusetts Institute of Technology (MIT) and the various models that were suggested³. Some key variables were identified and it was stressed that balanced and careful assumptions are needed. The chairman of the open-ended informal working group pointed out that their discussions only covered the payment of royalties by contractors, therefore not treating the issue of distribution of these royalties between member states, and provided a brief summary of the work that was conducted: discussions about different modalities of the financial model were held, including consultations regarding the choice between a flat rate or a two-tiered system and the consideration of a five year review period, while other details (for example the interaction with national tax regimes) were purposefully disregarded in this phase.

¹ Election to fill a vacancy on the Legal and Technical Commission in accordance with article 163, paragraph 7, of the United Nations Convention on the Law of the Sea (31 January 2019), *ISA Doc. ISBA/25/C/14* (2019).

² Appendix IV Draft Regulations on Exploitation of Mineral Resources in the Area (9 July 2018), *ISA Doc. ISBA/24/LTC/WP.1/Rev.1* (2018) (hereinafter referred to as "Draft Exploitation Regulations").

³ "Financial Regimes for Polymetallic Nodule Mining: A Comparison of Four Economic Models", <https://ran-s3.s3.amazonaws.com/isa.org/jm/s3fs-public/files/documents/mit.pdf> (consulted on 15 February 2019).

The open-ended informal working group eventually produced two recommendations: the intention to hold a second meeting of this working group was expressed and the Secretariat was requested to elaborate two or three viable options to be evaluated and discussed during the second part of the 25th Session. The floor was then given to delegates of a long list of countries, highlighting different issues and formulating several questions and remarks. The payment system (with basically three options: an ad valorem royalty system, a profit-sharing system or a hybrid model of the aforementioned) and the ideal rate were considered, fair conditions relative to land based mining were stressed, there was a call for a clear overview of all applicable costs, the relevant capacity of the International Seabed Authority was discussed and the proposed 1% levy for environmental damage and liability was questioned, as it was considered arbitrary and low by some delegates and stakeholders. After these interventions, the chairman of the open-ended informal working group concluded that a lot of progress had been made, but a lot of work remained to be done. The Secretary-General subsequently announced the following steps in the process and the forthcoming documents to conclude this agenda item.

• Overview of the status of contracts

The afternoon meeting started with a brief overview of the 29 exploration contracts (17 for polymetallic nodules, 7 for polymetallic sulphides and 5 for cobalt-rich ferromanganese crusts) that are currently in force. The scheduled periodic reviews were discussed and consultations were adequately supported by a relevant summary prepared by the Secretariat⁴.

• Report on the implementation of the 2018 decision of the Council

As a next agenda item, the implementation of last year's Council decision regarding reports of the chairman of the Legal and Technical Commission was discussed. To support these consultations, the Secretary-General ran through a document providing an updated overview of the measures that were taken in that context, including progress made in connection with the Draft Exploitation Regulations, outcomes of the second annual consultation between the Secretariat and contractors (summarized in the Warsaw Statement), matters relating to organized workshops, development of regional environmental management plans, implementation of the envisioned data management strategy and treatment of some other issues⁵. The document inter alia suggests the disclosure of exploration contracts and associated activities through specific templates, covering the key elements of the non-standard provisions of each contract, and the existing training programmes were mentioned as a valuable contribution to the common heritage of mankind, as they do not only assist capacity-building, but also facilitate the dissemination of information on deep sea mining. The Secretary-General highlighted the lack of sustainable funding for the purpose of covering participation costs of members of the Commission and the Finance Committee from developing countries and encouraged additional contributions to the voluntary trust fund. He also treated in more detail the subject of development of regional environmental management plans and the workshops which are needed to procure this, expressing appreciation for the roadmap that was established.

⁴ Status of contracts for exploration and related matters, including information on the periodic review of the implementation of approved plans of work for exploration (11 January 2019), *ISA Doc. ISBA/25/C/9* (2019).

⁵ Implementation of the decision of the Council relating to the reports of the Chair of the Legal and Technical Commission in 2018 (23 January 2019), *ISA Doc. ISBA/25/C/12* (2019).

• Discussions on the role and development of standards and guidelines and the interpretation of key concepts within the framework of the Draft Exploitation Regulations

To start consultations on the last topic for the first meeting day, two relevant discussion papers (one covering the role and development of standards and guidelines and the other outlining some issues regarding the key concepts and terms used in the Draft Exploitation Regulations) were introduced⁶. The Council treated the envisioned standards and guidelines, which should fulfill a crucial role in the upcoming exploitation regime, as a complementary piece to the exploitation regulations⁷ and consideration was given to questions of how to best reflect and incorporate these standards and guidelines and their suggested development process. The majority believed that more clarity needed to be provided on the legal status of guidelines (mandatory or merely recommendatory?), as any unnecessary uncertainty or confusion should be absolutely avoided. The list of critical standards or guidelines that was prepared by the Secretary-General was mentioned and it was acknowledged that there has to be a logical balance between the rules which are embedded in the regulations and the more detailed instructions to be included in standards and guidelines, establishing an appropriate equilibrium between legal certainty and flexibility. Timely adoption was stressed as a very important aspect and there seemed to be a consensus that the most critical standards and guidelines should be developed before final approval of the exploitation regulations, while others can possibly be adopted later on. In addition, the Belgian delegation pointed out that the development of standards should not be company-driven but rather state-driven: private actors are welcome to provide input in the course of the drafting process, but states and the ISA should eventually decide. Belgium stressed that the created regime should be sufficiently detailed and based on scientific evidence, in order to facilitate proper implementation.

Besides the development and status of standards and guidelines, the definitions and use of the key concepts of the Draft Exploitation Regulations were discussed. The absence of a detailed and clear definition of ‘serious harm’ in the context of environmental protection was for example an issue⁸. Council members also indicated that the meaning of the terms ‘good industry practice’, ‘best environmental practices’, ‘best available techniques’ and ‘best available scientific evidence’, which are all frequently used in similar contexts and seem to be inherently linked to each other, remains vague and various proposals to provide more clarity were introduced, inter alia drawing inspiration from similar concepts in existing legal instruments. The current definitions, included in the schedule attached to the Draft Exploitation Regulations⁹, would remain as placeholders until there is a general understanding of the scope and purpose of these terms and guidelines on the interpretation and application of these important concepts should be developed.

6 Content and development of standards and guidelines for activities in the Area under the Authority's regulatory framework (17 December 2018), *ISA Doc. ISBA/25/C/3* (2018); Key terms: distinguishing between good industry practice and best practices under the draft regulations on exploitation of mineral resources in the Area (15 January 2019), *ISA Doc. ISBA/25/C/11* (2019).

7 Article 92-93 Draft Exploitation Regulations.

8 For example article 4, 48 and 97 Draft Exploitation Regulations.

9 Schedule 1 Draft Exploitation Regulations.

• Discussions on the decision-making processes of the Draft Exploitation Regulations

During the morning meeting, the Secretariat introduced its discussion paper on decision-making processes and delegation of powers within the Draft Exploitation Regulations¹⁰. As this is a delicate topic from a legal perspective, it was stressed that there should always be appropriate guidance and supervision by the Council, but with a view to timely decision-making, delegation of certain tasks and duties should not be ruled out. Some delegations, like the suspension or termination of contracts¹¹, were generally considered inappropriate, but others might be very useful, if necessary and carefully considered. The discussion paper presented a clear overview of all delegations in the current Draft Exploitation Regulations and the Council agreed that these need to be thoroughly assessed, creating a proper balance between appropriate allocation of competences and efficient decision-making. Specific decision-making procedures, providing for provisional decisions by the Secretary-General that should be reported and can afterwards be approved or rejected by the Council, were considered in order to attain that objective. Transparency and accountability were also stressed numerous times as crucial elements and a specific policy document on regulatory approaches, inter alia indicating which decisions can be delegated and which should not, was deemed desirable. Furthermore, a review of delegated authorities after a five year period appeared to be a thoughtful option. The Secretary-General concluded that there seemed to be a general agreement on the problematic issues with regard to decision-making, providing a good start for future discussions on this subject.

• Discussions on regional environmental management plans within the framework of the Draft Exploitation Regulations

The Secretariat introduced the next discussion topic, dealing with the status and development of regional environmental management plans (REMPs) within the framework of the Draft Exploitation Regulations¹². There seemed to be a consensus on the critical role of REMPs in the light of the crucial objective of protection of the marine environment and the seemingly facultative nature of these plans in the Draft Exploitation Regulations was discussed: most delegates suggested a change of wording to clarify that these regional environmental management plans were not just optional, while others deemed it unnecessary to introduce an obligation, pointing out that the REMP for the Clarion-Clipperton Zone was indeed developed in the absence of such a duty¹³. Recommendations to have REMPs in place prior to the approval of a plan of work for exploitation were formulated, as they are believed to be essential to assess the environmental impact, but there was some concern that embedding such a rule in the exploitation regulations could cause delay in the granting of exploitation contracts. The Belgian delegation preferred regional environmental management

¹⁰ Delegation of functions by the Council and regulatory efficiency (21 December 2018), *ISA Doc. ISBA/25/C/6* (2018).

¹¹ Article 101 Draft Exploitation Regulations.

¹² Relationship between the draft regulations on exploitation of mineral resources in the Area and regional environmental management plans (20 December 2018), *ISA Doc. ISBA/25/C/4* (2018).

¹³ Article 2, §5 Draft Exploitation Regulations.

plans as preconditions for exploitation and strongly encouraged the development of additional tailor-made REMPs, as only one such plan has been adopted up till now. A guidance document on the development of REMPs was deemed desirable and informal workshops to boost this process in the build-up to the second part of the 25th Session were suggested, but the incorporation and legal consequences of regional environmental management plans within the framework of the exploitation regulations remained the subject of lengthy discussions, as it is hard to convert elements of environmental policy into tangible rules or binding obligations. The preliminary strategy and the programme of work for the future development of REMPs, stressing the need for transparent, coordinated and scientifically sound processes, were considered and the proposed priority areas and tentative work schedule for the period 2019 –2020 were confirmed¹⁴.

• Discussions on the role of the precautionary approach within the framework of the Draft Exploitation Regulations

During the afternoon session, the role of the precautionary approach was discussed. The Secretariat introduced its discussion paper, supporting consultations on the application of this crucial environmental concept and providing a clear overview of the ways in which it is currently embedded in the Draft Exploitation Regulations¹⁵. The perception and interpretation of this general precept vary strongly among member states (also witnessed by semantic debates on the differences between the precautionary ‘principle’ and the precautionary ‘approach’) and it therefore seems necessary to develop a common framework, specifying how the precautionary approach should be implemented in the functioning and decision-making processes of the International Seabed Authority. The Belgian delegation was firm on this subject and believed that as long as we cannot fill the current knowledge gaps, we must ensure effective operationalization of the precautionary approach in order to prevent harmful decisions for the marine environment. Some highlighted that the precautionary approach is more than just a procedural mechanism, while other delegations stressed the legitimate interests of contractors (implying that some risks might be tolerable after careful consideration) and pointed out the importance of a level playing field and cost-effectiveness. It was clear that this topic will need to be further discussed in the future to determine the specific role and implementation of the precautionary approach within the context of the exploitation regulations.

¹⁴ Implementation of the Authority’s strategy for the development of regional environmental management plans for the Area (28 January 2019), ISA Doc. ISBA/25/C/13.

¹⁵ Implementing the precautionary approach to activities in the Area (9 January 2019), ISA Doc. ISBA/25/C/8 (2019).

• Discussions on independent assessment of environmental plans within the framework of the Draft Exploitation Regulations

To start the morning meetings of the third day, discussions on the proposed independent assessment of environmental plans during the review process of a plan of work for exploitation commenced with the introduction by the Secretariat of its relevant discussion paper¹⁶. The Council was requested to provide additional guidance on the matters that should be subject to such independent assessment and offer recommendations on the setting up of a roster of competent experts. A Belgian non-paper suggested a system providing for three separate opinions by independent experts, thus embedding these reviews as a necessary step in the consideration, but this interesting idea needed further elaboration to be considered a viable option¹⁷. Different delegations stressed the importance of transparency, efficiency, cost-effectiveness and impartiality and the Council weighed in on the possible nature, extent and purpose of the envisioned expert evaluations: many delegates submitted that a mandatory model (embedded in the exploitation regulations or one of its annexes) resulting in more informed and independent decision-making should definitely be considered, while others believed that such a system is not required and should thus not be institutionalized. Some of the latter delegations mentioned the existing possibility to involve independent experts¹⁸, expressed concern about the effect of such system on the independent functioning of the Legal and Technical Commission and noted that an appropriate model can always be developed later on, in the light of the evolutionary approach¹⁹.

More specifically with regard to the experts that should be consulted, some suggested to use existing bodies or lists of experts in an attempt to guarantee cost-effectiveness, while others indicated that a new roster of experts needs to be created on the basis of adequate selection procedures and geographically and culturally diverse representation. The Belgian delegation elaborated on their proposal and replied to the questions and remarks that were submitted. They reiterated the pursued objectives of expertise, independence and transparency and offered some clarification on the practical implementation of such a system, indicating among others when such independent evaluation would be triggered, what function these evaluations would serve, why three separate expert evaluations are needed and how much time this process would take. The three independent expert evaluations would be carried out automatically, separately and simultaneously: the opinions would have a mere advisory role and the process would run parallel with the public participation process, avoiding any delay in decision-making. The practical details would of course need to be specified in terms of reference and the nomination procedure for experts should also be further thought out, but Belgium was convinced that the benefits of this system of independent scientific evaluation would fully justify any additional costs, taking into account the potential impact of deep sea mining activities and the need for legitimacy.

¹⁶ 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 (11 January 2019), *ISA Doc. ISBA/25/C/10* (2019).

¹⁷ “Strengthening the environmental scientific capacity of the International Seabed Authority”, <https://www.isa.org.jm/document/statement-belgium-0> (consulted on 5 February 2019).

¹⁸ Article 12, §5, b) Draft Exploitation Regulations.

¹⁹ Section 1, §3 Annex Agreement of 28 July 1994 relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea, *United Nations Treaty Series*, vol. 1836, 3.

• Discussions on the inspection mechanism of the Draft Exploitation Regulations

Before lunch break, discussions on the inspection mechanism of the Draft Exploitation Regulations²⁰ were started with the introduction by the Secretariat of its relevant discussion paper²¹. The nature and effectiveness of the envisioned model was deemed debatable by a number of delegates and many believed that a few provisions should be reassessed. It was frequently stated that a transparent framework and sound legal bases were needed, indicating which activities are to be inspected and clearly establishing the scope and modalities in an inspection manual. Some countries considered it useful to look at similar existing regimes and the balanced model adopted under the Convention on the Conservation of Antarctic Marine Living Resources (with inspectors nominated by member states and remaining under their jurisdiction, but enforcing the internationally established regime) was suggested as a viable option. Most of the delegations believed that the system needs to be based on a cost-effective, risk-based approach, ensuring efficient use of available resources, and they were convinced that more attention should be paid to remote monitoring. This indeed appeared to be the most convenient option, given the remoteness of future mining operations, and many countries stressed that it should be expanded to cover all relevant activities of the involved vessels and underwater equipment. The issue of nomination and selection of inspectors was also highlighted and, apart from the above matters, there seemed to be a general agreement that the interaction with monitoring regimes of sponsoring states should be optimized, given the risk of double efforts or undesirable gaps. The Belgian delegation recommended that monitoring responsibility should not be left to the sponsoring states alone and would like to see this service being provided by the ISA, instead of duplicating similar regimes in several member states.

In the afternoon, two contractors were given the floor as part of the delegations of their sponsoring states: both Gerard Barron (Nauru Ocean Resources Inc., with Nauru as sponsoring state) and Alain Bernard (Global Sea Mineral Resources NV, with Belgium as sponsoring state) delivered comprehensive speeches to the Council, convincing the delegates of the benefits of deep sea mining, but stressing the importance of conducting these activities in a responsible and environmentally sound manner. The Deep Sea Conservation Coalition tried to refute the proclaimed advantages of deep sea mining within the context of sustainable development, but admitted that this is probably not the place nor the time to discuss these principal, overarching issues.

• Overview of the current developments regarding cooperation with other international organizations

As a last agenda item to be covered on the third meeting day, the Secretariat discussed the initiatives and possibilities to foster useful cooperation and partnerships with other international organizations. An overview of the current developments was provided and the signing of memoranda of understanding, inter alia with the Asian-African Legal Consultative Organization (AALCO), was noted. Different delegations applauded these cooperation initiatives and stressed the numerous benefits, encouraging the Authority to continue these efforts.

²⁰ Article 94-99 Draft Exploitation Regulations.

²¹ Implementing an inspection mechanism for activities in the Area (20 December 2018), *ISA Doc. ISBA/25/C/5* (2018).

THURSDAY 28 FEBRUARY 2019

• Discussions on matters related to the Enterprise (1/2)

After a brief confirmation of the received credentials from the Council members by the Secretariat, the fourth meeting day was completely dedicated to the role and development of the Enterprise, which needed to be clarified in the run-up to the exploitation phase. Mr. Eden Charles (Trinidad and Tobago), appointed as Special Representative for the Enterprise by the Secretary-General, introduced the topic by reporting on the current developments regarding the expression of interest from Poland to form a joint venture with the Enterprise²². The Special Representative, charged to negotiate with Polish representatives and to ensure that everything is in accordance with the international rules and regulations, outlined the content and the most important features of the draft proposal for a joint venture, which should trigger the operationalization of the Enterprise when it is finalized and was subject to lengthy consultations. The Polish delegate commented on the recent developments, expressing gratitude to be part of a historic step in the development of the International Seabed Authority and hoping for a successful result of these efforts, and this was followed by extensive discussions on the concept of 'sound commercial principles', the financial terms and applicable law of the draft proposal, the consistence with the 1994 Implementation Agreement, the mandate of the Special Representative and relevant liability, environmental protection and dispute settlement issues. Transparent general conditions and procedures for joint ventures with the Enterprise were deemed necessary and some delegations discussed the possible participation of this organ in the negotiations of the exploitation regulations and the meetings of the Council and the Assembly in anticipation of its operationalization, but the legal basis for that seemed debatable. The Belgian delegation considered that it would be useful to offer the Enterprise, which can be seen as an important stakeholder, the opportunity to make submissions during the negotiation process of the exploitation regulations and expressed that it was in favor of the swift creation of this organ as an essential element to achieve benefits for all mankind, but further information on the timing, different steps and costs of its inception was needed.

Following interventions of numerous delegations, the Secretary-General provided additional clarifications to support the ongoing discussions. During the afternoon meeting, the Special Representative for the Enterprise also added some explanations to resolve the outstanding issues, but frictions regarding his mandate seemed to block further progress. Some delegations questioned the exact content and modalities, while others firmly requested an extension of the expiring contract of the Special Representative or the appointment of an interim director for the Enterprise as a necessary step to keep moving forward on behalf of the common heritage of mankind. The African Group distributed a draft decision concerning the Special Representative, seeking a renewal of his contract, the establishment of a voluntary trust fund to support his work and an invitation to participate in the negotiations regarding the Draft Exploitation Regulations on behalf of the Enterprise, but several delegations indicated that some elements would need to be reassessed to reach a consensus. The meeting was suspended and informal consultations were held to provide a solution, but this did not produce immediate results. The meeting was therefore adjourned with the hope that more informal consultations would result in a revised draft decision, which could be discussed and agreed upon on the next meeting day.

²² Report of the Special Representative of the Secretary-General of the International Seabed Authority for the Enterprise on the proposal by the Government of Poland for a joint venture with the Enterprise (3 January 2019), ISADoc. ISBA/25/C/7 (2019).

FRIDAY 1 MARCH 2019

• Discussions on matters related to the Enterprise (2/2)

On the last meeting day, the African Group expounded on their revised draft decision, stressing the importance of an extension of the mandate of the Special Representative. After interventions by a few delegations and some clarifying remarks by the Secretary-General, the initial proposal to suspend the meeting for informal consultations was granted and a consensus was eventually reached. An amended revised draft decision was distributed and outlined by the African Group, but some confusion surrounding the exact textual changes to the former revised draft decision remained and there was notable concern from NGOs that they did not receive a copy of the draft decision. The meeting was therefore adjourned for a short amount of time and the decision, providing for an extension of the contract of the Special Representative for the Enterprise and limited, clearly defined participation of the latter in the negotiations concerning the Draft Exploitation Regulations, was subsequently adopted by the Council, concluding this important agenda item.

• Other matters and closure of the session

To complete the first part of the 25th Session, a few minor points and administrative details were discussed and appeals to pay appropriate attention to the interests of land based mining and scientific research were launched. The President of the Council officially concluded the meeting and announced the dates for the next Council meetings in July 2019.

Contact person

Sarah Vanden Eede

Oceans & Fisheries Policy Officer
WWF-Belgium

T: +32 (0) 2 340 09 31
sarah.vandeneede@wwf.be

wwf.be



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