



MINERAL EXPLOITATION IN THE AREA

Joint CIL-ISA Workshop

As part of on-going stakeholder consultation, the International Seabed Authority (ISA), in partnership with the Centre for International Law of the National University of Singapore, held a workshop on mineral exploitation in the Area in Singapore on 16-17 June 2015. The workshop focussed on issues relating to the development of a sustainable deep sea mining industry and highlighted the urgent need for an exploitation code, which would include a transitional financial regime with an initial payment mechanism comprising an annual flat fee and a royalty payment. Several key environmental issues were identified such as the need for wide accessibility of scientific data and the need to clarify key environmental terms such as 'serious harm to the marine environment', 'cumulative impacts' and the scope of environmental impact assessments. The benefits of facilitating participation by key stakeholders, including contractors, non-governmental organizations (NGOs) and other interested parties in relevant ISA processes to develop the code were also emphasized.

INTRODUCTION

The objective of the Workshop was to canvas the main perspectives and concerns of stakeholder groups, continue the process of stakeholder participation in the development of a regulatory framework for mineral exploitation on the two key consultation documents issued by the ISA in March 2015. The first, the Draft Framework for the Regulation of Exploitation Activities (<http://bit.ly/1MzQRUn>), issued by the Legal and Technical Commission (LTC) of the ISA. The second, the Discussion Paper (<http://bit.ly/1c7wBO1>), on the Financial Terms of Exploitation Contracts issued by the ISA Secretariat.

The Workshop was opened by Professor Robert Beckman, Director, CIL, followed by a keynote address by Mr Nii Odunton, Secretary-General, ISA.

In his address, the Secretary-General summarized the content of the two consultation documents and

described the steps taken by the ISA, so far, to develop an exploitation code. He also spoke about the current state of play with respect to deep sea mining technology.

The sessions were co-chaired by Mr Michael Lodge, Deputy to the Secretary-General and Legal Counsel, ISA and Professor Tommy Koh, Chairman, Governing Board, CIL, and was attended by 89 participants representing a cross-section of stakeholders, contractors, State sponsors, NGOs, academia including the ISA Secretariat and members of the LTC.

It is hoped that the report of these discussions will assist the LTC when it prepares its report on the draft regulatory framework for submission to the ISA Council in July 2015.

DISCUSSIONS

There were two panel discussion sessions with Session 1: *Draft Framework for the Regulation of Exploitation* moderated by Mr Michael Lodge and Session 2: *Financial Terms of Exploitation Contracts* moderated by Professor Tommy Koh.

SUMMARY Session 1: Discussion on the Regulatory Framework for Exploitation

Panelists were Ms. Sreekala Kumar, Assistant Programme Manager, Ship & Marine Technology, Keppel Offshore & Marine Technology Centre, Singapore; Mr. Duncan Currie, Independent International Affairs Professional, Globelaw, New Zealand; Dr. Philomène Verlaan, Attorney-at-Law and Oceanographer, University of Hawai'i, Manoa; Mr. Josh Brien, Head of Ocean Governance and Natural Resources Division, Commonwealth Secretariat, London; Mr. Nick Merritt, Partner, Norton Rose Fulbright, Singapore, and Mr. Dominic Roughton, Partner, Herbert Smith Freehills, Tokyo.

The panel featured six presentations. The first provided an overview of possible engineering technologies, the second highlighted key environmental issues to be considered in regulating seabed mining in the Area and the latter four offered perspectives from academia,

transition from exploration to exploitation and for this purpose, it was suggested that the Council set deadlines and identify priority tasks and deliverables as soon as possible assisted by a small group of appointed experts to assist the Secretariat with specific issues. The exploitation code should provide legal certainty and stability; and also include protection of any intellectual property rights that may be related to proprietary technological solutions as well as other knowhow. Other elements mentioned included the need for clear provisions on the enforcement of security, dispute resolution, and the desirability of an adaptive and evolutionary legal framework as opposed to one that is overly prescriptive.

Finally, together with existing rules of international law on the responsibilities and obligations of State sponsoring persons and entities, this code will provide a framework to deter the development of 'sponsoring States of convenience' that could potentially offer an easy path to market for contractors.



Caption: L-R: Ms Sreekala Kumar, Mr Duncan Currie, Dr Philomène Verlaan, Mr Michael Lodge, Mr Josh Brien, Mr Nick Merritt, and Mr Dominic Roughton

public international law, mineral regulation and the legal community.

Comments and questions by panellists and participants fell into three broad categories: (i) those that related to the development of a regulatory code for mineral exploitation in the Area; (ii) environmental issues; and (iii) process issues, as summarized below.

Regulatory Code for Mineral Exploitation

There was a clear consensus on the urgent need for a regulatory code for mineral exploitation to be adopted as soon as possible so that a sustainable deep sea mining industry will develop. Having an exploitation code in place would allow for the

Environmental Issues

This group of issues was dominated by the tension between the lack of knowledge and definite guidance relating to:

- (i) the state of the deep sea environment and what would constitute acceptable environment impact; and
- (ii) the technology that will ultimately be used to exploit deep sea minerals.

To help ease this tension, it was stressed that scientific data relating to the environment should be made publicly available on a web-based platform and in a standardized format so as to ensure verifiability

and comparability. The importance of clearly defining parameters for assessing the environmental impacts of mineral exploitation, developing environmental management plans at the regional scale and monitoring the fulfilment of environmental obligations was also emphasized.

Concerns were raised relating to the difficulties arising when taking into account direct, indirect, and cumulative impacts from mining activities and when identifying the area of impact (whether at the scale of a concession block, biogeographic scale or ocean basin scale). Other concerns included the need to link these concepts and processes with the criteria and processes developed by other international institutions such as the Food and Agricultural Organization (FAO) in respect of vulnerable marine ecosystems (VMEs) and the Conference of the Parties of the Convention on Biological Diversity in respect of Ecologically and Biologically Significant Areas (EBSAs).

Comments relating to environmental issues also referred to the need to establish a monitoring and compliance regime under the responsibility of the ISA and to clarify essential environmental terminology that may trigger specific legal obligations such as the threshold for 'serious environmental harm'.

Process Issues

These issues centred on two distinct concerns - the modalities of work of the Commission and the role of the ISA. It was suggested that the contractors make available its perspective on the regulatory regime to the LTC, Council and Assembly and that greater transparency was needed in the work of the ISA.

With respect to the perspective of the contractors or 'contractors' voice', several panellists and participants expressed the desire that there should be a way for contractors to share what they would consider to be acceptable mining terms in relation to their business models so that this could be taken into account in the development of the regulatory framework. Some participants noted that this was the purpose of the broad stakeholder engagement so far, and commended the ISA for its foresight in this respect. It was suggested that the Rules of Procedure of the ISA Assembly should be amended in due course so that contractors could achieve observer status, similar to that accorded to NGOs.

Participants at the joint CIL/ISA Workshop



On the issue of greater transparency, it was proposed that the Commission should consider holding more open meetings, as permitted by its existing Rules of Procedure, when discussing the development of the exploitation code.

With respect to the role of the ISA in the administration of mining in the Area, it was emphasized that the ISA should undertake regulatory compliance and environmental monitoring, and that consideration should be given to whether the current structures within ISA were 'fit for purpose'. It was widely noted that decisions on commercial viability should be made by the contractors rather than by the ISA. Furthermore, the ISA should not seek to be overly prescriptive in managing contractors' individual projects.

SUMMARY Session 2 : Discussion on the Financial Terms of Exploitation Contracts

Panelists were Mr. Chris Brown, Independent Consultant, Shandong; Mr. Romeo Spinelli, JS Capital Power, Zurich, Switzerland; Mr. Daniel Millet, Consultant, Environmental Risk Management DNV, Høvik, Norway; Ms. Soh Pui Ming, Partner, Tax Services, Ernst & Young, Singapore

This panel discussion comprised four presentations offering perspectives from consultants and

professionals in the areas of accounting, tax, financial services, environmental risk and international law.

The main thrust of the discussion concerned qualitative parameters of payments to be made to the ISA by contractors: type of payment (annual fee, royalty, profit based contribution, etc.), the need to have a transitional period and fund allocation (taking into account ISA administrative needs - including environmental monitoring costs and research - and distribution to member States).

The main concern expressed by contractors was their need for certainty as well as the need to incentivize the large financial investments for deep seabed mining.

Given his prior experience and taking into consideration the views offered by the panel and participants, Professor Koh proposed a transitional financial regime to encourage the growth of this industry and ensure its sustainable development. This would comprise a simple fee structure of an annual flat fee and a royalty payment. To provide stability in the initial years, this regime should be in place for an appropriate length of time (such as 10 years) after which there should be a review where any changes agreed upon would apply prospectively.

There was consensus that any financial system should be simple and easy to implement and administer.



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