International Seabed Authority ISBA/20/LTC/11

Legal and Technical Commission

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Monopolization of activities in the Area

Note by the secretariat

Background

1. During its nineteenth session, the issue of monopolization of activities in the Area was discussed by the Council of the International Seabed Authority. In response to concerns raised, several delegations shared the view that the alignment of the Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area (Nodules Regulations) with the Regulations on Prospecting and Exploration for Polymetallic Sulphides in the Area (Sulphides Regulations) and the Regulations on Prospecting and Exploration for Cobalt-rich Ferromanganese Crusts in the Area (Cobalt Crusts Regulations) had not been completed. The present note provides a review of the relevant provisions of the United Nations Convention on the Law of the Sea, the 1994 Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea and the regulations relating to monopolization of activities in the Area.

2. Nothing in the Convention or the 1994 Agreement specifically prevents one member State (whether applying as a State party or as a State enterprise) from making more than one application for a plan of work for exploration, whether for polymetallic nodules or for any other type of mineral resource. Likewise, there is nothing to prevent a natural or juridical person or a consortium of such entities from making more than one application. At the same time, the Convention is also unclear as to the maximum number of applications that may be made by any of the above entities or combinations of entities.

3. Nevertheless, article 6 of annex III to the Convention contains provisions, in its paragraphs 3 (c) and 4, that are intended to prevent one entity from gaining a dominant position in the Area.

4. Paragraph 3 reads as follows:

> If the proposed plans of work conform to these requirements, the Authority shall approve them provided that they are in accordance with the uniform and

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non-discriminatory requirements set forth in the rules, regulations and procedures of the Authority, unless:

…

(c) The proposed plan of work 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;

(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).

5. Paragraph 4 reads as follows:

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 this Annex. 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.

6. It should be noted that, unlike other provisions of annex III, paragraphs 3 (c) and 4 of article 6 specifically apply to plans of work for polymetallic nodules and exclude other resources. Even if a plan of work falls into the categories covered by paragraph 3 (c), the Authority may still approve it, 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. It can equally be inferred that, if the Authority determines that approval of a plan of work would 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, such a plan of work should not be approved.

7. Those provisions have never been applied in practice, in part because of the decision to establish a pioneer investor regime under resolution II of the Third United Nations Conference on the Law of the Sea. Resolution II contains an implicit limitation on the number of plans of work for exploration that could be held, or could be sponsored, by individual States; that is to say a limit of one contract to each of the entities listed in paragraphs 1 (a) (i) to (iii) of resolution II.[1] The pioneer regime came to an end with the entry into force of the Convention and the 1994 Agreement.

[1] Even in this case, however, the practical effect of paragraph 1 (a) (ii) would have been to allow multiple applications by natural or juridical persons and combinations of such entities from a number of Western European States (although this did not in fact happen).

Nodules Regulations

8. In 2000, the Authority adopted the Nodules Regulations. Article 6, paragraph 3 (c), of annex III to the Convention was reproduced with minor modifications in regulation 21, paragraph 6 (d), of the Regulations, which reads as follows:

> The Commission shall not recommend approval of the plan of work for exploration if part or all of the area covered by the proposed plan of work for exploration is included in:
>
> …
>
> (d) If the proposed plan of work for exploration has been submitted or sponsored by a State that already holds:
>
> (i) Plans of work for exploration and exploitation or exploitation only in non-reserved areas that, together with either part of the area covered by the application, 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;
>
> (ii) Plans of work for exploration and exploitation or exploitation only in non-reserved areas which, taken together, constitute 2 per cent of that part of the Area which is not reserved or disapproved for exploitation pursuant to article 162 (2) (x) of the Convention.

9. While it is a safe way to reproduce the provision of the Convention which reflects the best available compromise for achieving a solution, the practical application of this provision is problematic, as with article 6, paragraph 3 (c), of annex III to the Convention. It is difficult in practice to define a circular area of 400,000 square kilometres surrounding the centre of either part of the area. Before the establishment of the outer limits of the national jurisdiction of all coastal States, it is impossible to define the size of the Area and therefore impractical to define 2 per cent of that part of the Area. It should be noted that article 6, paragraph 4, of annex III to the Convention is not reproduced in the Regulations.

Sulphides Regulations and Cobalt Crusts Regulations

10. In the case of polymetallic sulphides, the Legal and Technical Commission decided at an early stage of its discussions on the subject that the limitations set out in article 6 of annex III could not apply. That was for two reasons: the provision itself is explicitly applicable only to polymetallic nodules and the provision makes no practical sense from a scientific perspective if applied to sulphides. Accordingly, the Commission has sought to develop an anti-monopoly provision that is fair and reasonable to all potential applicants.

11. In 2008, the Commission originally recommended to the Council that the Sulphides Regulations and the Cobalt Crusts Regulations should prevent multiple applications by affiliated applicants in excess of the overall size limitations for a single application.

12. The suggested language, to be inserted as an additional paragraph in regulation 12 (ISBA/16/C/WP.2), read as follows:

> 5. The total area covered by applications by affiliated applicants shall not exceed the limitations set out in paragraphs 2, 3 and 4 of this regulation. For

> the purposes of this regulation, an applicant is affiliated with another applicant if an applicant is directly or indirectly controlling, controlled by, or under common control with, another applicant.

13. There was much discussion of the recommendation in the Council during the fifteenth session, with various views expressed, but no agreement could be reached.

14. It was only during the sixteenth session, in 2010, that the decision was taken to deal more flexibly with the potential problem of monopolization of activities in the Area. Revisions were agreed to draft regulation 23 of the Sulphides Regulations, so that it now reads as follows:

> 7. The Legal and Technical Commission may recommend approval of a plan of work 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 with regard to polymetallic sulphides or to preclude other States Parties from activities in the Area with regard to polymetallic sulphides.[2]

15. As with the Nodules Regulations, there is no definition of what constitutes a monopoly.

16. The Cobalt Crusts Regulations incorporated regulation 23, paragraph 7, of the Sulphides Regulations.

Recommendations

17. The Commission is invited to take note of the background information provided herein regarding the development of the relevant provisions of the three sets of regulations.

18. The Commission is further invited to consider whether to recommend to the Council that the Nodules Regulations be further aligned with the Sulphides Regulations and the Cobalt Crusts Regulations or to make any other recommendation to the Council on the matter.

[2] This provision follows the wording of the second sentence of article 6, paragraph 4, of annex III to the Convention, by amending “The Authority may approve plans of work covered by paragraph 3 (c)” to “The Legal and Technical Commission may recommend approval of a plan of work” and adding “with regard to polymetallic sulphides” after “activities in the Area”.