International Seabed Authority ISBA/22/LTC/13

Legal and Technical Commission

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Issues related to the sponsorship of contracts for exploration in the Area, monopolization, effective control and related matters

Note by the secretariat

I. Introduction

1. In 2013, at the nineteenth session of the Authority, the Legal and Technical Commission, during the course of its consideration of proposed amendments to the Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area, held general discussions on the issue of the monopolization of activities in the Area. It noted that in recent years new models of business arrangements had begun to emerge that required further consideration (ISBA/19/C/14, para. 21). In 2014, the Commission reconfirmed its earlier observation that a new way of doing business appeared to be emerging with regard to applications for plans of work for exploration. It noted that even though the new way was compliant with the regulations, it needed to be brought to the attention of the Council (ISBA/20/C/20, para. 31).

2. In 2015, at the twenty-first session of the Authority, the Commission considered an interim report on this issue prepared by the secretariat (ISBA/21/LTC/12). The Commission agreed to keep this matter on its agenda and requested the secretariat to continue its work on the matter and prepare a more detailed analysis for the Commission at its next meeting illustrating and identifying more specifically the new ways of doing business that had been highlighted by the Commission in its previous discussions. The present document has been prepared in response to that request (ISBA/21/C/16, para. 45).

II. Background

3. At the heart of the system for the exploration and exploitation of resources in the Area established in Part XI of the United Nations Convention on the Law of the

Sea and the 1994 Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea is the so-called "parallel system". This is elaborated in article 153 of the Convention. The essential elements of the parallel system include assured access for States parties and their nationals to seabed mineral resources along with a system of site-banking, whereby reserved areas are set aside for the conduct of activities by the Authority through the Enterprise itself or in association with developing States or in joint venture with the contractor who provided the particular reserved site.[1] This system was designed to avoid the monopolization of the seabed mining industry by developed countries and ensure that viable mine sites would be available for future generations.

4. Rights to apply for a plan of work for seabed activities in reserved areas are accorded exclusively to developing States[2] and the Enterprise by virtue of annex III, articles 4 and 9, of the Convention and regulation 17 of the Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area (see ISBA/19/C/17). The same provision applies to polymetallic sulphides (see ISBA/16/A/12/Rev.1, regulation 18) and to cobalt-rich ferromanganese crusts (see ISBA/18/A/11, regulation 18). Since 2008, applications for plans of work for exploration relating to certain available reserved areas were submitted by entities sponsored by the following small island developing States and areas: Cook Islands (Cook Islands Investment Corporation, see ISBA/20/LTC/3), Kiribati (Marawa Research and Exploration Ltd., see ISBA/18/C/18), Nauru (Nauru Ocean Resources Inc., see ISBA/17/C/9), Singapore (Ocean Mineral Singapore Pte. Ltd, see ISBA/19/LTC/11) and Tonga (Tonga Offshore Mining Limited, see ISBA/17/C/10). Guided by the Convention, the Regulations and the advisory opinion of the Seabed Disputes Chamber of the International Tribunal on the Law of the Sea on the responsibilities and obligations of States with respect to activities in the Area, both the Commission and the Council concluded that all of the above-mentioned sponsored entities were qualified applicants, their applications were compliant with the Convention and the Regulations and all of them possessed the financial and technical capability to carry out the proposed plan of work for exploration in the respective reserved areas (see ISBA/17/C/9, paras. 37-40; ISBA/17/C/10, paras. 32-35; ISBA/18/C/18, paras. 27-30; ISBA/20/C/7, para. 26 (c); and ISBA/20/C/18, para. 24 (c)).

III. New models of business arrangements

5. The above-mentioned sponsored entities having been considered and confirmed as qualified applicants notwithstanding, the Commission observed the existence among them of models of business arrangements unlike any previously envisioned. In particular, the Commission noted the existence of close associations or collaborations between developing States and their sponsored entities, with the business interests of entities registered in, or owned by nationals of, developed States.

[1] See Satya Nandan, "Administering the mineral resources of the deep seabed", paper prepared for the Law of the Sea Symposium of the British Institute of International and Comparative Law, London, 2005. Available from www.biicl.org/files/1392_nandan_opening.doc.

[2] Or any natural or juridical person sponsored by them and effectively controlled by them or by other developing State, or any group of developing States.

6. Tonga Offshore Mining Limited, for instance, was described as “a Tongan incorporated subsidiary of Nautilus Minerals Incorporated, which holds 100 per cent of the shares of [Tonga Offshore Mining Limited] through another wholly owned subsidiary, United Nickel Ltd., incorporated in Canada” (ISBA/17/C/10, para. 15). Canada is a developed State without any contractual arrangement with the Authority. The corporate structure of Nautilus Minerals Incorporated shows that among its largest shareholders are developed States conglomerates such as Teck Cominco, AngloAmerican and Gazmetall (ibid.). A different type of arrangement applies in the case of the contractors Cook Islands Investment Corporation and Ocean Mineral Singapore Pty. Ltd. (Singapore). In the case of Cook Islands Investment Corporation, its application stated that: “the application by the Cook Islands Investment Corporation is supported by CI-GSR, an equal and equitable arrangement between the Cook Islands Government and G-TEC Sea Mineral Resources NV (GSR) of Belgium. GSR signed a contract for the exploration of polymetallic nodules with the Authority on 14 January 2013” (ISBA/20/LTC/3, para. 12). In the case of Ocean Mineral Singapore Pty. Ltd., the contractor stated that: “in order to execute the proposed exploration plan of work in an efficient and cost-effective manner, [Ocean Mineral Singapore Pty. Ltd.] intends to collaborate with UK Seabed Resources Ltd., which holds the exploration license for an area adjacent to the area under application” (ISBA/19/LTC/11, para. 8).

7. Although the Commission recommended the approval of all these arrangements as compliant with the Regulations, certain Council members expressed uncertainty over the potential implications, with regard to the issue of ownership and effective control, and the overall impact such an arrangement may have on the future operations of the Enterprise and the concept of the common heritage of mankind.[3]

8. With regard to monopolization, the argument was put forward that some of these new arrangements could inadvertently lead to the dominance of the interests of developed States in seabed activities in reserved areas, a predicament which the parallel system and annex III, article 9, were deliberately designed to discourage. Furthermore, the Enterprise and the reserved area as a concept were meant to facilitate the realization of the common heritage principle and guarantee that activities in the Area are carried out for the benefit of humankind as a whole. The reserved areas are available to developing States and the Enterprise, with the Enterprise having priority (see ISBA/19/C/17, regulation 17; ISBA/16/A/12/Rev.1, regulation 18; ISBA/18/A/11, regulation 18). However, because of effect of the Agreement,[4] the Enterprise is not in a position to avail itself of this right owing to a lack of capital and technology. The Enterprise is thus compelled to relinquish its right to the developing States. This conforms to the spirit of establishing the Authority and the common heritage formula. The recent trend of partnerships between developing and developed States raises the need to revisit foundational concepts such as the parallel system, the reserved area and the future operationalization of the Enterprise.

[3] See the International Seabed Authority press release of 19 July 2011 (SB/17/11).

[4] See section 2 of the annex to the 1994 Agreement.

IV. New ways of doing business

9. In addition to the foregoing, in recent years, the Commission has also observed a new trend occurring in relation to the manner in which new applicants for plans of work exercise their option relating to the provision of reserved areas. An alternative to the reserved areas regime was provided,[5] allowing contractors to elect either to provide a reserved area or to offer an equity interest in a future joint venture with the Enterprise. Since then, Brazil (see ISBA/20/C/17, in relation to crusts), China (see ISBA/19/C/2, in relation to crusts, and ISBA/17/C/11, in relation to sulphides), Germany (see ISBA/20/C/16, in relation to sulphides), India (see ISBA/20/C/6, in relation to sulphides), Japan (see ISBA/19/C/3, in relation to crusts) and the Russian Federation (see ISBA/17/C/12, in relation to sulphides) have all opted to offer an equity interest in a joint venture arrangement with the Enterprise in lieu of providing a reserved area. Increased adoption of the joint venture option could result in a considerable decrease in the amount of reserved areas available for future generations, thus having direct implications on the parallel system. Alternatively, the joint venture option raises real questions relating to the modalities and operationalization of the Enterprise. Both issues, as observed by the Commission, require further detailed consideration.

10. Another legitimate but nevertheless new way of doing business that has recently been observed by the Commission relates to the practice of selective use of reserved areas. For example, the application area of Nauru Ocean Resources Inc. (sponsored by Nauru) was divided into four regions taken from four different reserved areas, and the exploration contract that was signed between the Authority and Marawa Research and Exploration Ltd. (sponsored by the Republic of Kiribati) covered three regions in three blocks. The most obvious case demonstrating this new trend however is the recent application by China Minmetals Corporation (sponsored by China), whose application area was divided into eight blocks, selected from five different reserved areas (see ISBA/21/C/2). The implications of this trend on the remaining unclaimed reserved areas, on environmental management of the Area and on the interests of the Enterprise and developing States require further consideration.

V. Conclusion

11. In the light of the foregoing, two observations can be made. First, regarding the new models of business arrangements, although novel, they are fully in compliance with the terms of the Convention, the Agreement and the Authority's current rules and regulations governing activities in the Area. The same can be said of the new ways of doing business with regard to new applications for plans of work for exploration. The second observation relates to the implications of these new trends on foundational concepts such as the parallel system, the Enterprise and the principle of the common heritage of mankind. The Commission was perhaps correct when it observed that these issues require further consideration.

[5] Regulation 16 of both the Sulphides and Crust Regulations provides that "Each applicant shall, in the application, elect either to: (a) contribute a reserved area to carry out activities pursuant to article 9 of annex III to the Convention, in accordance with regulation 17; or (b) offer an equity interest in a joint venture arrangement in accordance with regulation 19".

12. In the light of the concerns highlighted above and considering the lack of time available to the currently constituted Legal and Technical Commission to give full consideration to the issues involved, the Commission may wish to keep this matter on the agenda for the next Legal and Technical Commission. In the meantime, the Commission may also wish to consider requesting the secretariat to undertake a more complete study on the issue of abuse of dominant position, taking into account trends and developments in deep seabed mining, in order to gain a clear and definitive understanding of the implications of the new ways of doing business outlined above.