Interventions made by the Tonga Delegation at the 2nd Part of the 25th Session of the Council

AGENDA ITEM 11

Part VII : Payment Mechanism and the Financial Model

Allow me to thank the Chair of the second meeting of the open-ended working group of the Council for his report provided on the financial model and the discussions which took place on the 11th and 12th July 2019, last week which provides an insight to the discussions which took place. Allow me also to thank MIT for their final report provided on the Economic Model and System of Payments.

As we had highlighted in the first part of the 25th session of the Council, **the form and design of the payment mechanism** will need to reflect the requirements of the Convention which includes the need to ensure that the payment mechanism guarantees optimum revenues for the Authority,

1. Options on the payment mechanism

As highlighted in the report of the Chair of the open-ended working group, the three options highlighted in the MIT report were discussed during the working group with some delegations reflecting their preferred options and interests. Tonga would like to highlight as have others, its support for the fixed rate ad valorem royalty given it is transparent and straightforward to manage fairly. Tonga also notes that an ad valorem system increases with metals prices, and that as metal prices are the strongest drivers of operational profit, an ad valorem system provides the common heritage with profit related upside in payments.

2. Environmental Compensation Fund

We take note of the discussions on the environmental compensation fund of approximately 1% and the assumptions made by the consultants. We are pleased to see that there is importance placed on this issue and would like to ensure that further discussion and consideration of these rates will allow us to realize a sufficient and appropriate rate for environmental compensation to allow the Authority to dispose of its responsibility to protect the marine environment effectively.

3. Review of the Payment mechanism

We are pleased to note that there is general agreement on the need for a review mechanism, as we had highlighted in the first part of the Council's session. For a sufficient review to be undertaken, a set and clear implementation period will need to be clear in the Draft Regulations, as set out under DR81. This will allow the **Authority to study and observe the progress of implementation and provide certainty and predictability for the contractors**.

These are our preliminary comments.

Agenda Item 11 – Part I : Introduction (DR 1 - 4)

Thank you for giving me the floor and allow me also to thank the Legal and Technical Commission for their hard work and commitment in ensuring progress is made on the draft exploitation regulations as contained in the document numbered WP.1 and the clear accompanying explanatory notes provided in C/18.

As Australia had mentioned in their intervention yesterday which we support, with similar sentiments expressed this morning by Jamaica and Germany I recall, we would also like to know if there will be any opportunity for written submissions to be made during the intersessional period as this will allow my delegation to provide a more detailed and substantive submission.

However, for now, my delegation would like to make the following comments on Part I.

PART I

DR 2

On DR2 we support the clarification sought by Australia on the application of "market based instruments" in particular,

a. the extent to which the ISA is able to implement market-based instruments, and

b. why other modalities for implementing the PPP are not included within the scope of this DR2(e)(iv). Regulatory requirements around pollution prevention, liability for harm caused by pollution and, cost-recovery for pollution clean-up would appear to be highly pertinent PPP instruments in this context.

DR 3 : Duty to cooperate and exchange of information

On DR 3, as highlighted by my delegation in previous years, and reflected in the Code Project which we commend Pew Charitable Trusts for its ongoing efforts in that regard, and which Costa Rica and Australia had also eloquently iterated including Jamaica this morning, the cooperation and exchange of information between the Authority and its Members and Contractors are vital. The current formulation as set out under DR3(a) which incorporates the phrase **"use their best endeavours to"**, waters down the obligation. We are of the view that this should be removed from the current formulation to read "Members of the Authority and Contractors **shall cooperate** with the Authority to provide such data and information as is reasonably necessary for the Authority to discharge its duties and responsibilities under the Convention".

DR4 : Rights of coastal states

On DR4, we note the considerations made by the LTC in paragraph 11 of the document C.18 in particular the recommendation for guidelines to be put in place to address the issue of establishing an evidential standard for "clear grounds" as well as the issue of appropriate consultation and notification protocols.We think it would be worthwhile to consider and discuss further which instrument would better serve the purpose of DR4.

a. Firstly, consultation and notification protocols are important given the potential impacts to coastal states, especially small island developing States whose rights under article 42 and other relevant provisions are pivotal to their economic, social, and environmental interests. This may be better served by incorporating a requirement to consult relevant coastal states prior to submitting the Plan of work. The standards and guidelines to be developed under DR4 can further elaborate what this entails and could consider the proposals by FSM in this regard and its 2-step process which we find some interest in.

b. Placing the sole responsibility on coastal states, such as SIDS to prove "serious harm" may prove onerous on SIDs like Tonga in terms of its limited capacity and putting further stress on SIDS vulnerabilities premised upons its recognised special case for sustainable development. Perhaps the current wording of the regulations can capture an avenue for "other users" in collaboration or cooperation through either individual or joint submissions, to avoid imposing the sole responsibility of identifying the harm on the coastal state.

These are our preliminary comments on this Part I.

Agenda Item 11 – Part II : Applications for approval of plans of work in the form of contracts

Thank you for giving me the floor and allow me to make the following comments on Section 3 simply to address some of the proposals we had submitted which as it appears, has not been reflected in the current draft of the regulations. These relate to DR13.

Before doing so, I wish to associate our delegation with the sentiments expressed by Australia, the United States, Nauru, and the ICPC on the importance of elaborating and implementing the principle of due regard with regards to all users permitted under the Convention of the seabed, in particular cable companies and by extension, cable users in terms of those receiving benefits through services provided through such cables such as small island developing States like mine in the Pacific.

DR 13 - Section 3

In DR13(1)(f), with reference to the term "economic viability", there is still no clear guidance on what it entails or what it means exactly. We would find it useful to have guidelines to assist the Commission in making such a determination, given economic terms vary from interest group to interest group. This may be addressed via reference to the pre-feasibility study.

On DR13(2), on the issue of "financial capability", the financial structure of the contractors, as we understand, differ, depending on whether they are for example private companies, state owned enterprises, government departments, as well as the Enterprise. It is important for the draft regulations to reflect how DR13(2) is to be applied in a fair and consistent manner amongst these different contractors.

Agenda Item 11 – Part III : Rights and Obligations of Contractors

Thank you for giving Tonga the floor to speak on this issue. Allow me to simply reiterate an intervention made by my delegation in the first part of this session on REMPs.

We wish to support the intervention made by Germany and others on the need for REMPs to be in place prior to the approval of a plan of work. The operation of the contractor, particularly in implementing its plan of work and environmental management and monitoring plans as it relates to REMPs, will need to be incorporated as a condition of the exploitation contract under DR17.

In addition to existing provisions under the draft regulations, clear standards will need to be further developed to supplement and guide Contractors on the expectations and process, management and monitoring required.

This would further assist the Contractors in developing their environmental impact statement as required under DR47(3)(c) of the current draft of the regulations. The REMPs will benefit Contractors by reducing uncertainty in the planning process as well as reducing environmental impacts and strengthen investor confidence.

Agenda Item 11 – Part IV: Protection and preservation of the Marine Environment

Thank you for giving Tonga the floor and allow me to make the following comments on Part IV. Prior thereto, allow me on behalf of the Delegation of the Kingdom of Tonga, to associate with distinguished representative of Nauru, and others, to convey our best wishes on the recognition of this auspicious day celebrating The Nelson Mandela International Day. We stand together with the international community in celebrating all that the late great Nelson Mandela stood for and what Madiba continues to stand for today.

DR 45

a. Firstly, on DR45, development of environmental standards, we are pleased to see that the regulations expressly spell out the need for these standards to be developed in accordance with DR94. We are also pleased to see that DR94(3) includes technology, methods and processes as part of these standards, all of which are crucial in ensuring best environmental practices are employed to protect the environment.

1. Secondly, as these regulations deal with the critical role of standards and guidelines, it is essential that we identify the standards that need to be in place once the exploitation regulations are passed. As we had mentioned yesterday, there is a need to amend the Enclosures I and II, prepared by the LTC, to reflect firstly, the draft regulations, particularly environmental measures to be in the form of standards rather than guidelines.

1. Thirdly, the review of such standards, as reflected in DR94(4), are crucial in order for EIA, EMMP standards and the REMPS to adapt in light of new information and knowledge, not just scientifically but in other areas such as geology, mineral resources and engineering. This is especially important for the less well understood mineral types such as polymetallic sulfides and in protecting the common heritage of mankind.

DR 47

On DR47, we highlighted in previous years the importance of ensuring that any lessons learned from activities during the exploratory phase such as the "*mining systems component tests*" is incorporated into the "Exploitation Plan of Work", REMPs, EIS, and EMMP and we see these being reflected in Annex IV of the draft regulations amongst others. This will help ensure a proper description and understanding of potential general impact categories and the necessary measures to be factored into the various planning and operational phases of exploitation.

DR 55

On DR55, we wish to echo support on the need to amend the current DR 55 to separate compensatory related funds as currently reflected in DR54 and DR55(a) from non-compensatory funds to address the purposes covered in DR55(b) - (e). Having two will allow for the efficient use for the purposes of (1) compensating for damages, as per the ITLOS Advisory Opinion liability gap and (2) for other 'sustainability' type purposes (education, research, environmental purposes).

Agenda Item 12 – Report of the Chair of the Legal and Technical Commission on the work of the Commission at its 25th session (ISBA/25/C/19.ADD.1)

Thank you for giving Tonga the floor to speak on this agenda item and allow me at the outset to thank the Chair of the Legal and Technical Commission for her report as contained in ISBA/25/C/19.ADD.1 and to thank the Commissioners for the hard work undertaken throughout the session and the significant progress we have seen to date. We are sensitive to the fact that the amount of work the Commission undertakes on our behalf remains a challenge despite the combined expertise it has and its size. We congratulate the Chair of the LTC and all Commissioners as a collective for their ongoing commitment especially at these seminal times.

It is pleasing to see the attendance of Commission members, and as said, in particular during this time where the workload of the Commission has increased from previous years. My delegation wishes to acknowledge the important role of the Voluntary Trust Fund in ensuring the participation of LTC members from developing countries including ours, and we would like to thank all contributors to this fund and encourage positive consideration of all those who are able, to do so. Noting the challenges faced by the Fund as it stands, we wish to reiterate what we had mentioned earlier today and encourage member states, contractors, and all entities able to do so, including observer friends, to continue with their contributions to the Fund.

On Part II(A), in relation to the implementation of training programmes, we are pleased to see that 10 contractors provided information on the policies and procedures in place to address issues of health, safety and harassment. We think this is good practice which should be replicated by others.

On Part II (B), it is pleasing to see that most contractors are complying with reporting requirements under the standard clauses. It is also encouraging to see the collaboration between contractors as well as academia which is vital in ensuring all available resources and knowledge are utilized to allow us to better understand the Area.

However, it remains a concern seeing that some contractors have not considered nor responded to the LTC's questions and recommendations with respect to their previous annual reports. The recommendation by the Commission for the SG to reach out to both these contractors and their sponsoring states should be undertaken immediately to determine the lack of response.

On Part V of the Report, we've had considerable discussion around standards and guidelines, here in our informal discussions and even in the Pretoria Workshop hosted by South Africa which we were fortunate to attend which I used to also wish the Springboks well at the upcoming World Cup in Japan though Tonga's 'Ikale Tahi or Sea Eagles might give the Springboks a run for their money. There was talk of cricket on Monday so I thought I would add some rugby into the mix.

That said, we would like to thank the Commission for the recommendations made and see this as a starting point for our work in completing the draft regulations for exploitation. In so saying, we find the following main points as crucial:

a. Firstly, a clear and common interpretation of "Standards" and "Guidelines" in the context of draft regulations 94 and 95 of the Draft Exploitation Regulations. In this regard we find the paper prepared by the Delegation of Germany in the document C/29 as an important guide in this regard.

b. Secondly, in having this common understanding, we can then determine which part of the draft regulations are essential to be elaborated by way of standards and which to be elaborated by guidelines. In my delegation's view, we will still need to settle this in light of the fruitful discussions we've had and the potential submissions to be made after this session. It will be worthwhile for the Commission to amend the current Enclosures I and II to incorporate the Council's comments.

c. Finally, my delegation appreciates that the development of standards and guidelines will have to be undertaken in phases and we find the proposed phases by the Commission as the proper way to go about this.

Agenda Item 13 - Report of the Finance Committee

Thank you for giving Tonga the floor and allow me to thank the Chair of the Finance Committee for his report contained in ISBA/25/A/10-ISBA/25/C/31 which we just heard and the work of the Finance Committee in general. We would like to commend the members of the Committee as well for shouldering the work of and demands on the Committee as a whole.

My delegation would like to make the following comment as it relates to Part VIII of the Report.

Regarding the development of rules, regulations and procedures on the equitable sharing of financial and other economic benefits derived from activities in the Area pursuant to Article 140(2) and the importance of advancing implementation of article 82 of the Convention in parallel.

We take note of the work of the Finance Committee, in this regard, with your permission Madam President, Tonga would like to submit a non-paper for the consideration of the Council which may assist and contribute to the discussions on this very important issue. So with your leave Madam President, we will endeavor to do so before the closing of the meeting of the Council this week.

As we know, UNCLOS proposes the development of a mechanism for the distribution of mining royalties for specific purposes, which include Administrative Expenses (Article 173(2)), and the Economic Assistance Fund (Article 51) as reflected in Part VIII of document A/10 and C/31 which has been distributed this afternoon in hard copy.

It is crucial in the development of this equitable sharing mechanism, key considerations under the Convention are made and weighed appropriately. One of the crucial criteria which must be taken into account are the special interests and needs of developing States, including the least developed countries, and the land-locked states and the small island developing States (SIDS) amongst others. The paper serves to contribute to this development and to ensure that the equitable sharing criteria reflect the intentions of the state parties to UNCLOS when it was framed, notwithstanding that circumstances relating to the definition of developing states have evolved since 1982, particularly with regard to small island developing States as a special case for sustainable development due to their unique and specific vulnerabilities.

As we had mentioned in the past, it is essential during this process that all are consulted, and the need for continuous coordination between the Legal and Technical Commission and the Finance Committee, given the work they are developing in parallel such as operationalizing the common heritage of mankind and ensure all views and issues are given appropriate weighting.

Finally, Madam President, we would like to thank all member states and contractors that have contributed to the voluntary trust fund and we note the dire straits that it finds itself in. As a developing member state, we rely on the fund to facilitate the attendance of a member of the LTC that is a national of our country. Tonga also relies on the Fund for its attendance at the meetings of the Council. We are very grateful for the assistance provided by the Fund and would encourage member states and contractors, and all entities that are able to do so, to continue with

their voluntary and valuable contributions which allows for the proper functioning of the bodies of the Authority like the Council and LTC.