



28th SESSION OF THE COUNCIL OF THE INTERNATIONAL SEABED AUTHORITY (PART II)

Item 10: Report on the Intersessional dialogue (ISBA/28/C/9)

Mr. President,

My delegation thanks the delegations of Belgium and Singapore for their work as co-facilitators of the Intersessional Dialogue and for the second Briefing Note which they have distributed at the beginning of the session.

We observe with concern that there still exist divergent positions on, among other issues, what are the obligations of the Council in the current scenario.

In our opinion, it would be desirable to arrive at a position to adopt a decision by consensus (Section 3 (2) of the Annex of the Agreement) that promotes the interests of all members of the Authority (Section 3 (5) of the Annex of the Agreement).

In this spirit, we submit the following considerations:

Firstly

Subparagraph (c) *obliges* the Council *to consider* a provisional approve of a plan of work for exploitation in case it is submitted before the Council has completed the elaboration of the rules, regulations and procedures relating to exploitation.

We agree that, as indicated in decision ISBA/28/C/9 (par. 3) in submitting appropriate recommendations to the Council, the Commission is under *no obligation* to recommend approval or disapproval of a plan of work, pursuant to section 3, paragraph 11(a), of the Annex to the Agreement, which provision also envisages a scenario in which the Commission *does not make a recommendation*.

In our opinion, and to avoid possible interference in the functions of the Commission by the Council, the Commission should request the Council the appropriate guidelines or directives in application of article 163 (9). In turn, the Council could, if it deems it appropriate, request the Commission to make a recommendation under article 165 (2) (a) in this regard. Both actions are provided for in the Convention and are part of normal institutional practice.

Secondly

Subparagraph (c) *allows* the Council *to provisionally approve* a plan of work for exploitation but does not require it to do so. It is therefore a faculty and not an obligation.

This follows from Section 3 (11) which allows for the plan of work to be rejected by a qualified majority of the Council. Furthermore, Section 3 (12) that expressly provides that "any dispute that may arise with respect to the rejection of a plan of work will be submitted to the dispute settlement procedure established in the Convention."

Thirdly

Subparagraph (c) provides that, in the absence of rules, regulations and procedures related to exploitation, the consideration and provisional approval of the plan of work shall be based "on the rules contained in the Convention and on the terms and principles contained in the Annex". In this regard, the Principles governing the Area contained in Section 2 of Part XI of the Convention shall be interpreted and applied with the provisions of the Annex together as a single instrument.

In general, the Spanish delegation is concerned about the Council's responsibility in environmental matters, that is, how to ensure the effective protection of the marine environment, in accordance with the mandate of Article 145 if a plan of work for the exploitation is provisionally approved. Essentially, the need to apply the precautionary principle/approach in this unregulated context.

In this sense, we also consider that, in application of article 165 (2) (e) and within the normal functioning of the Authority, the Council may request a recommendation from the Commission regarding the protection of the marine environment, taking into account the opinions of recognized experts.

In recent years, since Part II of the 26th session held in December 2021, the Spanish delegation has maintained a firm position in the sense that mineral exploitation activities in the Area, that is, DSM on a commercial scale, cannot start until the Council approves and provisionally applies the Regulations of Exploitation in accordance with the Convention and the Agreement.

For this reason, in the context of the debates on the interpretation of the "two-year rule", Spain, together with other delegations, has defended the application of a precautionary pause that allows us to regulate activities of exploitation in a detailed and adequate manner incorporating the environmental principles and all the necessary instruments to ensure the effective protection of the marine environment.

Fourthly

However, in our view, Article 137 (2) on the Legal Condition of the Area and its resources, does not allow the start of DSM on commercial scale without adequate rules, regulations and procedures. According to this provision: "All rights in the resources of the Area are vested in mankind as a whole, on whose behalf the Authority shall act. These resources are not subject to alienation. The minerals recovered from the Area, however, may only be alienated in accordance with this Part and the rules, regulations and procedures of the Authority".

There is no exception to this general principle that is a consequence of the principle of the Common Heritage of Mankind in article 136 and whose legal superiority has been expressly recognized by States Parties in article 311 (6).

Several provisions of Annex III of the Convention confirm this interpretation:

Article 1 provides that “Title to minerals shall pass upon recovery in accordance with this Convention”.

Article 3 provides that “every approved plan of work shall”: (c) confer on the operator, in accordance with the rules, regulations and procedures of the Authority, the exclusive right to explore for and exploit the specified categories of resources in the area covered by the plan of work.

Therefore, for my delegation, it seems clear that the *provisional approval of a plan work for exploitation* foreseen in subparagraph (c), without being in conformity with the rules, regulations and procedures of the Authority (which are not in place), does not confer exclusive rights of exploitation for commercial purposes to the contractor. Moreover, the lack of regulations of the financial provisions of the contracts (payment system) makes the signing of an exploitation contract between the Authority and the contractor not feasible, and therefore, and in any case allows the start of commercial production.

For the moment, these would be our first considerations. We will provide our written statement to the Secretariat together with an English translation for delegations to consult.

Thank you so much.