

Opening remarks to informal dialogue

8 March 2023

1. First, let me wish everyone a very happy International Women's Day 2023.
2. I wish to thank the co-facilitators for organizing this webinar. I also wish to thank all the participants for their interest in this important discussion, including those that have sent in written submissions.
3. It is clear that the issue that is under discussion today has generated a lot of interest and it is also clear that there are widely differing positions that are potentially very difficult to reconcile. It is very appropriate therefore that we have been able to find space and time to have a mature discussion in this informal environment. I congratulate Belgium for taking the initiative to call for this consultation, and thank also Singapore for taking up the request to co-facilitate.
4. In putting forward some initial considerations I do not wish to pre-empt the discussion that you are going to have. Nor do I wish to prejudge the different submissions and legal arguments that have been raised. I do however wish to make six brief points.
5. **First:** I believe everyone would agree that the best way to ensure effective management of legitimate activities in the Area and the protection of the marine environment is through the adoption of RRPs consistent with Article 145 and other provisions of Part XI, the application of those RRPs to proposed plans of work, and the subsequent monitoring and enforcement of activities in the Area to ensure continued compliance with the RRPs. I believe all members of ISA would agree with this proposition.
6. If that is the case, then it follows that our collective responsibility is to continue to work diligently towards the adoption of RRPs within the timeframe set out in UNCLOS and the 1994 Agreement whilst at the same time maintaining the evolutionary approach to the functioning of ISA to ensure that it is equipped to apply and implement the RRPs. Again, I believe all members of ISA would agree with this proposition. I might add that I feel very much encouraged by the positive developments in New York last week that the spirit of compromise and progress is in the air and that we have every possibility of achieving this objective.

7. **Second:** It is the right of any State party to submit or to sponsor an application for approval of a plan of work for exploitation. Again, I believe all members of ISA would agree with this proposition. It is worth recalling here that nowhere in UNCLOS or the 1994 Agreement does it say that two year's notice is a prerequisite for an application. An application could be submitted without such notice. Whilst the 1994 Agreement took an evolutionary and precautionary approach by separating the exploration phase from the exploitation phase, it did not alter the fundamental rights of all States. In this sense, the two-year notice provision is designed to avoid the Council being taken by surprise.
8. **Third,** it is important to take note that no application is pending at the present time and that Nauru indicated to us last November that it had no intention to sponsor an application for approval of a plan of work before the end of the July 2023 session of ISA.
9. **Fourth:** We should not overlook the fact that UNCLOS, the 1994 Agreement and the RRP's of ISA already provide a basic process and framework for dealing with applications for approval of plans of work. We should remind ourselves that we are working towards the adoption of regulations to implement existing law and regulate the activities of future contractors, not to create new law or change existing rights and obligations of States. In fact, in many ways, our task is much simpler than that facing the BBNJ negotiators in New York. Within this existing framework, the organs and bodies of ISA have clearly delineated responsibilities. In simple terms, this framework implies that:
 - a. The duty of the secretariat is to receive an application and place it before the Legal and Technical Commission.
 - b. The task of the Legal and Technical Commission is to consider the application in accordance with UNCLOS, the 1994 Agreement and any applicable RRP's. How the Commission considers the application, and how long it takes for the Commission to consider the application, is a matter for the Commission at that stage. If, for example, the Commission considers that environmental baselines are inadequate (based on the scientific judgment of the Commission) it may recommend disapproval of the application or it may require the applicant to provide more information.
 - c. The Commission must eventually make its recommendation to the Council.

- d. The Council must consider the recommendation of the Commission and must then approve or disapprove the application in line with UNCLOS and the 1994 Agreement. In case of lack of consensus in the Council, the decision-making procedure set out in the 1994 Agreement will apply, as it has applied to all applicants so far on the basis of non-discrimination and equality of treatment. That decision-making procedure is carefully designed to balance all interests represented in the Council and it would be dangerous to disturb this balance.
 - e. The full range of dispute settlement procedures under Part XI are available to States parties, applicants for contracts, contractors, and the ISA.
10. **Fifth:** I believe that the co-facilitators and all participants today are motivated by the desire to avoid uncertainty in the interpretation and application of the provisions of UNCLOS and the 1994 Agreement. However, in doing so, I would strongly caution against the temptation to introduce *ad hoc* measures in response to specific situations just because it is convenient to do so. This, I suggest, would only create more uncertainty. We should remind ourselves that, for the past 28 years, it has been faithful adherence to the rule of law that has done more than anything else to build confidence in UNCLOS and its two implementing agreements. The implications of short-term interference with individual parts of the system go far beyond the implications for ISA or for the interests of one contractor, whatever may be our individual concerns or interests.
11. **Sixth:** In looking for a way forward, I encourage participants to be creative in finding a solution, but within the limits of what the law allows. For that reason, when considering any particular proposal, I would like to suggest that the proposal is measured against the following seven tests:
- a. The proposal must not result in *de facto* amendments to UNCLOS or the 1994 Agreement. Each part of UNCLOS and its two implementing agreements are parts of a whole and if we start to change one part, there is nothing to stop us from changing every part.
 - b. The proposal must not interfere with the balance of rights and responsibilities given to all States Parties under UNCLOS, including those assigned to developing States parties.

- c. The proposal must not undermine the scientific and technical independence of the Legal and Technical Commission or pre-empt its decisions in relation to a particular recommendation.
 - d. The proposal must not establish an undesirable precedent for future cases, and should consider the principle of non-discrimination between applicants.
 - e. The proposal must not undermine the decision-making procedures contained in the Part XI Agreement.
 - f. The proposal must not expose the ISA to unnecessary or unforeseen liability.
 - g. The proposal must not undermine the dispute settlement procedures applicable to Part XI, including the independence of the Seabed Disputes Chamber.
12. Any proposal that does not meet these seven tests is unlikely to offer a realistic way forward, no matter its short-term expediency. Furthermore, it is likely to threaten the integrity of UNCLOS, which represents the common denominating factor between the interests of all States Parties.
13. In closing, and I apologize for taking the floor for so long, I encourage States Parties to enter into a dialogue, but at the same time to be pragmatic. The answer to how we deal with possible eventualities (which are at present hypothetical) is unlikely to lie in a battle of legal interpretation. It would be wrong to focus unduly on a single provision, when that provision itself reflects a compromise between different views and is an integral part of the whole. We should not therefore over-complicate the task before us, and we should not overreact. At the end of the day, the system places States Parties, through the Council, in control of the final award of any exploitation contract. The system is robust, comprehensive and carefully designed and we should let the system work as it is intended to do.