International Seabed Authority ISBA/29/C/9

Council

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Statement of the President on the work of the Council of the International Seabed Authority during the first part of the twenty-ninth session

I. Opening of the session

1. At its 313th meeting, on 18 March 2024, the President of the Council, Juan José González Mijares (Mexico), opened the twenty-ninth session. The Council met from 18 to 29 March and held five meetings.

II. Adoption of the agenda

2. At its 313th meeting, the Council adopted the agenda for its twenty-ninth session (ISBA/29/C/1).

3. Later, at its 316th meeting, on 28 March 2024, the Council adopted a new agenda item 21, *Proposal to the Assembly of a list of candidates for the election of the Secretary-General* (ISBA/29/C/1/Rev.1).

III. Election of the President and Vice-Presidents of the Council

4. At its 313th meeting, the President of the Council informed that following the principle of rotation between regional groups, it was the turn of the Western European and other States regional group to nominate a candidate as President. Since that regional group had not yet reached agreement to nominate a candidate, the Council noted that the President for the twenty-eighth session, would preside until the election of the President for the twenty-ninth session.

5. At the same meeting, the Council elected Uganda (African States) and India (Asia-Pacific States) as Vice-Presidents, according to Rule 22 of the Rules of Procedure of the Council of the International Seabed Authority, while Canada (Western European and other States) remained in office as Vice-President until the election of the President took place, according to Rules 22 and 23 of the Rules of Procedure.

6. Subsequently, at its 314th meeting, on 21 March 2024, the Council elected by acclamation Olav Myklebust (Norway) as President of the Council for the twenty-ninth session. The Council also elected Brazil (Latin American and Caribbean States Group) as Vice-President.

IV. Report of the Secretary-General on the credentials of members of the Council

7. At the 316th meeting, on 28 March 2024, the Secretary-General indicated that, as at that date, credentials had been received from 29 members of the Council.

V. Election to fill a vacancy on the Legal and Technical Commission in accordance with article 163, paragraph 7, of the United Nations Convention on the Law of the Sea.

8. At its 313th meeting, on 18 March 2024, the Council elected María Gómez Ballesteros (Spain) to fill a vacancy on the Legal and Technical Commission resulting from the resignation of Adolfo Maestro González (Spain), for the remainder of his term until 31 December 2027 (ISBA/29/C/3).

VI. Status of the contracts for exploration and related matters, including information on the periodic review of the implementation of approved plans of work for exploration.

9. At the 317th meeting, on 28 March 2024, the Council was presented with a report (ISBA/29/C/5) on the status of the contracts for exploration and periodic reviews of the implementation of plans of work for exploration. The Council took note of the content of the report.

10. At the same meeting, the Council considered a note by the Secretariat on the relinquishment of 50 per cent of the area allocated to the Institut français de recherche pour l'exploitation de la mer (Ifremer) under the contract for exploration for polymetallic sulphides between the Institut français de recherche pour l'exploitation de la mer (Ifremer) and the International Seabed Authority (ISBA/29/C/8). The Council took note of the content.

VII. Draft regulations on the exploitation of mineral resources in the Area

11. At its 313th meeting, on 18 March, the Council took up agenda item 10 on consideration of the draft regulations on the exploitation of mineral resources in the Area. All subsequent discussions on the draft regulations took place in informal sessions of the Council, open to participation by members of the Authority and observers.

12. In line with the road map endorsed by the Council in November 2022 (ISBA/27/C/21/Add.2, annex II), the Council decision of 21 July 2023 (ISBA/28/C/24) and with the President's briefing note of 15 February 2024, the President of the Council presented the consolidated text of the draft regulations on exploitation of mineral resources in the Area, as well as a suspense document, a proposal compilation, a matrix of environmental standards and guidelines, and suggested working modalities for the first part of the twenty-ninth session. During the remainder of the session, the Council held thematic discussions on specific aspects of the draft regulations, with the support of the Chair of the Open Ended Working Group, Facilitators and Rapporteurs, and detailed textual discussions chaired by the President of the Council on the basis of the consolidated text.

13. From 18 to 20 March 2024, the Open-ended Working Group of the Council on the financial terms of a contract under article 13, para. 1 of Annex III to the UNCLOS

and under section 8 of the Annex to the Agreement relating to the implementation of Part XI of the UNCLOS 1982 held its tenth meeting. On 18 and 19 March, the topic for discussion was the royalty mechanism and review mechanism. On 19 March, a thematic discussion was held on equalization measures, having Australia as Rapporteur. On 20 March, the Open-ended Working Group held a discussion on environmental externalities. Participants agreed to continue the discussions intersessionally and further refinement of the text.

14. On 20, 21, 25 and 26 March 2024, the Council discussed the President's consolidated text, from the Preamble to draft regulation 25.

15. On 22 March, a discussion was held on the inspection mechanism, having Norway as Rapporteur. Many participants emphasized the need for an Independent Compliance and Enforcement (ICE) mechanism. However, some hesitancy was expressed, as some also saw value in an independent Compliance Committee (CC) that facilitates communication between the Chief Inspector, the Legal and Technical Commission and the Council, while also cooperating with the Secretariat and Member States. Various conceptual issues, including institutional placement, were discussed. The rapporteur invited further written submissions and to continue the intersessional work.

16. The Informal Working Group on Institutional Matters held its Seventh Meeting on 25 March, on the topic of 'effective control'. Divergent views were expressed between the "regulatory control approach" and the "economic control approach". Therefore, the Co-Facilitators indicated that further intersessional work would continue on the topic, inviting all interested delegations to participate.

17. On 26 and 27 March, the Informal Working Group on the Protection and Preservation of the Marine Environment held its Seventh Meeting. On 26 March the topic for discussion was the Environmental Compensation Fund. On 27 March, the topics for discussion were EIA/EIS process, REMPs and Test Mining. At the end of the meeting, the Facilitator invited delegations to continue with intersessional work, and to follow up with written proposals on the various subjects touched upon during the discussions.

18. A thematic discussion was held on Intangible Cultural Heritage definition on 27 March, with the Federated States of Micronesia as Rapporteur. Overall, while there was agreement on the importance of protecting Underwater Cultural Heritage (UCH) and intangible cultural heritage, further clarification and operationalization of UCH and intangible cultural heritage provisions within the regulations were deemed necessary to ensure effective implementation. Participants were invited to pursue discussion intersessionally.

Reports of the negotiations of the draft regulations

19. At the 318th meeting, on 29 March 2024, the Council took note of all oral reports by the Chair of the Open-ended Working Group, Facilitators and Co-Facilitators of the informal working groups, and the Rapporteurs, as well as the summary of the consideration of the President's consolidated text (see annex I). A delegation emphasized the need to accelerate the pace of work and expressed its support for a third meeting of the Council in November 2024, if necessary to make progress on the draft regulations, but indicated that discussion of this proposal could take place in the context of review of the roadmap, scheduled for July 2024.

VIII. Report of the Chair of the Legal and Technical Commission on the work of the Commission at the first part of its twenty-ninth session.

20. At its 313th, on 18 March, the Vice Chair of the Legal and Technical Commission, Ms. Sissel Eriksen, delivered a preliminary report on behalf of the Chair of the Legal and Technical Commission on the work of the Commission at the first part of its twenty-ninth session.

21. At its 316th meeting, on 28 March, the Council took note of the Report of the Chair of the Legal and Technical Commission on the work of the Commission at the first part of its twenty-ninth session (ISBA/29/C/7). Many delegations expressed appreciation for the ongoing hard work of the Commission. The Council noted with appreciation the revised recommendations for the guidance of contractors and sponsoring States relating to training programmes under plans of work for exploration. Many delegations underscored the importance of training opportunities provided by Contractors for developing countries and commended the very positive progress accomplished in increasing the participation of qualified women under the Women in Deep-sea Research project. Many delegations also welcomed the launch of the "ISA Capacity Development Alumni Network" (iCAN) as a way to further enhance ownership and expertise in deep-sea related disciplines.

22. The Council also took note of the adoption by the Commission of criteria for identifying contractors at risk of non-compliance as well as the modalities for facilitating an exchange of views with contractors. The Council took note of a draft regulation relating to certificates of origin, proposed by the Commission on the basis of a suggestion by Belgium, and decided to include the proposed draft regulation in the next iteration of the President's Consolidated Text.

23. The Council also noted with appreciation the progress on the development of environmental threshold values as well as the advanced work on the development of a standardized procedure and template for the development, establishment and review of regional environmental management plans, noting that some aspects of the standardized procedure would need to be updated for alignment purposes with the regulations for exploitation of mineral resources in the Area when adopted.

24. The Council took note of the ongoing development of the guidance note for the implementation of the standardized procedure and template and looked forward to the presentation of the package at its next meeting.

IX. Cooperation with other relevant international organizations

25. At the 316th meeting, on 28 March 2024, the Council considered a memorandum of understanding (MOU) between the International Seabed Authority and the Food and Agriculture Organization of the United Nations (FAO) (ISBA/29/C/2). The purpose of this MOU is to facilitate cooperation and collaboration between the Authority and FAO in the areas of common interest, in particular in relation to deep sea fisheries and Areas Beyond National Jurisdiction (ABNJ) matters. The Council approved the memorandum of understanding and requested the Secretary-General to sign the MOU and ensure appropriate coordination with FAO of policy measures within their respective mandates in ABNJ to achieve its objectives.

X. Report on cooperation with the OSPAR Commission

26. At the 316th meeting, on 28 March 2024, the Secretary-General presented a report (ISBA/29/C/6) on cooperation with the Commission for the Protection of the Marine Environment of the North-East Atlantic (OSPAR Commission). The report

had been requested by the Assembly at its twenty-eighth session, concerning the decision adopted by the OSPAR Commission, resulting in the extension of the scope of the North Atlantic current and Evlanov Sea basin marine protected area ('NACES MPA') over the Area, and its potential implications on the exclusive mandate assigned to the Authority over the Area by the Convention. Some delegations emphasized the importance of preserving the Authority's mandate in relation to regulating and organizing activities in the Area including the protection of the marine environment and proposed that a framework for coordination with the OSPAR Commission be developed. Another delegation also raised the polarization of debate pertaining to the exclusive mandate of the Authority in various organizations and called upon members of the Authority to maintain the integrity of the mandate of the Authority whilst preventing further polarization to occur. Several delegations recognized the specific and exclusive mandate of the Authority. Many delegations also recalled that the measures adopted by the OSPAR Commission could only be considered as binding on OSPAR Contracting Parties. Some noted that both organizations could have in certain circumstances, complementary roles to play. Many delegations welcomed the efforts engaged by the Secretariat to enter into dialogue with the OSPAR commission and were of the view that the memorandum of understanding signed between both organizations should serve as basis to ensure proper consultation and coordination.

27. The Council took note of the report and requested the Secretary-General to provide regular updates on the status of cooperation between the two organizations.

XI. Report of the Secretary-General on incidents in the NORI-D contract area in the Clarion-Clipperton Zone

28. At the 315th meeting, on 22 March 2024, The Council took note of the report (ISBA/29/C/4/Rev.1) of the Secretary-General on incidents in the **NORI-D contract area in the Clarion-Clipperton Zone**.

29. Whilst the majority of delegations expressed support for the right to protest at sea, they also recognized that such a right was not absolute and was limited by the rights of other States in their exercise of the freedoms of the high seas, and also must be carried out with due regard for the rights with respect to activities in the Area in accordance with UNCLOS.

30. A sponsoring State stressed the need to take action to prevent obstruction of activities in the Area, to allow the exercise of sovereign rights as a sponsoring State and to ensure the protection of human life at sea. That sponsoring State proposed the establishment of a safety zone of up to 500 metres around vessels and installations conducting activities in the Area as an interim measure until a revision of ISA exploration regulations.

31. The flag State of the 'Arctic Sunrise' stated its position on the right to protest at sea and described in detail the exercise of its flag State's responsibilities and exclusive jurisdiction over the vessel. Reference was made to the decision of the Amsterdam District Court and the Report of the Human Environment and Transport Inspectorate of the Dutch Ministry of Infrastructure and Water Management.

32. The exchange of views that followed the statements diverged on the manner to address the issue under discussion but called for dialogue to ensure the safety of life at sea for protesters and contractors. It was not questioned that ensuring safety at sea had guided actions taken and that the exercise of the right to protest cannot compromise safety at sea. It was recalled that what is safe on land can quickly become risky at sea. A suggestion to adhere to a code of conduct was made.

33. It was also recalled that under Article 146 of UNCLOS, with respect to activities in the Area, necessary measures shall be taken by ISA to ensure effective protection

of human life. Some delegations favoured the adoption of measures in order to prevent interference with Contractors' activities, including by means of establishing a safety zone. However, several delegations expressed that the Authority should coordinate such measures with the International Maritime Organization (IMO) Maritime Safety Committee. Some delegations considered that Regulation 33 of the Regulations on Prospecting and Exploration in the Area was not a sufficient basis for the Secretary-General to take immediate measures as this provision does not refer to the safety of life at sea and did not provide any basis for the immediate measures issued on those grounds. Others were of the view that such immediate measures of a temporary nature were necessary and appropriate, and that the Secretary-General had fulfilled his obligation under UNCLOS and accordingly, asked that the Secretary-General continue to take appropriate and necessary action should the need occur.

34. At the 318th meeting, on 29 March 2024, the Council was informed by a delegation that it was consulting with other delegations with a view to proposing a draft decision of the Council identifying appropriate measures to ensure the safety of human life when activities in the Area are being undertaken. Several delegations noted the urgency of this topic.

Annex

Reports on progress made by the working groups

A. Oral report delivered by the Chair of the Open-ended Working Group in Respect of the Development and Negotiation of the Financial Terms of a Contract, Olav Myklebust (Norway)

1. The meetings of the Open-Ended Working Group took place on 18 March, 19 March and 20 March 2024. To recall, the delegations had been invited to prepare for the meeting based on the Chair's meeting note shared with the delegations on 1 March 2024.

2. At the commencement of the meeting, the Chair provided a brief overview of the agenda of the Open-Ended Working Group, and recalled the guiding questions previously proposed to inform the discussions, which were formulated based on the main outstanding conceptual issues. The Chair also reminded the participants that the Open-Ended Working Group would have the benefit of the presence of two distinguished experts: Dr Richard Roth from the MIT and Dr Luke Brander.

3. The first discussion point focused on the issue of incentives. It was recalled at the outset that both the purposes and the categories of incentives had been matters in discussion. In the context of the unfolding discussion, it remained a debated issue whether incentives may address the disparity of the concentration of resources, most delegations expressing, however, some opposition to this possibility. It has emerged from the discussion that there appears to be general agreement that financial incentives should be available, but it remained uncertain what other categories of incentives may also be introduced. Several delegations emphasized the importance and necessity of incentives supporting the transfer of technologies and training.

4. The second issue discussed in detail was the review of the payment system and the payment mechanism. In this context, Canada has provided a detailed update on the intersessional work. This intersessional work entailed the elaboration of new proposed standards, which have been, for the time being, included in the Suspense Document. Delegations were invited to consider these proposals in detail and continue the constructive inter-sessional work on them. Delegations disagreed on whether it is appropriate to incorporate the concepts of environmental impacts in the review of the payment mechanism.

5. The discussions moved to the issue of the commencement of commercial production (as now reflected in Draft Regulation 27). Canada provided further explanations of the relevant part of the intersessional work, and the proposed alternative wording put forward for the Regulation gained wide support. The issue of the role and rights of coastal States arose in this context, but it was eventually agreed that the proposed standard text, put forward by Canada and now included in the Suspense Document, adequately tackles this aspect.

6. In relation to the commencement of commercial production, the issue of the date on which payments from contractors should commence also arose. The Secretary-General, addressing the floor, emphasized the need to consider the need for an annual fixed fee from the date of the contract, regardless of commercial production. The purpose of such a fee, which was provided for in the 1982 Convention, is to ensure that member States are not required to subsidize the costs of managing contracts prior to the date of commercial production. Once commercial production starts, the royalty regime would replace the fixed fee.

7. Following the conceptual discussions, delegations continued with a regulation-by-regulation discussion of particular regulations relevant to the financial terms, which has

resulted in further refinement of, and in certain respects commendable agreement on, previously open matters.

8. The final part of the meeting of the Open-Ended Working Group focused on the issue of environmental externalities. Dr Luke Brander provided a detailed overview of his work carried out for the benefit of the Council last year, addressing, among other issues, the required level of certainty a policy-maker should possess when factoring ecosystem valuation into policy-making. The floor was open for comments and questions, with delegations expressing divergent views on whether environmental externalities should (and even possibly could) be internalized in the royalty mechanism. A central part of this discussion appeared to focus on how the internalization of externalities would affect the position of contractors when compared with those of land-based miners.

9. In closing the session, the Chair provided a brief summary of the meeting, and urged participants to continue the constructive discussions intersessionally.

B. Oral report delivered by the facilitator of the informal working group on the protection and preservation of the marine environment, Raijeli Taga (Fiji)

10. The meetings of the informal working group took place on 26 and 27 March 2024. The facilitator's briefing paper, issued on 1 March 2024, had outlined the proposed questions to frame and orientate the discussions, with a view to narrowing down and precisely defining the still outstanding, specific conceptual issues. During the opening minutes of the meeting, the facilitator recalled the guiding questions and, absent any objection from the floor to proceed along the proposed modalities, substantive discussion on the guiding questions ensued, involving both delegations and observer parties.

11. The first overarching topic under discussion was the issue of the Environmental Compensation Fund. The discussions covered several outstanding issues. These included the issue of whether the liability regime applicable to the compensation mechanism should be a strict or fault-based liability regime; the issue of how best to ensure the management of the Fund; the issue of damages eligible for compensation from the Fund; and the issue of the scope of parties entitled to receive compensation from the Fund. Overall, a divergence of views remained apparent on most of these issues. In respect of on the applicable liability regime, certain delegations emphasized that imposing a strict liability regime would be at odds with the Convention, but other delegations noted that to do so would be in line with other environmental compensation mechanisms. Most delegations expressed support for codifying only the establishment and the foundational rules of the Fund within the Exploitation Regulations (recording the already agreeable parameters of the Fund), with more detailed rules to be included in standards and guidelines. Several participants emphasized that the focus on the Fund should not detract from the primary focus being the prevention of environmental harm and the finalisation of the relevant regulations to achieve this goal.

12. On the second day of the meetings of the working group, the discussion turned to the issues of environmental impact assessment and environmental impact statements. The United Kingdom (who coordinated intersessional work along with Germany and Netherlands) provided an update to the working group on the most recent proposals, presenting the working group with an overall restructuring proposal. The aim of the proposal is to strike a balance between more high-level provisions to be included in the Regulations, and more technical provisions being relegated to standards or guidelines. The restructuring proposal gained considerable support from member States and participants. The United Kingdom has indicated that work may continue in the framework of a drafting group, which member States were encouraged to participate in.

13. The third part of the discussions revisited the issue of regional environmental management plans. The majority of contributing members and delegates agreed that regional environmental management plans are first and foremost policy documents. Multiple contributors proposed to explore ways to give effect to specific parts of REMPs by way of binding instruments. The facilitator recalled that the Secretariat had issued a recent discussion paper on this matter.

14. The final part of the meeting of the working group focused on the issue of test mining. As the coordinator of intersessional work, Germany opened the discussion by providing an update on the current state of the discussions, pointing out that overall agreement on the matter has not yet crystallized in the intersessional period. As the unfolding discussions demonstrated, it remains a point of disagreement whether the Convention allows the exploitation regulations to prescribe test mining prior to the approval of a plan of work for exploitation; or it is an indispensable first step to have a contract already in place by the time test mining commences. Delegations have also reflected on the status of test mining in the context of exploration contracts. It has been suggested that a more streamlined approach may be considered in circumstances where a particular type of mining equipment has already been tested, in order to avoid unnecessary repeat testing.

15. In closing the meeting of the working group, the facilitator invited delegations to indicate their interest in participating in further intersessional work to the Secretariat, and to follow up with written proposals on the various subjects touched upon during the discussions. The deadline for written submissions is 1 May 2024.

C. Oral report delivered by the rapporteur of the thematic discussion on the ICE mechanism, Mr Terje Aalia (Norway)

16. The thematic discussion on the ICE mechanism took place on 22 March 2024. The discussion among Member States and other participants was organized along the lines of the guiding questions proposed by Norway, which had been available on the ISA's webpage since 13 March 2024.

17. At the outset of the session, the rapporteur briefly summarized the background of the issues before the Council and the intersessional work, recalling in summary format the variety of previous proposals on the ICE mechanism. This overview reflected on an ICE mechanism from the 27th and the 28th sessions, and the most recent proposal, which is the one presented by Germany on what is now Draft Regulation 102 in the President's Consolidated Text.

18. The discussion commenced with the German delegation setting out the rationale of their proposal. Among other points, it was emphasized that the proposal aims to demonstrate a strong compliance regime, comparable to other international mechanisms. While the proposal would aim to ensure an overall Member State-controlled process, emphasis was also put on the need not to undermine the role of existing compliance mechanisms, the functioning of the Legal and Technical Commission in this respect, and ensuring the involvement of the Secretariat.

19. Following this proposal, a number of delegations expressed overall appreciation for it, while others emphasized that the previously proposed hybrid model should still serve as a preferred basis for further discussions. Although several delegations agreed that the Council is entitled to create new organs in accordance with the Convention, at the same time, other delegations questioned the need for creating a new organ, potentially with a mandate and competence overlapping with those of existing organs. It has also been raised whether the Regulations are the format in which the Council is entitled to establish new organs - as opposed to other decisions. These delegations invited further assessment of this matter. Several delegations

emphasized the utility of following an ”evolutionary approach”. The discussions then continued on the basis of the guiding questions outlined by the rapporteur.

20. The first question raised the issue of situating the proposed Compliance Committee within the institutional framework of the Convention. In the light of the discussions which unfolded on this item, it appears that several delegations find it important to ensure the independence of the Committee, while other delegations questioned the rationale of making the Committee independent from the LTC. However, delegations presented diverging views as to how best this independence should be understood. It has been emphasized that the politicization of the Committee should be avoided. The need to consider cost-efficiency in devising the system was also referred to. Discussions also addressed whether the Committee should be positioned under the Council or under or within the LTC. Positions continue to diverge on this matter and it was suggested that views from the LTC should also be considered.

21. The next question addressed the scope of the decision-making powers of the Committee. It has been suggested that the Compliance Committee should be entitled to issue compliance notices, emergency orders and orders to undertake immediate action. Other delegations underlined that the Compliance Committee should be empowered to review inspection reports and issue compliance notifications, while allowing the Legal and Technical Commission to continue carrying out the responsibilities it has historically been carrying out pursuant to the Convention.

22. On the third question concerning the composition of the Compliance Committee, several delegations emphasized the need to incorporate criteria in order to ensure that members of the Committee have the required technical qualifications and credentials, as well as ensuring equitable geographic distribution. It has been suggested that a hierarchy between the Compliance Committee and the Legal and Technical Commission should be avoided.

23. In the concluding remarks, the rapporteur invited further written submissions, also on the remaining guiding questions to facilitate continuing the intersessional work, with a view to bringing delegates closer to securing a robust inspection, compliance and enforcement mechanism, consistent with the call of several delegations for further work on this matter. With the indulgence of the group, we may initiate intersessional work to this effect, and then continue the work at the next Council meeting in July.

D. Oral report delivered by the distinguished co-facilitators of the Informal Working Group on Institutional Matters, H.E. Amb. Gina Guillén-Grillo (Costa Rica) and Mr. Salvador Vega Telias (Chile)

24. The Informal Working Group on Institutional Matters met on 25 March 2024. As the briefing note issued by the co-facilitators before the meeting had set out in further detail, the topic of the discussion was the issue of effective control. At the commencement of discussion, the co-facilitators underscored the relevance of the subject matter (which was also reflected in the negotiating history of the Convention) and provided a brief overview of the status of the discussions.

25. The co-facilitators reminded the delegates and other participants that a variety of approaches to the issue of effective control exist in international law, depending on the context in which the concept arises. As the co-facilitators recalled, two particular formulations, which had been referred to in the context of State sponsorship of contractors in the exploitation regime, are the “regulatory control approach” and the “economic control approach”.

26. Once the floor was open for comments, several delegations addressed the two different approaches. It has become apparent that a divergence of views remains, but multiple delegations have voiced the possibility of finding a reconciliation between the two approaches.

27. Delegations who supported the "regulatory control approach" underlined that adhering to this approach would be in accordance with UNCLOS and the 1994 Agreement, and the practice consistently followed in the context of the exploration regulations. According to the delegations raising this point, introducing a new approach would amount to changing what was describes as the traditionally accepted interpretation of the concept of effective control under UNCLOS and the 1994 Agreement, and would undermine the premise that the decision whether to sponsor a contractor is a matter to rest between the sponsoring State and the contractor. However, a number of other delegations noted that adopting the "economic control approach" would be permissible, and would in fact reflect the practice followed within some domestic legal systems, with examples of best practices being available to study, adopt, and develop solid mechanisms for the exploitation phase, fulfilling the mandates flowing from the Convention.

28. Delegations disagreed on how the implementation of an "economic control approach" would bear upon the position of developing States. Certain delegations maintained that the practical consequence of such an approach would be the prevention of less developed States from sponsoring contractors. Other participants pointed out that developing States would in fact benefit from the implementation the "economic control approach", which would also facilitate enforcement against assets in case that becomes necessary.

29. A number of delegations have also reflected on the ramifications of effective control rules for the liability of States. Those who supported adhering to the "regulatory control approach" emphasized that the obligations of the sponsoring State are, by their nature, obligations of conduct (as reflected in the 2011 Advisory Opinion of the Seabed Disputes Chamber of ITLOS), which, in essence, impose obligations on the sponsoring State to introduce an appropriate regulatory framework to apply to the contractor. At the same time, other delegations referring to the ITLOS Advisory Opinion recalled the importance of avoiding a situation where "jurisdictions of convenience" are created as a result of the sponsorship regime, allowing unduly lenient regulation and supervision of contractors. This was described as a factor militating in favour of the "economic control approach". In response, it was pointed that the supervision of contractors fundamentally remains the responsibility of the Authority, and in circumstances where the Authority carries out its responsibility in accordance with robust regulations, lenient regulation and a competition between "jurisdictions of convenience" should be by definition impossible even if the "regulatory control approach" is followed.

30. In concluding the meeting, the co-facilitators indicated that further intersessional work would continue on the topic, inviting all interested delegations to express their wish to participate to the Secretariat.

E. Report of Thematic Discussion of an Equalization Measure

31. On Tuesday, 19 March, the Council held a thematic discussion on an Equalization Measure as part of the Financial Terms of Contracts, in an informal setting.

32. Dr Daniel Wilde of the Commonwealth Secretariat and Dr Richard Roth of MIT provided expert input to the discussions. On behalf of those who participated in this thematic discussion, I thank them for their assistance.

33. Dr Wilde gave a presentation explaining the legal basis in the Convention and the 1994 Implementation Agreement for an equalization measure. His presentation is available on the Authority's website.

34. Dr Wilde also explained why the average effective tax rate provides a sound basis for comparing the tax burden on land based miners producing the same metals as may be recovered from the Area, and the potential tax burden on deep seabed miners under the base royalty models produced by MIT. He also provided an overview of the two options shortlisted by the intersessional working group on an equalization measure.

35. The two options are:

A **hybrid model** by which a contractor shall pay to the Authority a royalty **additional** to the base royalty if they receive tax exemptions or subsidies against which sponsoring state payments are creditable, or alternatively, the contractor and its related entities pay a 25% **'top-up' profit share** to the Authority against which all payments to states related to mining activities are creditable. The definitions of related entities and profits would be based on the OECD Globe Rules

The second model, which was developed with the assistance of the IGF, requires a contractor to pay a 25% **additional profit share** to the Authority against which sponsoring state payments are creditable.

36. Draft text for the hybrid model was included in the report of the Intersessional Working Group on an Equalization Measure before the November 2023 meeting of the Council and is also included in the Suspense Document. Draft text for the additional profit share model was provided in the Briefing Note for the August 2023 meeting of the Intersessional Working Group on an Equalization Measure, but for ease of reference is also published on Authority's website under the papers for Thematic Discussions during Part 1 of this Council session.

37. Delegations that took the floor supported the inclusion of equalization measure in the draft Regulations.

38. There was also support for including a simple provision in the draft regulations to provide for an equalization measure, with details of the preferred model for an equalization measure to be provided in a Standard. Dr Wilde suggested in his presentation that draft text could read:

'A contractor shall pay the equalization measure provided for by the Equalization Measure Standard.'

39. However, there was no consensus on which of the two models for an equalization measure is preferred, with some delegations stating they need to consider the two options further.

40. Among the issues on which delegations sought clarification was the treatment of sub-contractors under the two models for an equalization measure. A further issue raised was how an equalization measure would apply to the Enterprise.

41. Some delegations also expressed support for an equalization measure that would address environmental externalities. However, Dr Wilde and Dr Roth explained that the two models under consideration addressed the equalization of corporate taxes only, and did not address environmental issues, which were the subject of a separate discussion.

42. As the hybrid model and the additional profit share model are relatively complex, Australia can facilitate further intersessional discussions on these models if delegations so wish.

F. Report on the thematic discussion on the issue of "Intangible Cultural Heritage" definition.

43. On the afternoon of Wednesday, 27 March 2024, the Council held a thematic discussion on the issue of "Intangible Cultural Heritage" definition. For the discussion, delegations were invited to consider the issue of "intangible" cultural

heritage in connection with activities in the Area, Delegations also received brief recap of the intersessional work.

44. For the thematic discussion, delegations were invited to address up to three guiding questions:

1. Should the exploitation regulations address “intangible” underwater cultural heritage?

2. If the exploitation regulations are to address “intangible” underwater cultural heritage, then should the concept be defined in the exploitation regulations, and if so, what would be an appropriate definition?

3. Assuming that the exploitation regulations address “intangible” underwater cultural heritage, what would such regulatory language look like?

45. On the first guiding question, on whether the exploitation regulations should address “intangible” underwater cultural heritage, most delegations responded either in the affirmative or with openness to the possibility of the exploitation regulations addressing “intangible” underwater cultural heritage. A number of delegations pointed to support in existing international law and related instruments and processes for addressing the notion of “intangible” underwater cultural heritage, including the 2001 and 2003 UNESCO Conventions on underwater cultural heritage and intangible cultural heritage, respectively; the references to traditional knowledge of Indigenous Peoples and local communities in the recently adopted BBNJ Agreement; as well as references in the United Nations Declaration on the Rights of Indigenous Peoples. Delegations also noted that cultural heritage is associated in various forms with the marine environment, including that of the Area, and that there are existing domestic regulatory practices that acknowledge and accommodate this, including environmental impact assessments that incorporate socio-cultural dimensions.

46. It was also stressed, however, that there might be a need to consider a more fundamental threshold question of whether the terminology of “underwater cultural heritage” is a suitable one for the exploitation regulations, given that article 149 of UNCLOS refers to “objects of an archaeological and historical nature” rather than “underwater cultural heritage”. It was further stressed that it might be premature to discuss a differentiation between “tangible” and “intangible” underwater cultural heritage before addressing this fundamental threshold question.

47. Another view was expressed that even if the exploitation regulations were to use the language in article 149 of UNCLOS, that language would still have to be interpreted and implemented broadly, and likely in line with the concept of “underwater cultural heritage” as reflected in the 2001 UNESCO Convention.

48. On the second guiding question, on whether the concept of “intangible” underwater cultural heritage should be defined in the exploitation regulations, and if so, how, delegations that expressed openness to such a definition considered, among other matters, the 2001 and 2003 UNESCO Conventions on underwater cultural heritage and intangible cultural heritageparticularly their definitions for “underwater cultural heritage” and “intangible cultural heritage.” A number of delegations looked favorably in particular to the definition of “intangible cultural heritage” in the 2003 UNESCO Convention for a possible model for the exploitation regulations, noting that the 2003 UNESCO Convention has been widely ratified. However, it was also noted that the 2003 UNESCO Convention applies only to intangible cultural heritage in the territories of its State Parties and might therefore not be a wholly suitable fit as a model for defining and regulating “intangible” underwater cultural heritage in the exploitation regulations.

49. Aside from the references to the UNESCO Conventions, delegations generally noted that intangible "underwater cultural heritage" typically reflects certain close cultural connections to the marine environment, particularly as expressed, practiced, and passed down through generations by Indigenous Peoples and local communities in the form of traditional knowledge, origin legends, navigational techniques, oral traditions and expressions, social and religious practices and rituals, and performing arts.

50. On the third guiding question, as to what regulatory language in the exploitation regulations would look like if the regulations were to address "intangible" underwater cultural heritage, delegations presented and discussed a rich range of options. Delegations broadly expressed openness for a recent proposal by Spain on the system of protection that would be utilized when encountering underwater cultural heritage associated with activities in the Area, particularly "tangible" underwater cultural heritage such as human remains, wrecks, and human-made artifacts. This system of protection would build on existing draft exploitation regulation 35 and involve notifications to and consultations with, among others, States that are origins of the encountered cultural heritage or otherwise associated with the heritage, as well as with relevant intergovernmental organizations like UNESCO and relevant Indigenous Peoples and local communities. Such a system of protection could also apply to "tangible" underwater cultural heritage that have associated "intangible" aspects. However, for so-called "pure intangible" underwater cultural heritage that is not directly connected to physical elements of the marine environment, the proposal from the intersessional period suggested that such cultural heritage would be better addressed through the creation of particular environmental zones of interest that highlight the cultural nature of those zones. It could also be addressed through the establishment of area-based management tools under other instruments and processes, such as under the BBNJ Agreement. Under this approach, it would be the Indigenous Peoples, local communities, and other concerned Stakeholders who would take the initiative to bring their proposals to the Authority or other relevant organizations.

51. A number of delegations also stressed that regulatory language on "intangible" underwater cultural heritage should be linked as much as possible to specific sites in the Area, and that there needs to be a process for establishing and verifying such a link. It was also stressed that safeguarding such heritage through regulatory language must be done in a manner that is reasonable, feasible, practical, and based on broadly accepted definitions and approaches under international law.

52. A number of delegations discussed in a preliminary manner possible regulatory text, including language on obligations on Contractors to report encounters with underwater cultural heritage, or language incorporating such heritage as subjects of seabed baseline surveys and EIAs conducted by Contractors, and language based on the adequacy of an application for a plan of work in part on whether cultural rights and interests have been adequately identified by the applicant Contractor.

53. A number of delegations also stressed the relevance of language on the rights of Indigenous Peoples such as free, prior, and informed consent, especially as reflected in the United Nations Declaration on the Rights of Indigenous Peoples, in order to aid in safeguarding "intangible" underwater cultural heritage as well as to facilitate the full and effective participation of Indigenous Peoples in the work of the Authority on matters that affect them. A suggestion was also made to establish a Committee on Intangible Cultural Heritage in the Authority to address such heritage in a standing manner.

54. To conclude, the rapporteur recommended that the intersessional working group on underwater cultural heritage continues its work during the upcoming

intersessional period, building on the thematic discussion, and reports to the Council on that work in the second part of the Council's 29th Session. Unless otherwise instructed, the Federated States of Micronesia will continue facilitating that intersessional working group. The rapporteur thanked delegations for their interest and active engagement in the thematic discussion and the intersessional working group, and to the representatives of Indigenous Peoples for contributing to the discussions.