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2020/0372 (NLE)

Proposal for a

COUNCIL DECISION

**on the position to be taken on behalf of the European Union at the meetings of the
International Seabed Authority Council and Assembly**

EXPLANATORY MEMORANDUM

1. SUBJECT MATTER OF THE PROPOSAL

This proposal concerns the decision establishing the position to be taken on the Union's behalf at meetings of the International Seabed Authority Council and Assembly in connection with the envisaged adoption and implementation of regulations on exploitation of mineral resources in the Area (ISBA/25/C/WP.1) and the related standards and guidelines.

2. CONTEXT OF THE PROPOSAL

2.1. The draft regulations on exploitation of mineral resources in the Area

The draft regulations on exploitation of mineral resources in the Area ('the Regulations') aim to enable contractors to move from the exploration of mineral resources in the Area to the exploitation of those resources. The draft regulations prepared by the Legal and Technical Commission of the International Seabed Authority were circulated in March 2019 and are currently being negotiated by the International Seabed Authority Council. The regulations are drafted in accordance with part XI of the United Nations Convention on the Law of the Sea (UNCLOS) and the agreement relating to the implementation of the Part XI of UNCLOS. The draft regulations require that certain issues are addressed in accordance with, or taking into account, standards and guidelines to be developed by the organs of the International Seabed Authority. The standards will be legally binding on Contractors and the International Seabed Authority, whereas the guidelines will be recommendatory in nature. The European Union is a party to UNCLOS.¹ Pursuant to Article 2 of Council Decision 98/392/EC of 23 March 1998 the Union and its Member States shall coordinate the positions they adopt in bodies of the International Seabed Authority in accordance with the procedure laid down in Annex III².

2.2. The meetings of the Council of the International Seabed Authority

The Council is the executive organ of the International Seabed Authority. It is within the Council of the International Seabed Authority that the regulations are being negotiated and will subsequently be adopted before they are submitted to the Assembly of the International Seabed Authority, the supreme and political organ comprising 167 members and the European Union, to give its final approval. The Council of the International Seabed Authority will apply the regulations provisionally, pending approval by the Assembly. As a party to UNCLOS, the EU is automatically a member of the Assembly of the International Seabed Authority and an observer to the Council of the International Seabed Authority, which comprises 36 members elected by the Assembly. As a general rule, decision-making in the Council of the International Seabed Authority should be by consensus. If all efforts to reach a decision by consensus have been exhausted, decisions on questions of procedure shall be taken by a majority of members present and voting, and decisions on questions of substance shall be taken by a two-thirds majority of members present and voting. As an observer to the Council of the International Seabed Authority, the EU has no voting rights. However, the EU has participation and voting rights in the Assembly of the International Seabed Authority.

¹ Council Decision 98/392/EC of 23 March 1998 concerning the conclusion by the European Community of the United Nations Convention of 10 December 1982 on the Law of the Sea and the Agreement of 28 July 1994 relating to the implementation of Part XI thereof (OJ L 179, 23.6.1998, p. 1.).

² Normal procedure for positions on questions within the Community's competence; and procedure governed by Title V of the Treaty on European Union for questions falling under the European Union's foreign policy.

2.3. The envisaged provisional adoption of regulations by the Council of the International Seabed Authority

A first draft of the regulations was presented on the 23rd session of the Council of the International Seabed Authority in August 2017. The International Seabed Authority Legal and Technical Commission as well as the Council agreed to a schedule that aims at concluding the negotiations of the regulations by 2020, however due to the covid-19 pandemic the 26th session of the Council planned for July 2020 has been postponed until further notice

The envisaged regulations will be legally binding on the parties in accordance with UNCLOS and to the 1994 Agreement relating to the implementation of Part XI of UNCLOS.

2.4 The envisaged approval of regulations by the Assembly of the International Seabed Authority

Once the Council of the International Seabed Authority will finalize the negotiations of the regulations and will be able to provisionally adopt them, the regulations will be submitted to the Assembly of the International Seabed Authority for its consideration and final approval.

3. POSITION TO BE TAKEN ON THE UNION'S BEHALF

The envisaged regulations also concern substantive matters for which the Union has external competence by virtue of Article 3(2) TFEU.

In particular, the EU has competence on the parts of the regulations dealing with the protection of the marine environment. Following the structure of Article 3(2) TFEU, on a case by case basis, the EU has external competence. In the first place because the provisions of UNCLOS related to the marine environment are provided for in the legislative act concluding UNCLOS on behalf of the Union³. Secondly, because a Union action on the regulations is necessary to enable the Union to exercise its internal competence, such as in the case of acquired environmental competence. Lastly, the EU has external competence since some provisions of the regulations may affect common rules or alter their scope. Here, the EU acquis (particularly in relation to EU secondary legislation in the field of environment, and other international agreements to which the EU is a full party) is covered or may be affected by parts of the draft regulations (or of the related standards and guidelines), giving the EU competence on those specific parts, some of which is exclusive.

As a consequence, the EU is entitled to take position at the International Seabed Authority with respect to the relevant parts of the regulations that are presented in this statement, and the related standards and guidelines. Moreover the principle of loyal cooperation requires Member States to act in a certain manner in the International Seabed Authority proceedings.

It is proposed that the position to be adopted on behalf of the Union at the meetings of the International Seabed Authority Council and Assembly is established according to a two-tier approach. A Council Decision will set out the guiding principles and orientations of the Union's position, and it is subsequently adjusted for each meeting via non-papers prepared by the Commission and to be discussed in the Council Working Party.

The present decision incorporates the principles of UNCLOS and the objectives of the European Green Deal⁴, the Biodiversity Strategy⁵ as called for by the Council Conclusions on

³ Council Decision 98/392/EC

⁴ COM/2019/640 final

⁵ COM/2020/380 final

the Preparation of the post-2020 global biodiversity framework Convention on Biological Diversity (CBD)⁶.

Legal basis

3.1. Procedural legal basis

3.1.1. Principles

Article 218(9) of the Treaty on the Functioning of the European Union (TFEU) provides for decisions establishing *‘the positions to be adopted on the Union’s behalf in a body set up by an agreement, when that body is called upon to adopt acts having legal effects, with the exception of acts supplementing or amending the institutional framework of the agreement.’*

The concept of *‘acts having legal effects’* includes acts that have legal effects by virtue of the rules of international law governing the body in question. It also includes instruments that do not have a binding effect under international law, but that are *‘capable of decisively influencing the content of the legislation adopted by the EU legislature’*⁷.

3.1.2. Application to the present case

The International Seabed Authority Council and Assembly are two of the three principal organs of the Authority set up by Article 158 UNCLOS.

The regulations, which the Council of the International Seabed Authority is called upon to adopt on a provisional basis, constitute an act having legal effects. The final approval of the regulations by the Assembly of the International Seabed Authority also constitute an act having legal effects. The envisaged acts will be binding under international law in accordance with Article 145, 153 and 162 of the UNCLOS and with the Agreement relating to the implementation of Part XI of UNCLOS.

The envisaged acts does not supplement or amend the institutional framework of the Agreement.

Therefore, the procedural legal basis for the proposed decision is Article 218(9) TFEU.

3.2. Substantive legal basis

3.2.1. Principles

The substantive legal basis for a decision under Article 218(9) TFEU depends primarily on the objective and content of the envisaged act in respect of which a position is taken on the Union's behalf.

3.2.2. Application to the present case

The main objective and content of the envisaged act relate to environmental policy.

Therefore, the substantive legal basis of the proposed decision is Article 191 TFEU.

3.3. Conclusion

The legal basis of the proposed decision should be articles 191 TFEU in conjunction with Article 218(9) TFEU.

⁶ <https://data.consilium.europa.eu/doc/document/ST-15272-2019-INIT/en/pdf>

⁷ Judgment of the Court of Justice of 7 October 2014, Germany v Council, C-399/12, ECLI:EU:C:2014:2258, paragraphs 61 to 64.

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THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Articles 191 TFEU, in conjunction with Article 218(9) thereof,

Having regard to the proposal from the European Commission,

Whereas:

- (1) The United Nations Convention on the Law of the Sea (UNCLOS) and the Agreement of 28 July 1994 relating to the implementation of Part XI thereof ('the Agreement') was concluded by the Union by Council Decision 98/392/EC of 23 March 1998.
- (2) Pursuant to Article 162(2)(o)(ii) of the UNCLOS, the Council of the International Seabed Authority may adopt and apply provisionally, pending approval by the Assembly, the rules, regulations and procedures of the Authority, and any amendments thereto, taking into account the recommendations of the Legal and Technical Commission or other subordinate organ concerned. These rules, regulations and procedures shall relate to prospecting, exploration and exploitation in the Area and the financial management and internal administration of the Authority.
- (3) The Council of the International Seabed Authority during its upcoming meetings is to adopt regulations on the exploitation of mineral resources in the Area.
- (4) Pursuant to Article 160(2)(f)(ii) of the UNCLOS, the Assembly of the International Seabed Authority may consider and approve the rules, regulations and procedures of the Authority, and any amendments thereto, provisionally adopted by the Council pursuant to article 162, paragraph 2 (o)(ii). These rules, regulations and procedures shall relate to prospecting, exploration and exploitation in the Area, the financial management and internal administration of the Authority.
- (5) It is appropriate to establish the position to be taken on the Union's behalf in the International Seabed Authority Council and Assembly, as the envisaged regulations will be binding on the Union, as party to UNCLOS and the Agreement relating to the implementation of PART XI of UNCLOS.
- (6) It is also appropriate to establish the position to be taken on the Union's behalf in the International Seabed Authority Council and Assembly, as the regulations on exploitation of mineral resources in the Area will be binding on the Union and capable of decisively influencing the content of Union law, notably in the field of the protection of the marine environment.
- (7) In matters relating to the protection of the marine environment, the EU and its Member States are bound by the precautionary principle (Article 191 of the TFEU) and the ecosystem based approach (Directive 2008/56/EC article 3.4 and 3.5, article 10

and Annexes I and VI; Regulation (EU) No 1380/2013 Article 2.3; Directive 2014/89/EU Article 5). This legal framework justifies the content of the proposed position to be taken on the Union's behalf.

- (8) Insofar as the Union is limited in expressing its position in the Council of the International Seabed Authority due to its limited observer status, the Union's position is to be expressed by the Member States of the Union that are members of the Council of the International Seabed Authority.

HAS ADOPTED THIS DECISION:

Article 1

The position to be taken on the Union's behalf in meetings of the International Seabed Authority Council and Assembly is set out in the Annex.

Article 2

The position of the Union within the International Seabed Authority Council referred to in Article 1 shall be expressed and upheld by the Member States of the Union that are members of the International Seabed Authority Council whenever the Union is limited in expressing its own position due to its limited observer status

Article 3

This Decision is addressed to the Commission and the Member States.

Done at Brussels,

*For the Council
The President*