



Council of the
European Union

Brussels, 23 July 2021
(OR. en)

11056/21

LIMITE

JUR 432
COMAR 20
COJUR 20
ENV 549

OPINION OF THE LEGAL SERVICE¹

From:	Legal Service
To:	Working Party on the Law of the Sea
Subject:	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 <ul style="list-style-type: none">• Nature of EU competence• Application of Article 218(9) TFEU

DOCUMENT PARTIALLY ACCESSIBLE TO THE PUBLIC (19.09.2023)

I. INTRODUCTION

1. On 8 January 2021, the Commission submitted a proposal based on Article 191 TFEU and Article 218(9) TFEU 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 (hereinafter 'the proposed Decision')².

¹ This document contains legal advice protected under Article 4(2) of Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, and not released by the Council of the European Union to the public. The Council reserves all its rights in law as regards any unauthorised publication.

² Doc. 5139/21 and 5139/21 ADD 1.

2. **DELETED**

3. Following the request to provide a written advice, the present contribution confirms, and further develops in writing the answers given by the Council Legal Service ('CLS') at the informal videoconferences of the members of COMAR.

II. LEGAL FRAMEWORK

4. As a legal successor to the European Community ('EC'), the European Union is party to the United Nations Convention of 10 December 1982 on the Law of the Sea ('UNCLOS') and to the Agreement of 28 July 1994 relating to the Implementation of Part XI of UNCLOS (the '1994 Agreement').³ Part XI of UNCLOS regulates the activities of exploration for and exploitation of the resources in the "Area", in which Article 1(1) UNCLOS defines as *'the sea-bed and ocean floor and subsoil thereof, beyond national jurisdiction.'* It also provides for the necessary measures to ensure effective protection of marine environment from harmful effects which may arise from such activities (Article 145 UNCLOS).
5. According to Article 156(2) UNCLOS *"[a]ll States Parties are ipso facto members of the Authority"*. The Authority is the organisation *"through which States Parties shall (...) organize and control activities in the Area, particularly with a view to administering the resources of the Area"*.⁴ The organs of the Authority include an Assembly, a Council (hereinafter 'ISA Council') and a Secretariat.⁵ The Assembly, which consists of all the members, is the supreme organ,⁶ and is competent to consider and approve the rules, regulations and procedures of the Authority, and any amendments thereto, which were provisionally adopted by the ISA Council.⁷

³ The EC became party to the two instruments following the adoption of 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) and the deposit of the instrument of confirmation contained in Annex II to Council Decision 98/392/EC.

⁴ Article 157(1) UNCLOS.

⁵ Article 158(1) UNCLOS.

⁶ Article 160(1) UNCLOS.

⁷ Article 160(2)(f)(ii) UNCLOS.

6. The ISA Council, which consists of 36 members of the Authority, is its executive organ.⁸ It may adopt and apply provisionally, pending approval by the Assembly, the rules, regulations and procedures of the Authority related to prospecting, exploration and exploitation in the Area and the financial management and internal administration of the Authority, taking into account the recommendations of the Legal and Technical Commission or other subordinate organs concerned. Importantly, the rules, regulations and procedures remain in effect on a provisional basis until approved by the Assembly or until amended by the ISA Council in the light of any views expressed by the Assembly.⁹ Currently, the following EU Member States are also members of the ISA Council: Italy, France, Germany, Poland, the Czech Republic, the Netherlands, and Spain.¹⁰ While the European Union is a fully-fledged member of the Assembly, it has only an observer status within the ISA Council.¹¹
7. A declaration made in 1998 by the EC pursuant to Article 5(1) of Annex IX to the UNCLOS¹² (and to Article 4(4) of the 1994 Agreement) specifying the matters governed by the Convention (and the 1994 Agreement) in respect of which competence has been transferred to it by its Member States (hereinafter 'the declaration of competences') states with regard to the provisions on the prevention of marine pollution contained, *inter alia*, in Part XII of the Convention, that '*the Community has exclusive competence only to the extent that such provisions of the Convention or legal instruments adopted in implementation thereof affect common rules established by the Community*' and '*[w]hen Community rules exist but are not affected, (...), the Member States have competences, without prejudice to the competence of the Community to act in this field*'.

⁸ Article 162(1) UNCLOS.

⁹ Article 162(2)(o)(ii) UNCLOS.

¹⁰ The full composition of the ISA Council is available on https://isa.org.jm/files/files/documents/Composition_of_the_Council_1996-2024.pdf. The members of the ISA Council are elected by the Assembly, in accordance with paragraph 15, of section 3, of the annex to the 1994 Agreement.

¹¹ See recital 8 and Article 2 of the proposed Decision and point 2.2. of the explanatory memorandum to the proposed Decision.

¹² Annex IX to UNCLOS contains the rules regarding participation by international organisations and requires that the instrument of formal confirmation by the organisation contains a declaration specifying the matters governed by the Convention in respect of which competence has been transferred to it.

8. Article 2 of Council Decision 98/392/EC on the conclusion of UNCLOS and the 1994 Agreement also provides that the "*Community 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 III.*" Annex III to the Decision, which contains the mandate of COMAR, organises "*the coordination of the activities of the Community and its Member States in the International Seabed Authority and its bodies (...)*"¹³.
9. The proposed Decision relates to the position to be taken on behalf of the Union at the meetings of the ISA Council and Assembly concerning the future regulations on exploitation of mineral resources in the Area contained in document ISBA/25/C/WP (the 'Draft ISA Regulations') and the related standards and guidelines.¹⁴ The overall objective of the Draft ISA Regulations is to provide for the exploitation of mineral resources in the Area which is consistent with UNCLOS and the 1994 Agreement.¹⁵ The Draft ISA Regulations therefore regulate the exploitation of the Area, which - after an introductory section (Part I) - concern various issues related thereto, including plans of work (Part II and V), the rights and obligations of contractors (Part III), protection and preservation of the marine environment (Part IV), closure plans (Part VI), financial terms of an exploitation contract (Part VII), annual, administrative and other applicable fees (Part VIII), information-gathering and handling (Part IX), general procedures, standards and guidelines (Part X), inspection, compliance and enforcement (Part XI), as well as procedures for dispute settlement (Part XII) and the review of the regulations (Part XIII).

¹³ See also the final recital to the decision.

¹⁴ See point 1 of the Explanatory Memorandum.

¹⁵ See also the Preamble of the Draft ISA Regulations.

DELETED FROM THIS POINT UNTIL THE END OF THE DOCUMENT (PAGE 26)

PUBLIC