

International Seabed Authority

Press Release



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SEABED COUNCIL GETS REPORTS FROM LEGAL AND TECHNICAL COMMISSION AND FINANCE COMMITTEE; BEGINS REVIEW OF OUTSTANDING ISSUES IN DRAFT REGULATIONS

The Seabed Council, beginning its substantive work at the 15th session of the International Seabed Authority in Kingston, today took note of a report of the Legal and Technical Commission, in which the expert body recommends the adoption of the revised text of the draft regulations on prospecting and exploration for cobalt-rich ferromanganese crust (document ISBA/15/LTC/CPR.1).

The Commission noted that the document would in due course be transmitted to the Council for its consideration at the sixteenth session of the International Seabed Authority in 2010.

Also at its morning meeting, the Council took note of the report of the Finance Committee in which it recommended the appointment of PricewaterhouseCoopers as auditors of the Authority's financial statements for 2009 and 2010.

The Council also elected Bangladesh for vice-president representing the Asian group, and Canada to represent the Western European and Other States group. On Monday, 25 May, Poland and Mexico were elected vice-presidents representing the Eastern European group, and the Group of Latin American and Caribbean States, respectively.

On its substantive work, the Council began discussions on outstanding issues in the draft sulphide regulations following presentation of a working paper (ISBA/15/C/WP.2) by the secretariat detailing information and recommendations on each issue.

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The Commission's report (ISBA/15/C/2) was presented by its Chairman Sandor Mulsow Flores (Chile). During its session which began on 18 May, a week ahead of the Authority's fifteenth session, the Commission considered a range of issues, including the annual reports of contractors exploring for nodules in the international seabed Area; applications for similar activities by Nauru Ocean Resources Inc. and Tonga Offshore Minerals Ltd.; and a proposal for a network of areas of particular environmental interest in the Clarion-Clipperton Fracture Zone.

Other topics discussed were recommendations for the guidance of contractors; review of environmental recommendations; recommendations on the reporting of exploration expenditure by contractors; the draft regulations on prospecting and exploration for cobalt-rich ferromanganese crusts in the Area; update on progress on the geological model for the Clarion-Clipperton Zone.

Report of the Legal and Technical Commission

In its report, the Commission noted that the revised text of the draft regulations on prospecting and exploration for cobalt-rich ferromanganese crusts in the Area incorporated all the revisions it had proposed at the fourteenth session in 2008, as well as the revisions to the text of the draft regulations on prospecting and exploration for polymetallic sulphides in the Area which was agreed in the Council during the same session.

Following discussions of the text in which Commission members expressed their views on some technical issues, it was decided to adopt it as "its recommendation to the Council ..."

Annual reports of contractors

The Commission took note of and welcomed the collaborative programmes being conducted or planned between some of the contractors. It noted that such cooperative efforts could facilitate the maintenance of time series stations and optimize the results of research cruises. With regard to the classification of nodule types based on size, surface etc. the Commission noted the lack of uniformity in the classifications used by different contractors and encouraged the contractors to integrate their data into the International Seabed Authority database. The Commission suggested that contractors collect samples for genetic characterization of fauna and micro-organisms and standardize sampling protocols and design.

Review of two new applications

The Commission was informed by a letter dated 5 May 2009 addressed to the Authority's Legal Counsel that Nauru Ocean Resources (sponsored by Nauru) and Tonga Offshore Mining Ltd. (sponsored by Tonga) had requested that consideration of their applications for approval of a plan of work for exploration in reserved areas be postponed

for a number of reasons. The Commission took note of the request and decided to defer consideration of the item until further notice.

Areas of environmental interest in Clarion-Clipperton Zone

The Commission said that the establishment of a network of areas of particular environmental interest in the Clarion-Clipperton Fracture Zone could contribute in a number of important ways to the general objectives of the environmental regime established by the Authority. Furthermore, the scientific information that could be generated by such areas would be useful for the adoption of rules, regulations and procedures incorporating applicable standards for the protection and preservation of the marine environment. It would also greatly facilitate the periodic review of environmental regulations and recommendations.

The Commission considered it premature to make any proposal to the Council to institute a permanent closure of the areas concerned. Nevertheless, to prevent future irreversible damage, the Commission considered that the development of polymetallic nodule resources in the Clarion-Clipperton Fracture Zone demanded a rational and comprehensive environmental management plan for the Zone as a whole, based on the best available scientific knowledge.

The Commission recommended the convening by the Authority of an international workshop, including Commission members with relevant expertise, as well as representatives of contractors and other experts, to review further the proposal for the establishment of the network.

Environmental recommendations

The Commission called for a revision and update of recommendations made by two workshops on the environment in 2001, noting that material contained in them was out of date. It said the revision should include a standard sampling protocol and storage protocol for archiving data, in order to optimize the comparison, at a regional scale, of the environmental data collected by the contractors.

Reporting of exploration expenditure

The Commission on 22 May 2009 adopted recommendations for the guidance of contractors for the reporting of actual and direct exploration expenditures as required by annex 4, section 10, of the Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area (ISBA/15/LTC/7).

The purpose of the recommendations was to provide guidance to contractors in relation to the books, accounts and financial records to be maintained in accordance with the Regulations, the identification of internationally accepted accounting principles, the definition of the actual and direct costs of exploration, the format for the presentation of

financial information in the annual reports, and the form of certification of the expenditure.

Update on progress on the geological model for the Clarion-Clipperton Zone

The Commission received a presentation on the status of the project to establish a geological model for the Clarion-Clipperton Zone, and noted that the project was near completion. The Authority would convene a workshop later in 2009 to present the results of the project. The Commission expressed its satisfaction with the impressive achievement and noted that the participation of the contractors had been critical to the project's success. The Commission also took note of plans to commence work on a similar geological model for the Indian Ocean.

On other matters, the Commission discussed a briefing note provided by the secretariat on the current state of submissions to the Commission on the Limits of the Continental Shelf and exchanged views and concerns.

Discussion of the Commission's report

Several delegations made comments on the Commission's report. With reference to the Commission's recommendations for the guidance of contractors for the reporting of actual and direct exploration expenditures, China suggested that in order for the contractors' annual reports and financial statements to be standardised, the Secretariat should create a template to be used as a guide. The delegation acknowledged the achievements of the Kaplan project with regard to its research in the Clarion-Clipperton Fracture Zone, but pointed out that scientific knowledge remained limited. It was therefore difficult to assess the potential impact of exploration activities on the environment and to establish safeguards. It suggested that the Kaplan project was a good starting point from which to strengthen the exchange of information and collaboration and establish a unified system for the protection of the marine environment.

India sought clarification on the basis for that recommendation requiring contractors to itemize any expenditure on a single item exceeding US\$100,000 in any one year (ISBA/15/LTC/7, Annex). The Commission chairman said the figure was based on the input of technical experts in the Legal and Technical Commission about the costs associated with the equipment needed for exploration. He added that in the current contractors' reports these costs were not clearly presented and the recommendation emerged from a consensus among the Commission's membership that this information should be disclosed.

Finance Committee Report

The Finance Committee in its report to the Council, made a number of recommendations, including the appointment of PricewaterhouseCoopers as independent auditor for 2009 and 2010.

It urged members of the Authority to pay their assessed contributions to the budget on time and in full. It also appealed to them to pay outstanding contributions to the budget from previous years as soon as possible, and requested the Secretary-General, at his discretion, to continue his efforts to recover the amounts.

In other recommendations, the Committee encouraged observers attending and participating in the Authority's meetings to make voluntary contributions to its budget and/or to the Endowment and the Voluntary Trust Funds of the Authority.

The Finance Committee expressed gratitude to the Government of Norway for its contribution of \$250,000 to the endowment fund and US\$50,000 to the voluntary trust fund. In 2008, the committee had approved the transfer of US\$60,000 from the endowment fund to the voluntary trust fund (ISBA/14/A/7). In view of Norway's contribution, the Committee recommended that the Secretariat should delay the transfer of the balance of \$40,000 until it became necessary.

The Committee recommended an increase in the Authority's Working Capital Fund by the addition of the total amounts of the advances of the new members of the Authority – Congo, Liberia and Switzerland.

It also took note of the efforts of the Secretary-General to effect savings in the Authority's budget during the financial period 2009-2010. It requested the Secretary-General to look into the possibility of disaggregating the current package offered to the Authority for conference servicing and to incorporate alternative interpretation services in the Authority's budget proposal for 2011-2012.

On the issue of seeking alternative sources for interpretation services for future sessions, the Russian Federation urged that any decision should take into account the quality of service as well as cost as a high standard of interpreting skills is critical to the work of the Authority.

Review of outstanding issues

The Secretariat presented the Review of outstanding issues concerning the draft regulations on prospecting and exploration for polymetallic sulphides in the Area (ISBA/15/C/WP.2). This 25-paragraph working paper, with three annexes, covers additional background on the outstanding issues with respect to the draft, which the Council had agreed to consider at this session. A revised text of the entire draft regulations (ISBA/15/C/WP.1), harmonized in all official languages, and incorporating the revisions, was also presented to Council.

There are five outstanding issues for which the Secretariat provided additional information. These issues include revisions to regulation 23 (overlapping claims), annex 4, section 17.5 on termination in the event of force majeure, and annex 4, section 25.2 pertaining to enforcement of decisions by competent courts or tribunals. Also included is

information on the proposed amount of fees for exploration and a formulation that would prevent multiple applications by affiliated applicants in excess of the overall size limitations.

On fees, the paper sets out, in Annex 1, elements to be considered in the cost of processing a plan of work for exploration. The paper listed 13 components involved in processing from receipt, custody and acknowledgement of an application, to preparing and updating the contract information in the Authority's database.

The Secretariat's review document suggested possible revisions to relevant provisions of the draft regulations concerning overlapping claims. Specifically, it recommended a fifth paragraph in regulation 12 to address the total area covered by the applicant, and regulation 23 with seven paragraphs dealing with overlapping claims as a basis for continued discussion by the Council.

According to the revised formulation set out in the document, an overlapping application submitted within a period of 60 days of an earlier application would have the effect of suspending further action on both (or all) applications until such time as any conflicts between applications could be resolved. It also provided options for achieving finality to the process of overlapping claims. Such options include binding arbitration in accordance with the United Nations Commission on International Trade Law (UNCITRAL), or the Optional Rules for Arbitration of Disputes Relating to Natural Resources and /or of the Environment.

The document presented by the Secretariat also addressed the relevant provisions of section 17 of annex 4 on the standard clauses for exploration contract to include a provision whereby a contract may be considered terminated should an event of force majeure persist for an indefinite period. It noted that since section 21 of annex 4 gives the Council powers to suspend or terminate contracts in certain circumstances, and also sets out procedural safeguards for contractors on the receipt of notices of termination or suspension, force majeure would most appropriately be covered in section 21 rather than section 17.

Discussion on the issues

Delegations welcomed the proposals contained in the Secretariat's review of the outstanding issues saying the document would further efforts to speed up the Council's deliberations on the draft regulations. Mr. Mahmoud Samy (Egypt), President of the 36-member body, said he sensed a degree of optimism among members that they were willing to complete review of the text of the draft sulphides regulations before the end of the current session. Argentina, Australia, Bangladesh, India, Jamaica, Mexico, the United Kingdom, Trinidad & Tobago, and Vietnam were among delegations calling for compromise along with careful but speedy deliberations towards having the legal regime adopted at this session.

The representative of China said that while the issues to be resolved were few, they were nonetheless critical. He noted that limited scientific knowledge of the Area presented some difficulty in measuring the impact of exploration on costs and on the marine environment. Argentina said adoption of the sulphides regulations would provide investors and contractors with a good framework with which to operate, particularly in the current world economy. Echoing those sentiments, Australia added that Article 45 of the United Nations Convention on the Law of the Sea allowed the Council the flexibility to update the regulations using knowledge gained after its adoption. Jamaica reminded the delegations of the observation made by Secretary-General Nii Allotey Odunton (Ghana) that concluding work on the text would send a positive message to contractors and the United Nations.

Mexico's representative warned that failure to resolve the outstanding issues at this session could result in no action for decades. Addressing China's concern regarding limited scientific knowledge on deposits, she observed that on-going research and exploration activities would provide information which the Council could review periodically.

On the outstanding issues, South Africa saw no difficulty applying the first-come-first-served rule when applications for approval of work for exploration in areas overlap each other. Germany and the Republic of Korea supported the view that first-come-first-served, as applied in the Nodules regulations was a more effective method of dealing with overlapping claims. The representative of Germany said that while the Secretariat's proposal was a good one, lengthy negotiations and arbitration could present problems.

On the issue of force majeure, South Africa and Trinidad & Tobago called for revision to language in Annex 4, section 17.3 of the draft regulations. The paragraph states:

In the event of force majeure, the Contractor shall take all reasonable measures to remove its inability to perform and comply with the terms and conditions of this contract with a minimum of delay; provided that the Contractor shall not be obligated to resolve or terminate any labour dispute or any other disagreement with a third party except on terms satisfactory to it or pursuant to a final decision of any agency having jurisdiction to resolve the dispute.

The representative of Trinidad & Tobago suggested that ending that paragraph after the word "delay" would be sufficient.

Fees for application

Discussion on fees for application, in regulation 21 of the draft, focused on two options – whether those fees should be fixed or progressive. Some delegations suggested that the Authority determine the actual cost of processing each application, while others raised the possibility of adding a refund clause to the article.

Arguing for a fixed fee approach, Argentina, Germany, Nigeria, the United Kingdom, and the United States observer agreed that fees based on the amount of work involved in dealing with each application would present many variables. China and New Zealand said a progressive fee system would encourage relinquishment of blocks not used by contractors. Japan's alternative approach seeking to determine the actual cost of processing application was endorsed by India, New Zealand and Canada. Germany wondered whether a refund clause, similar to that in Article 13, paragraph 2 of Annex 3 of the convention, could be included in the regulations.

Nigeria recommended a flat rate with the proviso that if the fee was inadequate the applicant would cover the difference. Germany said it would support Nigeria's recommendation provided a refund clause was also added. Canada and the United States observer said the Council should allow more time for delegations to consider Nigeria's proposal.

Sulphides regulations

The text of the draft regulations on prospecting and exploration for polymetallic sulphides consists of a preamble and 45 regulations organized into ten parts and four annexes. The regulations only deal with prospecting and exploration phases and applies only to polymetallic sulphides.

The draft covers introduction and the use of terms and scope, prospecting, the process of applying for approval of a plan of work for exploration, and the form and content of the contract for exploration. Also covered is the protection and preservation of the marine environment, confidentiality of data and information and procedures to ensure it, procedures for the implementation of the Regulations, and the settlement of disputes. Also included is the procedure to be followed should the prospector or contractor locate resources other than polymetallic sulphides, and the guideline for the review of the Regulations five years after its approval by the Assembly of the Authority.

Annex 1 is the form of notification of intention to engage in prospecting and Annex 2 is application for approval of a plan of work for exploration. Annex 3 is the contract which sets out the names of the parties; describes the subject matter; the entry into force and contract terms. Annex 4 contains the standard clauses for an exploration contract, covering matters many of which are dealt with in the regulations. There are certain obligations a contractor must follow as well as measures to be taken to prevent,

reduce and control pollution and other hazards to the marine environment in the international seabed Area.

**Afternoon Meeting:
Council continues discussion on outstanding issues;
Nigeria, China propose amendments**

When the Council resumed in the afternoon, the President announced that Nigeria was working on a draft amendment to Regulation 21 of the draft regulations, relating to the fees for applications (ISBA/15/C/WP.1). This issue would be taken up in later discussions.

With regard to the second outstanding issue, overlapping claims, Japan reiterated a position it had taken in previous sessions: the question of overlapping claims was a problem to be negotiated between applicants without external intervention.

China proposed an amended text which outlined a three-step process of working out overlapping claims to reach a fair and equitable settlement for all sides. The first step was to encourage the applicants to find solutions between themselves. If they were not successful, the Authority could play the role of mediator. If this intervention failed, the matter should be referred for arbitration, the means of which could be agreed upon by the applicants. South Africa felt this proposal would create risk of hindering the progress of both applications if the parties could not find common ground.

In response to a question raised by New Zealand about a timeframe for applications to be presented to the Authority for consideration, the Secretariat explained that according to Article 162 of the Convention, there was nothing to prevent an application for exploration of resources to be submitted at any time, regardless of whether regulations were in place to govern those resources. In the case of polymetallic nodules, many applications were made at the same time and there were overlapping claims. As set out in Resolution 2 of the United Nations General Assembly, conflicts were to be resolved by negotiation first and then referred if necessary to the United Nations Commission on International Trade Law (UNCITRAL). However, no cases required referral.

The Council moved on to the examination of the third outstanding issue, force majeure. This matter is addressed in Section 17 of Annex 4 of the draft regulations for polymetallic sulphides: Standard clauses for exploration contract (ISBA/15/C/WP.1) However, as noted in the Secretariat's review of outstanding issues (ISBA/15/C/WP.2), provisions relating to the suspension or termination of contracts are set out in section 21 of the same annex. Section 21 also outlines procedural safeguards for contractors with regard to suspension or termination. The review document therefore proposes that any provision relating to termination of a contract by reason of force majeure would be most appropriately dealt with in section 21 of annex 4. It was suggested that additional text be added to the section stating that the Council could suspend or terminate a contract:

- d) if the contractor is prevented from performing its obligations under this contract by reason of an event of force majeure, as described in section 17.1, which has persisted for a continuous period exceeding two years, despite the contractor having taken all reasonable measures to remove its inability to perform and comply with the terms and conditions of this contract with minimum of delay.

China expressed the view that a two-year wait was not necessary, and that the contractor and the Council could negotiate within that period to suspend or terminate the contract.

Introducing the discussion on applications by affiliated applicants, the Secretariat's Legal Officer explained that the purpose of this provision, regulation 12, paragraph 5 of the draft regulations on polymetallic sulphides, was to provide an anti-monopoly safeguard by limiting the number of applications that any single entity could make, whether on its own or through its affiliations with other entities. In the relevant regulation, affiliation is defined as an issue of control of any given entity or enterprise: "an applicant is affiliated with another applicant if an applicant is directly or indirectly controlling, controlled by or under common control with another applicant."

The Secretariat said the issue of control is a complex one because it has no single, specific definition. In general in commercial law, more than 50% ownership indicates control, he continued. In other contexts, where there are several shareholders, 40% may be enough to give effective control to one shareholder. China and Mexico expressed concern about the potential ambiguities in the description of control and affiliation in the provision and called for precise definitions to be formulated.

The Council will continue discussions on the outstanding issues when it resumes on Monday, 1 June.

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