COUNCIL RESOLVES SOME OUTSTANDING ISSUES RELATED TO THE REGULATIONS ON SULPHIDES

The adoption of three proposals to resolve some of the outstanding issues related to the draft regulations on polymetallic sulphides in the Area, pushed the Council of the International Seabed Authority closer to completing its substantive work as it continued deliberations this afternoon in Kingston.

The Council adopted a proposal by South Africa to delete language from section 17.3 of annex 4 of the text dealing with force majeure. It also adopted a revision to Section 25.2 of the same annex of the draft regulations (ISBA/15/C/WP.1). This was a technical amendment proposed in the outstanding issues working paper (ISBA/15/C/WP.2) by the Secretariat. A new proposal by the Secretariat, offering a technical amendment to regulation 45 making it consistent with article 162(2)(o)(ii) of the United Nations Convention on the Law of the Sea, was also adopted.

The Council decided to suspend debate on a formulation to prevent multiple applications until the Secretariat provided new text for regulation 12, paragraph 5 of annex II of the working paper (ISBA/15/C/WP.2). The Secretariat was also asked to propose new wording for regulation 21, Fees for application, to address the amount and limits of fees.

Fees for application

The Council examined the question of fees for applications, dealt with in regulation 21 of the draft regulations, on the basis of a proposal formulated by Nigeria and Germany. They proposed the addition of a new paragraph 3b is as follows:
If the administrative costs incurred by the Authority in processing the application are less than the fixed fee, the Authority shall refund the difference to the applicant. If the fixed fee does not cover the administrative costs, the Authority may request the applicant to pay the difference.

Canada and Japan advocated the use of a flat fee on the grounds that applicants should be guaranteed a degree of certainty in terms of what they would have to pay. Both favoured the original text without paragraph 3bis but could accept the addition of the first sentence. Canada suggested that the fees could be revised periodically if it was found that they were not sufficient to cover the costs of processing the applications, and that wording could be included to give the Authority the right to make decisions concerning this matter. India and the United States observer spoke in favour of the refund mechanism since this was in keeping with a similar clause in the Convention. However, Nigeria argued that if the refund mechanism were allowed, the option to collect extra funds to cover costs should also remain. Pakistan agreed with the inclusion of paragraph 3bis in its entirety.

Jamaica noted that it was the norm for a fixed application fee to be set based on an average cost, and endorsed Canada’s suggestion that from time to time the fee could be updated if necessary. Mexico suggested a periodic review every three to five years, as well as granting the Council the right to revise the fees if exceptional circumstances should arise. Council President Mahmoud Samy (Egypt) requested the Secretariat to prepare a new text.

Anti-monopoly provision

With regard to annex 4, section 21 related to suspension and termination of contracts, Trinidad and Tobago reported that in informal consultations most delegations had agreed that the Secretariat’s paragraph (d) did not prejudice in any way the rights of contractors. However, one member remained uncomfortable with the wording so a compromise had not been reached.

India reported on the group which met to discuss the matter of affiliated applicants (Regulation 12. paragraph 5). The representative said there had been little discussion because members felt it was important to come to an agreement in Council on exact interpretations of the terms anti-monopoly and affiliation before drafting new wording. China agreed with this view, adding that the concept of control of an enterprise was a complex one based on several factors in addition to ownership.

Jamaica proposed that the Secretariat could formulate definitions to be used specifically for the purpose of this regulation. Trinidad and Tobago endorsed this position and Uganda felt that through discussion, a good compromise could be reached on an interpretation of terms.
On the other hand, Ghana warned against becoming involved in establishing definitions; taking the discussion in this direction would delay progress towards adopting the regulations at this session, he said. Like South Africa, this delegation felt that the description of affiliation in the new paragraph 5 of Regulation 12 already provided “a picture of what a monopoly would look like” and this was a good guide for action. Similarly, the Netherlands urged the Council to be guided by the recommendations of the Legal and Technical Commission as explained in section E of ISBA/C/15/WP.2 and by the relevant articles of the Convention. Senegal noted that the principle of managing the Area as the common heritage of mankind was in itself an anti-monopoly provision and that made it acceptable to adopt paragraph 5 in its present form.

The Secretariat reminded the Council that the reference to affiliation had been proposed by the Legal and Technical Commission as a result of its deliberations last year. The purpose was to prevent mining companies from forming several companies in different States to gain access to multiple areas to explore.

India pointed out that under regulation 11 of the draft regulations (ISBA/15/C/WP.1), every application by an entity must “be accompanied by a certificate of sponsorship issued by the State of which it is a national or by which or by whose nationals it is effectively controlled.” The Chinese delegate maintained that this had implications for states which had several mining entities. China had a number of such enterprises which were independent legal entities even through they were state-owned. If many entities submitted applications and the total application area could not exceed 10,000 square kilometres from one state, the consequences would not be fair. That issue should be taken into account.

China said it looked forward to new text from the Secretariat that would provide an acceptable definition of the word “control”. Urging careful consideration of any proposed new language, Uganda reminded delegates of provisions in the Convention that called for equitable sharing of the unique set of resources of the Area. Ghana suggested that any effort to address a definition of control must be guided by the Convention.

**Proposals adopted**

From the list of current proposals on the draft sulphides regulations the Council adopted, without objection, section 17.3 of annex 4 which now reads as follows:

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.

Before the Council adopted the revision to section 25.2 the Secretariat’s Legal Officer explained that the language was drawn directly from article 21, paragraph 2 of annex III to the Convention which was applicable to all State parties to the Convention. The revised paragraph reads as follows:
In accordance with Article 21, paragraph 2, of annex III of the Convention, any final decision rendered by a court or tribunal having jurisdiction under the Convention relating to the rights and obligations of the Authority and of the Contractor shall be complied with by the parties concerned and **shall be enforceable in the territory of any State Party to the Convention affected thereby.**

A technical amendment to regulation 45 of the draft proposed by the Secretariat for consistency with article 162, paragraph 2 (0)(ii) of the Convention was also adopted, and reads as follows:

In the light of the review, the Council may **adopt and apply provisionally, pending approval by the Assembly**, amendments to the provisions of these Regulations, **taking into account the recommendations of the Legal and Technical Commission or other subordinate organs concerned.** Any such amendments shall be without prejudice to the rights conferred on any Contractor with the Authority under the provisions of a contract entered into pursuant to these Regulations in force at the time of any such amendment.

Tomorrow morning the Authority will host an open briefing for all members and observers on current topics of interest. Three expert presentations will cover the following:


3. Safeguarding the Common Heritage of Mankind, by Professor Jia Yu, Deputy Director of the China Institute for Marine Affairs and Deputy Secretary-General of the Chinese Society of the Law of the Sea.

The Council will resume consideration of the outstanding issues concerning the draft regulations when it meets in the afternoon.

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