NAURU PROPOSAL GETS ATTENTION OF SEABED COUNCIL; VIEWS MIXED ON SEEKING OPINION FROM SEABED DISPUTES CHAMBER

The Council of the International Seabed Authority, working through its agenda for the sixteenth session in Kingston this afternoon, heard divergent views on a proposal by Nauru for an advisory opinion from the Seabed Disputes Chamber of the International Tribunal for the Law of the Sea. Delegations agreed to resume discussion on the topic later this week when the Legal Counsel will provide a short draft of the Nauru proposal.

The Legal Counsel emphasized that, since no dispute was involved, the issue under discussion fell under the advisory rather than the contentious jurisdiction of the Seabed Disputes Chamber. As an organ of the Authority, the Council could ask for an advisory opinion of the Chamber, which was the body qualified to respond on Seabed matters under Article 191 of the Convention.

The Government of Nauru had sponsored an entity for a plan of work in prospecting and exploration for polymetallic nodules in the Area. In a communication to the Authority (ISBA/16/C/6), it said it would like an advisory opinion from the Seabed Disputes Chamber on the interpretations of the relevant provisions of the United Nations Convention of the Law of the Sea and the 1994 Agreement relating to the implementation of Part XI of the Convention (General Assembly resolution 48/263) pertaining to the responsibility and liability of sponsoring states.

Nauru said that without clarity on the issues of responsibility and liability “it is extremely difficult for a developing State to confidently sponsor activities in the Area .....”

Nauru’s request for advisory opinion

Nauru’s representative told the Council that the Nauru Ocean Resources Incorporated which it had sponsored, was a subsidiary of Nautilus Minerals Incorporated, a world leader in deep sea mineral exploration and development. His Government considered the project important.
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in its quest to identify new economic development opportunities. Nauru’s terrestrial resources were almost completely depleted and there were no known non-living resources in its exclusive economic zone that were commercially prospective.

Whilst Nauru’s sponsorship agreement with the Nauru Ocean Resources Inc. conferred numerous powers upon the State, it believed the Seabed Disputes Chamber might be able to clarify whether there were any additional measures the sponsoring state must take. If there were such measures, additional safeguards could then be incorporated into the sponsorship agreement with Nauru Ocean Resources.

As Nauru would like the application for the plan of work to be heard by the Legal and Technical Commission in 2011, there needed to be sufficient time before then for the incorporation of any feedback from the Seabed Disputes Chamber this year.

He said an advisory opinion from the Seabed Disputes Chamber would provide greater certainty to sponsoring States or those who intended to do so. It would demonstrate to private sector investors that there was a procedure to refer matters to a functioning tribunal that could adjudicate disputes regarding activities in the Area. Finally, the advisory opinion could help develop standards that must be observed in the Area leading to the promotion of best practices and consequently the protection of the environment.

**Discussion on Nauru proposal**

The Fiji delegation spoke in support of Nauru’s proposal, pointing out that for Small Island Developing States members of the International Seabed Authority, the only foreseeable participation in the mining process was by State sponsorship of private sector enterprise. Therefore, it was encouraging to observe the kind of cooperation evident in the agreement between the Government of Nauru and Nauru Ocean Resources, which is a Nauru incorporated subsidiary of Nautilus Minerals.

Fiji described the Nauru proposal as “a call for clarity and certainty” on the responsibilities and liabilities a Sponsoring State assumed under such a role and that it contained “no element of evasion”, but rather showed a commitment to faithfully fulfilling responsibilities to the international community and to the vulnerable economies of Small Island Developing States.

The Fiji delegation stressed that if the International Seabed Authority system was seen to work efficiently in Nauru’s case, it would send a clear message that it could work for private sector cooperation with any developing country. The representative said the way forward was for the Secretariat of the Authority to prepare a draft decision that succinctly captured the essence of the Nauru proposal, for presentations to the Council for discussion.

A number of delegations supported the proposal of Nauru in principle but were not satisfied with all aspects of the document. Mexico said Nauru’s proposal raised a number of important questions, but felt that a clearer, more succinct formulation of the request would clarify the scope of the issues involved. Supporting the request from Nauru, Germany said the

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question of the extent of liability for sponsoring states was relevant to all States but particularly important for developing countries. It, too, called for clearer wording to be submitted. The Republic of Korea called for “active interaction” in response to Nauru’s proposal and suggested that a synopsis of the essential legal matters be formulated for consideration. Spain called the proposal “imprecise” as it did not specify the advice required.

The Netherlands stated that the issue was complex, and that in order for it to be given the serious consideration it deserved, more background information and further legal analysis were required. The representative suggested the Secretariat commission a study on inter-State liability, adding that a precedent had already been set in the International Maritime Organization. Canada agreed that a study might be a good way forward.

**Divergent views**

Some delegations felt the Legal and Technical Commission should be asked to provide recommendations for discussion by Council, while others said the Council was competent to send the proposal to the Chamber. There were also delegations that wanted the Secretariat to put together a report summarizing the issues, while others called on Nauru to provide the Council with a revised draft of its proposal.

Argentina, Brazil, Senegal and India, agreed that it would not be desirable for the Council to consider the proposal with recommendations from the Commission. Senegal said that while it accepted the legitimacy of Nauru’s request it did not agree with the procedure for presenting the request.

Trinidad and Tobago, Jamaica, Uganda, Sudan and South Africa agreed that, owing to the complexity of issues in the proposal, the Seabed Disputes Chamber would be the proper body to provide an opinion on the proposal. The delegation of Trinidad and Tobago said the opinion would not involve any binding legal obligation but would be beneficial to all other states, particularly developing states. Jamaica argued that the Council had the expertise and was established to deal with such complex issues. Supporting Jamaica, the representative of Uganda pointed to Article 191 of the United Nations Convention on the Law of the Sea on Advisory Opinions, to push his position on the need for urgent action by the Council. The Article reads as follows:

“The Seabed Disputes Chamber shall give advisory opinions at the request of the Assembly or the Council on legal questions arising within the scope of their activities. Such opinions shall be given as a matter of urgency.”

The delegation of South Africa emphasized that the Council was competent to send such a matter to the Seabed Disputes Chamber for its consideration.

The United Kingdom called attention to the complexity of the issue, suggesting that it raised concerns beyond those of Nauru alone. It requested the Secretariat to prepare a report summarising all the issues.

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The Legal Counsel was given the floor to clarify some of the questions raised by Council members. The first point he underscored was that, since no dispute was involved, the issue under discussion was one that would fall under the advisory rather than the contentious jurisdiction of the Seabed Disputes Chamber. As an organ of the Authority, the Council could ask for an advisory opinion of the Chamber, which was the body qualified to respond on Seabed matters under Article 191 of the Convention.

With regard to the competence and authority of the Council to consider Nauru’s proposal, the Legal Counsel reminded the members of Article 162 which deals with the powers and functions of that body. Article 162 paragraphs 2a) and 2l) read:

2. The Council shall:

(a) supervise and coordinate the implementation of the provisions of this Part on all questions and matters within the competence of the Authority and invite the attention of the Assembly to cases of non-compliance;

(l) exercise control over activities in the Area in accordance with article 153, paragraph 4, and the rules, regulations and procedures of the Authority.

With regard to the procedure for submitting a request for advice, he explained that the Seabed Disputes Chamber modelled its advisory jurisdiction process on that of the International Court of Justice. A Note would be sent to the Chamber along with all documents pertinent to the request. The Chamber would notify all States parties and other relevant bodies which might be able to provide information on the question, and would set a date for the matter to be discussed. All interested parties would be invited to make statements at this time and at the end of the process, the Chamber would provide its opinion on the matter.

The Legal Counsel added that if the Council requested, the Secretariat could provide a short draft of the Nauru proposal and the questions raised set out under main categories or themes.

The Council president acknowledged that there were divergent views on the matter of Nauru’s proposal and suggested that delegations could hold informal consultations in order to reach a decision later this week.

The Council meets again tomorrow morning, Tuesday, May 4.

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