COUNCIL TO SEEK ADVISORY OPINION FROM SEABED DISPUTES CHAMBER
BY DRAFT DECISION INTRODUCED BY AUTHORITY’S SECRETARIAT

Discussion of outstanding issues of draft sulphides regulations resumed in Council

A draft decision by which the Council of the International Seabed Authority would formally request an advisory opinion from the Seabed Disputes Chamber of the International Tribunal for the Law of the Sea on provisions of the United Nations Convention relating to sponsoring State responsibility and liability was presented to the Council by the Secretariat this morning.

By the draft decision (ISBA/16/C/L.4), the Council, in accordance with Article 191 of the Convention, would request the Seabed Disputes Chamber, pursuant to Article 131 of the Tribunal’s Rules, to render an advisory opinion on the following questions:

1. What are the legal responsibilities and obligations of States parties to the Convention with respect to the sponsorship of activities in the Area in accordance with Part XI of the Convention?

2. What is the extent of liability of a State Party for any failure to comply with the provisions of Part XI of the Convention by an entity whom it has sponsored under Article 153, paragraph 2 (b), of the Convention?

3. What are the necessary and appropriate measures that a State Party must take in order to fulfill its responsibility under Article 139 and Annex III, article 4, of the Convention?

The Legal Counsel of the Secretariat explained that the draft decision followed the format of requests made by the United Nations General Assembly to the International Court of Justice. He emphasised that the first order of business for such judicial organs when they were asked for
an advisory opinion was to determine whether they had jurisdiction to handle the request before proceeding to examine the question and grant such an opinion.

Under the guidance of the Council president, Syamal Kanti Das, delegations did not begin discussions on the draft decision but agreed to have informal dialogue among themselves with a view to taking up the issue later in the week.

**Discussion on draft sulphides regulations**

The Council then began its consideration of the two outstanding issues of the draft regulations concerning Regulations 12 and 23, dealing with, respectively, the total area covered by an application and overlapping claims by applicants for a plan of work in the Area.

Beginning the debate on Regulation 12, the representative of Canada, on behalf of the CANZ group (Canada, Australia and New Zealand) read the following proposal for an anti-monopoly clause:

“The LTC may recommend approval of a plan of work if it determines that such approval would not permit a State party or entities sponsored by it to monopolise the conduct of activities in the Area with regard to polymetallic sulphides or to preclude other States parties from activities in the Area with regard to polymetallic sulphides.”

Canada suggested adding the text as paragraph 6b in Regulation 24, which deals with the consideration by the Legal and Technical Commission of plans of work for exploration. It noted that the wording of the proposal adhered closely to Article 6 (4) of Annex III of the United Nations Convention on the Law of the Sea and felt the text was “a true compromise that would help us move forward.”

A number of delegations, including Argentina, Bangladesh, Côte d’Ivoire, Japan, Mexico, Namibia, Netherlands, Spain, Trinidad and Tobago, Viet Nam, supported the CANZ proposal as a viable, if not perfect way, to advance the Council’s work on the draft regulations.

Other members, while agreeing in principle with the proposal, which they said clearly fell in line with the spirit of the Convention, called for more clarity and precision. Germany, for example, accepted the text as expressing a stance against the concept of monopoly, but had doubts about how the clause would be applied by the LTC in operational terms when faced with real competition-related issues.

Nigeria proposed the addition of an introductory sentence to the CANZ proposal as follows:

“For the purpose of this regulation, monopoly means a situation where a State party or an entity sponsored by it attempts or intends to control the activities in an area which will impinge on the interests of other parties.”
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Similarly, Sudan called for a clearer definition of “anti-monopoly” before it could seriously consider the CANZ proposal. India agreed that all parties should have a common understanding of what constituted monopoly and what criteria would be used to determine it.

Argentina suggested that the CANZ proposal could be adopted with an eye to advancing the work on the regulations, and that the LTC could develop criteria in due course for discussion and approval by the Council. Other delegations, including Canada, Germany and Senegal, supported this suggestion, expressing confidence in the Commission as the body competent to draft such details.

South Africa said that, while ideally the regulations on sulphides should go a step further than merely stating broad principles, the Council was faced with a less than ideal situation, which might require a measure of “constructive ambiguity” in order to make progress. If the goal was to adopt draft regulations at this session, there would be points on which not all members could agree. The Republic of Korea endorsed this position, in light of the number of years already spent on debating the regulations.

In a brief intervention, Secretary-General Nii Allotey Odunton reminded members that the Authority’s knowledge about the Area - what deposits existed and the potential of those deposits - remained very limited. While a code for polymetallic nodules had been completed since 2000, as yet very little work had been done in exploring for those deposits. What was needed was to establish a good legal framework so that work could take place and lead to deeper knowledge of the Area.

The Council decided to adopt the CANZ proposal with the understanding that the LTC would work on developing criteria to deal with the anti-monopoly question.

Overlapping Claims

The Council resumed deliberations on Regulation 23 which addresses overlapping claims - the situation where two or more applications are made close together in time with respect to the same area. At its meeting on 28 April, the Council received a proposal from China in the form of a compromise text on Regulation 23, Overlapping Claims, which reads as follows:

3. The Legal and Technical Commission and the Council shall take action in accordance with Regulations 24 and 25 over such applications only after any overlapping claims between applicants have been resolved in accordance with the procedures set out in this Regulation.

China’s revision deleted portions of the last two lines of paragraph 3 of the draft regulation, specifically: “or the overlapping claims have not been resolved 180 days after the Secretary-General’s notification to all applicants”.

Some members of the Council expressed concern at the proposed removal of the section of the paragraph which, they contended, stipulates an outcome in any arbitration proceedings involving overlapping claims.
China’s proposal also included a new paragraph, 10, as follows:

10. The Legal and Technical Commission shall make a decision on the overlapping claims within 180 days after the Secretary-General provides the report to the Commission in accordance with Paragraph 9 of this Regulation, taking into account the following factors with respect to each applicant concerned, in order to achieve a fair and equitable solution of the overlapping claims.

(a) the location and number of polymetallic sulphides sites that have been discovered in any area concerning the overlapping claims and the date of each discovery;

(b) the workload, continuity and extent of survey activities with respect to polymetallic sulphides that have been conducted in any area concerning the overlapping claims; and

(c) the financial cost of such survey activities conducted in any area concerning the overlapping claims, which is measured in constant United States dollars.

(d) the date of receipt by the Secretary-General of the application.

When debate resumed this morning China offered a slight amendment to the text of its proposed paragraph 10 replacing “any area” in (a), (b) and (c), with the words “all areas”.

Responding to requests from South Africa and Russian Federation for clarification regarding the removal of a portion of the original draft of paragraph 3, the Chinese delegation said applicants would do nothing but wait for the 180 days to expire, after which the principle of first-come-first-served would be applied.

A proposal by Germany supported by South Africa, and Trinidad and Tobago, suggested that, rather than trying to find a solution to the issue of overlapping claims in the regulations, it might be more beneficial to incorporate the substance of paragraphs 2 to 10 in a draft resolution for consideration.

China said it would be prepared to consider such a resolution if the Secretariat, after attending to the concerns of all parties, put forward a specific proposal that confined the overlapping claim within a specific period.

On confirmation from the Legal Counsel that the Secretariat could produce the draft text of a resolution, the Council President Syamal Kanti Das (India) announced that the draft resolution would be circulated when the meeting resumed at 3:00 pm today.

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