ISA COUNCIL BEGINS SUBSTANTIVE WORK OF SIXTEENTH SESSION
ELECTS PRESIDENT AND RESUMES WORK ON DRAFT SULPHIDES REGULATIONS

The Council of the International Seabed Authority, meeting in Kingston this afternoon, began its substantive work of the sixteenth session, electing a president and resuming work on the outstanding provisions of the draft regulations on prospecting and exploration for polymetallic sulphides in the Area.

Syamal Kanti Das, Advisor to the Government of India on Earth Sciences and member of the Legal and Technical Commission, was elected President of the Council. He was nominated on behalf of the Asian Group by the representative of Fiji, as chairman of the group. (See Biographical Note SB/16/6).

The Council also elected the four vice-presidents who will serve for the 16th session. Cote d’Ivoire will represent the African Group, while the vice-president for the Group of Latin American and Caribbean States is Trinidad and Tobago (also a vice president of the Assembly). Poland and Italy will represent the Eastern European and Western European and Others groups respectively.

The Council’s substantive work for the session, which includes the resolution of two outstanding issues relating to the draft regulations on polymetallic sulphides, commenced with an overview presented by the Secretariat based on document ISBA/16/C/WP.1 The outstanding issues concern Regulations 12 (5) and 23 dealing with, respectively, anti-monopoly and overlapping claims. The Legal and Technical Commission in 2008 recommended the insertion of an anti-monopoly provision aimed at preventing multiple applications by affiliated applicants in excess of the overall size limitations. Thus a fifth paragraph was added to Regulation 12 as follows:

5. The total area covered by applications by affiliated applicants shall not exceed the limitations set out in paragraphs 2, 3, and 4 of this regulation. For the purposes of this regulation, an applicant is affiliated with another applicant if an applicant is directly or indirectly controlling, controlled by or under common control with another applicant.
Regulation 23 addresses the situation where two or more applications are made close together in time with respect to the same area (referred to as overlapping claims).

Nigeria suggested that the parties in disagreement over the pending issues should have informal consultations before the Council took up the matter for further discussion and possible amendments. However, Argentina, Namibia and Trinidad and Tobago favoured proceeding directly to the discussion in Council, in keeping with the work schedule outlined by the Secretariat, which has designated three meetings for the consideration of these unresolved regulations. This position was endorsed by South Africa, who further suggested that the Secretariat circulate copies of the texts and amendments proposed by various delegations last year.

At the suggestion of the President, the discussion began on Regulation 12 (5). China opened the debate by stating it could not agree that a State body be viewed as an affiliated entity. The representative read out a proposal made by his delegation at the last session, which stated that “two or more applicants shall not be regarded as affiliated only because they are owned or the majority of their shares are owned by the same member state of the Authority.”

China said that neither the 1982 United Nations Convention on the Law of the Sea nor the 1994 Agreement relating to the implementation of Part XI (seabed provisions) prevented a member State from sponsoring multiple applicants. Furthermore, it said, the anti-monopoly provision should apply to the entity, not the country that sponsors it. While China agreed in principle to the anti-monopoly provision to prevent one country or enterprise from monopolizing activities in the deep seabed, such a provision should avoid the implication that one country could make only one application. Such an implication would mean that sponsoring states where all entities are state-owned would be placed at a disadvantage.

Germany said it understood the concern expressed by China, and suggested that state-owned enterprises could be excluded from the anti-monopoly clause. The representative recommended using the proposal made by India at the last session:

5. The total area covered at any one time by plans of work for exploration for polymetallic sulphides sponsored by the same State or allocated under a contract for exploration for polymetallic sulphides to affiliated entities, even if such affiliated entities are sponsored by different States, shall not exceed the limitations set out in paragraphs 2, 3 and 4 of this regulation. For purposes of this regulation, an entity is affiliated with another entity if an entity is directly or indirectly, controlling, controlled by or under common control with, another entity. The implementation of this paragraph shall be reviewed by the Council after five years.

Canada took the floor to suggest reverting to the basic spirit contained in Annex 3 Article 6 of the Convention, which states that the Authority may approve plans of work if it determines that such approval would not permit a State Party or entities sponsored by it to monopolize the conduct of activities in the Area or to preclude other States Parties from activities in the Area. Canada agreed to formulate specific wording to incorporate this reference.

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Overlapping Claims

The Council moved deliberations to the second outstanding issue: the question of how to deal with a situation where two or more applications are made close together in time with respect to the same area. Guided by the Council President, South Africa, Germany, China, Trinidad and Tobago, the Russian Federation and the United States delegations weighed in on the issue.

South Africa restated the position it held at the 2009 session: that the first application should receive first attention; that arbitration would not be the correct method to resolve overlapping claims and that work in the area should not be stalled due to an application thirty days later for work in the same area.

Germany said the Convention was the primary law to guide the Council in addressing overlapping claims. The representative drew attention to paragraph 3 of article 6 in Annex III of the Convention which covered the principle of first-come-first-served. Responding to Germany, the Legal Counsel noted that the Legal and Technical Commission, in drafting the sulphides regulations, took into consideration the experiences gained in the application process for nodules.

China said that while it accepted the principle of first-come-first-served, regulation 23 as currently drafted could put the applicant who committed considerable time, work and capital at a disadvantage over one which had done minimal preliminary work but submitted its application an hour or so earlier. Trinidad and Tobago pointed out that there was no ambiguity in the language of Annex III, Article 6, paragraph 3 of the Convention dealing with the processing of applications in the order they were received.

China said it was ready to provide the Council with a compromise text on regulation 23, and proposed the following:

**Regulation 23**

**Overlapping Claims**

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.

Add 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 the 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.

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(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.

China’s revision removed portions of the last two lines of paragraph 3 of the draft regulation 23, which, in the original draft, reads as follows:

3. The Legal and Technical Commission and the Council shall take action in accordance with regulations 24 and 25 respect to such applications only after overlapping claims between applicants have been resolved in accordance with the procedures set out in this regulation (or the overlapping claims have not been resolved 180 days after the Secretary-General’s notification to all applicants.)

Specifically the words: “or the overlapping claims have not been resolved 180 days after the Secretary-General’s notification to all applicants”, have been removed.

Explaining its proposal, China said that while the timing of the application is important, the other elements reflect the work done by the applicant at the preliminary stage. Responding to the President’s request for clarification, the representative explained that the removal of the lines was to “ensure logical continuity”.

South Africa said that while its delegation could accept the proposed paragraph 10, the portion removed from paragraph 3 was “vitally important” because it stipulates an outcome in any arbitration proceedings.

The Russian Federation observed that the wording proposed by China could be a basis for compromise. The delegation from Germany said it needed to study China’s proposal but would find it difficult to deviate from the principle of first-come-first-served. The United States observer said while the chance of two or more applications for work being in the same area was minimal, the Convention clearly makes provision for applications to be processed in the order in which they were received.

The President of the Council noted that “good progress was made” at today’s deliberations, and recommended informal overnight discussions between delegations to achieve a compromise text when the Council meets again tomorrow at 3:00 pm.