SEABED COUNCIL IN FIRST SUBSTANTIVE MEETING OF SEVENTEENTH SESSION DISCUSSES RECENT ADVISORY OPINION OF SEABED DISPUTES CHAMBER AND BEGINS CONSIDERATION OF DRAFT COBALT-RICH CRUSTS REGULATIONS

Also hears statement by Nauru Minister of Commerce, Industry and Environment on application for exploratory contract in Seabed Area by Nauru Ocean Resources Inc.

The advisory opinion on responsibilities and obligations of States sponsoring activities in the Area rendered by the Seabed Disputes Chamber of the International Tribunal for the Law of the Sea has proved to be a milestone in the life of Seabed Authority and the Law of the Sea, the Authority’s Secretary-General said this morning.

Introducing an item on the subject in the first substantive meeting of the Authority’s Council, Secretary-General, Nii Allotey Odunton said the advisory opinion given on 1 February 2011 provided important clarification of some of the more difficult aspects of the United Nations Convention on the Law of the Sea and the 1994 Agreement relating to the Implementation of Part XI of the Convention.

(In its unanimous advisory opinion, the Chamber listed important direct obligations of sponsoring States, among which were assistance to the Authority in the exercise of control over activities in the Area; the obligation to apply a precautionary approach; applying the best environmental practices; and ensuring the availability of recourse for compensation in respect of damage caused by pollution, as well as an obligation to conduct environmental impact assessments).

Also this morning, the Nauru Minister of Commerce, Industry and Environment, Dominic Tabuna, whose government originally asked the Council to request the advisory opinion welcomed it, saying it represented a significant and positive step in international law.

Statement by Secretary-General

Secretary-General Nii Allotey Odunton, introducing the item recalled that the proceedings before the Seabed Disputes Chamber of the Hamburg-based International Tribunal for the Law of the Sea were instituted by the Authority’s Council during the sixteenth session last year, pursuant to article 191 of the United Nations Convention on the Law of the Sea. It was in response to a proposal originally submitted by the delegation of Nauru. The Chamber was requested to render an advisory opinion on three legal questions relating to the obligations and responsibilities of States sponsoring activities in the Area. The opinion was delivered on 1 February 2011.
To facilitate a better understanding of the advisory opinion, particularly for members that did not participate in the proceedings of the Chamber, he said the Authority’s secretariat convened a half-day seminar at the United Nations Headquarters on 7 April 2011, during which four eminent legal experts were invited to comment on various aspects of the advisory opinion.

He said the seminar was well attended by Permanent Representatives and legal advisers of permanent missions to the United Nations, as well as senior professional staff from the United Nations Office of Legal Affairs and the Division for Oceans Affairs and the Law of the Sea.

As he had stated at the 21st meeting of States Parties to the Convention at the United Nations, the advisory opinion proved to be a milestone not only in the life of the Authority but also in the Law of the Sea. It provided important clarification of some of the more difficult aspects of the Convention and the 1994 Agreement.

The universal reaction to the opinion, including from academia, members of the Authority and the seabed mining industry, had been positive, in that it had provided much-needed and long-expected certainty in the interpretation of the obligations and responsibilities of sponsoring States under the Convention and the Agreement. It was an encouraging sign for the Authority and its members, not least because it suggested that the commercial sector was developing confidence in the legal regime for the orderly development of the resources of the Area that had been put in place over the past 13 years, he added.

**Council’s request for advisory opinion**

The Council reformulated the Nauru request into three general questions for the Chamber’s opinion, as follows:


2. What is the extent of liability of a State Party for any failure to comply with the provisions of the Convention, in particular Part XI, and the 1994 Agreement, 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 sponsoring State must take in order to fulfill its responsibility under the Convention, in particular article 139 and annex III, and the 1994 Agreement?”

The Chamber, a separate judicial body within the International Tribunal for the Law of the Sea, was established in accordance with Part XI, section 5, of the United Nations Convention on the Law of the Sea and article 14 of the Statute. The Chamber has jurisdiction in disputes with respect to activities in the Area, and is entrusted with the exclusive function of interpreting Part XI of the Convention and the relevant annexes and regulations that are the legal basis for the organization and management of activities in the Area.

The Chamber is composed of 11 judges. A quorum of seven members is required to constitute the Chamber. Members of the Chamber are selected by the members of the Tribunal every three years and
may be selected for a second term. The selection process ensures the representation of the principal legal systems of the world and equitable geographical distribution. The Chamber elects its President from among its members (Statute, article 35).

The text of the dispositif of the advisory opinion is contained in the annex of document ISBA/17/C/6-ISBA/17/C/LTC/5.

Statement by Nauru Minister for Commerce, Industry and Environment

Dominic Tabuna, Nauru Minister for Commerce, Industry and Environment, speaking on the application by Nauru Ocean Resources Inc. for exploratory contract, which his government had sponsored, said Nauru did not have any known commercially prospective mineral resources in its own Exclusive Economic Zone. It looked to the international seabed area to participate in the deep sea mineral industry to support the aspirations of its people. Nauru considered its membership of the International Seabed Authority of upmost importance and was committed to fulfilling its membership duties. (The Council will take up the application of Nauru Ocean Resources Inc. next Tuesday).

The Minister said Nauru Ocean Resources Inc. had requested the right to gather data and carry out scientific and technological studies. It was offering to expend significant resources for that purpose. Its exploratory work in the Area would be carried out for the benefit of mankind as a whole. The company was also committed to carrying out comprehensive training programmes for personnel of the Authority and developing State nationals nominated by the Authority. Nauru Ocean Resources Inc. which is wholly owned by the Nauru Education and Training Foundation and the Nauru Health and Environment Foundation, had assembled the world’s most experienced ultra deep sea exploration team and had the financial capacity to carry out world class exploration and environmental studies, the Minister said. Many of the experts on the company’s technical team were leaders of the largest programmes of seafloor polymetallic nodule exploration and engineering conducted to date.

The Minister said his government was particularly excited about the project because the application of Nauru Ocean Resources Inc. represented the first to explore in the Authority’s Reserved Area. His government was committed to fulfilling its sponsorship responsibilities and obligations under the Law of the Sea Convention. Since the start of the application process in 2008, they had been open and transparent, and had worked together with the Authority to ensure that the company’s exploration was mutually beneficial, he stated.

Discussions on advisory opinion

Following the Secretary-General’s introduction of the Seabed Disputes Chamber’s Advisory Opinion, several Council members took the floor to express satisfaction with the Chamber’s response to the Council’s request. Several speakers agreed with the Secretary-General’s description of the advisory opinion as a “milestone in the life of both the Authority and the Law of the Sea”. Others noted that it was significant that the opinion was unanimous, adding that the legal interpretations put forward by the Chamber brought a measure of clarity on matters related to the obligations of sponsoring States.

The Mexican representative was the first speaker to take the floor. She said that the fact that the Seabed Disputes Chamber had given its first advisory opinion at the request of the Authority demonstrated the growing cooperation among the institutions created under the 1982 United Nations Convention on the Law of the Sea. She put forward some recommendations as concrete steps the Authority could take against the backdrop of the advisory opinion:

1. Future regulations relating to the issue of sponsorship should be interpreted in the light of the advisory opinion.
2. The decisions of the Council on the adaptation of regulations for exploration and exploitation should make mention of the advisory opinion and that the regulations for cobalt-rich ferromanganese crusts would offer the first opportunity to do so.

3. The Authority, and specifically the Legal and Technical Commission, should initiate a process for the development of model laws incorporating the substance of the advisory opinion.

4. In light of the legal vacuum identified by the Chamber with regard to liability and compensation, the Authority should initiate a process to establish a fund to guarantee total compensation.

5. As the exploitation of seabed minerals edges closer to being realized, the Authority should look at the possibility of developing a system of international standards of strict liability.

Describing the opinion as “balanced” the representative of China said the Disputes Chamber clearly defined the obligations that applied equally to developed and developing States, and outlined the responsibility and liability of sponsoring States and contractors. India said the obligations of States and contractors were distinct and that there could be an extra burden on sponsoring States to cover damages not dealt with under the Convention.

The United Kingdom pointed to the fact that the advisory opinion was firmly grounded in established rules of international law and lauded the emphasis the Chamber placed on the importance of the obligations of States towards the protection of the marine environment.

Several delegations, including Australia, Bangladesh and Brazil supported Mexico’s call for “model laws” to be developed by the Authority. The representative of Germany further called for the inclusion of the issue of national legislation of sponsoring States into the work programme of the Authority in the form of seminars and studies. He said that his country would be using the advisory opinion as a starting point for a review of its legislation relating to the provision of recourse and compensation arising from seabed activities. The Netherlands representative suggested that in developing model legislation, the Authority could seek guidance from States Parties which already had such legislation in place.

Sharing the views of other delegations, Brazil said member nations should be encouraged to pursue legislation within each of their legal framework to assist in supervision of the activities of sponsored contractors and for administering their “due diligence” obligations. Australia supported the adoption of stringent laws by sponsoring States to ensure protection of the marine environment, and described the Chamber’s advisory opinion as a good starting point. Fiji said the model law would constitute a move towards international conformity.

Trinidad and Tobago said the opinion on the “due diligence” obligations of sponsoring States strengthened the provisions of the United Nations Convention on the Law of the Sea (UNCLOS) which required States Parties to assist the Authority in exercising control over the Area. Japan echoed the sentiments of other delegations concerning the opinion on States’ obligations and commended the Secretariat on its work in securing the advisory opinion of the Seabed Disputes Chamber.

South Africa raised the question of the type of damage for which sponsoring States would be considered liable. He was concerned that the advisory opinion implied a restriction to material damage and noted that under international law liability flowed from both legal and material damage. He agreed that States should be encouraged to adopt and enforce legislation relating to liability and further suggested that the Legal and Technical Commission use this criteria in their evaluation and approval of applications.

Argentina said the laws of sponsoring States should take into account the precautionary approach, protection of the marine environment and impact assessment, and should not be less stringent than those
adopted by the Authority. The Russian Federation said that in addition to the laws, States should create a set of controlling mechanisms and government standards for protection of the marine environment. Jamaica said the landmark opinion made it easier for developing States to sponsor activities in the Area.

Draft regulations on cobalt-rich crusts

The Council then moved on to its agenda item on the draft regulations on prospecting and exploration for cobalt-rich ferromanganese crusts in the Area (ISBA/16/C/WP.2). The Legal Counsel explained that the draft regulations were adopted by the Legal and Technical Commission in 2009 for consideration by the Council during the sixteenth session of the Authority. Although the Council took up the subject, it did not have sufficient time to complete its work, including the consideration of an informal proposal submitted by the delegation of China. The Council agreed to continue its work on the draft regulations at the current session, noting that the draft regulations proposed by the Commission would require further revision in order to bring them into alignment with the text of the regulations on polymetallic sulphides (ISBA/16/A/12/Rev.1) which was adopted by the Assembly in 2010.

The Secretariat had prepared an informal version of the draft cobalt-crusts regulations (ISBA/17/C/CRP.1) showing where further consequential revisions would be needed to bring the text into alignment with the regulations on polymetallic sulphides.

The main substantive areas of difference between the regulations on polymetallic sulphides and that on cobalt crusts related to the question of the size and configuration of the area to be allocated for exploration (regulation 12); and the progressive fee system (regulation 21).

Consideration of the draft regulations this morning began with a presentation by the Chinese delegation of a suggested revision of regulations 12 and 27, as follows (the revisions are highlighted):

**Regulation 12**

**Total area covered by the application**

2. The area covered by each application for approval of a plan of work for exploration for cobalt crusts shall be comprised of not more than **150 cobalt crust blocks** which shall be arranged by the applicant in clusters, as set out in paragraph 3 below.

3. Five contiguous cobalt blocks form a cluster of cobalt crust blocks. Two such blocks that touch at any point shall be considered to be contiguous. Clusters of cobalt crust blocks need not be contiguous. Clusters of cobalt crust blocks need not be contiguous but shall be proximate and located entirely **within a rectangular area not exceeding 300,000 square kilometers in size and where the longest side does not exceed 1,000 kilometres in length**.

4. Notwithstanding the provisions in paragraph 2 above, where an applicant has elected to contribute a reserved area to carry out activities pursuant to article 9 of annex III to the Convention, in accordance with regulation 17, the total area covered by an application shall not exceed **300 cobalt crusts blocks**. Such blocks shall be arranged in two groups of equal estimated commercial value and each such group of cobalt crust blocks shall be arranged by the applicant in clusters, as set out in paragraph 3 above.

**Regulation 27**
Size of Area and Relinquishment

2. By the end of the eighth year from the date of the contract, the contractor shall have relinquished at least one-third of the original area allocated to it;

3. By the end of the tenth year from the date of the contract, the contractor shall have relinquished at least two-thirds of the original area allocated to it; or

3 (bis). Notwithstanding the provisions in paragraph 2 and 3 above, a contractor shall not be required to relinquish any additional part of such area when the remaining area allocated to it after relinquishment does not exceed 1,000 square kilometers.

China’s view was that the size of the areas for exploration (2000 km²) and exploitation (500 km²) provided in the draft regulations were too small to make commercial mining possible and as such were not favourable to encourage activities in the Area. The delegation therefore proposed that those areas should be increased to 3,000 km² and 1,000 km² respectively.

In an explanatory note contained in the annex to its proposal (ISBA/17/C), China noted that the sizes of these areas were calculated on the basis of a hypothetical model mine site as described in document ISBA/12/C/3/Part 1 (Exploration and Mine Site Model Applied to Blocks Selection of Cobalt-rich Ferromanganese Crusts and Polymetallic Sulphides). However, China pointed out that, the model mine site (referred to as Model Mine Site 1 in the explanatory note) was not designed to make an economic evaluation of the mining area; the calculations were based on one coefficient – recovery efficiency of 82 per cent.

On the basis of surveys and research, China proposed a different hypothetical model mine site to calculate the areas, using four coefficients: crust thickness, grade, topography and recovery efficiency of 70 per cent rather than 82 per cent. It stated that crust grade, crust thickness and topography were key factors in determining the quality of a mining area and therefore all these factors needed to be taken into account in calculating accurate sizes for exploration and exploitation areas.

Based on the Chinese model mine site, the exploration area would be 4,000 km² and the exploitation area 1,000 km². However, in the interest of avoiding as far as possible the likelihood of overlapping claims among applicants, China proposed to limit the exploration and exploitation areas to 3,000 km² and 1,000 km² respectively.

The Chinese representative said that those modifications would encourage activities in the Area while reducing the potential for political disputes over claims.

The Council will meet this afternoon at 3 pm to continue its debate of the draft regulations for cobalt-rich ferromanganese crusts.