SEABED COUNCIL MAKES PROGRESS ON OUTSTANDING ISSUES IN DRAFT CRUST REGULATIONS

Discussions on a redraft proposal for article 21 of the draft crusts regulations and the fee for processing an application for approval of a plan of work by contractors, took up most of the meeting of the Council of the International Seabed Authority, in Kingston today.

Delegations considered ways to ensure an equitable balance between the fees the Authority charged for processing applications for exploration work plans from contractors, and the administrative costs it incurred for processing those applications.

The Council is seeking to complete work on the draft regulations on prospecting and exploration for cobalt-rich ferromanganese crusts in the Area before the eighteenth session ends on 27 July. Outstanding issues relate to the shape of the allocated exploration area in regulation 12 – Total area covered by the application; regulation 21 – Fees for application; regulation 27 – Size of the area and relinquishment, and regulation 30 – Periodic review of the implementation of the plan of work for exploration, which relates to issues being discussed in regulation 21.

The Netherlands’ proposed amendment differs from the original draft in that it introduces the requirement for the contractor to cover the shortfall in a case where the costs of processing an application exceeded the fees paid.

The proposal of The Netherlands reads as follows:

**Regulation 21**

**Fee for applications**

1. The fee for processing an application for approval of a plan of work for exploration for cobalt crusts shall be a fixed amount of [750,000] United States dollars or its equivalent in a freely convertible currency.

2. At the time of submitting an application, the applicant shall pay [50%] of the fixed amount.

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3. If the administrative costs incurred by the Authority in processing an application are less than [50%] of the fixed amount, the Authority shall refund the difference to the applicant.

4. If the administrative costs incurred by the Authority in processing an application are more than [50%] of the fixed amount, the applicant shall pay the difference to the Authority. The Secretary-General shall determine the amount of any such difference and notify the Contractor of the amount due within [one] year of the conclusion of the contract. The notification shall include a statement of expenditures.

5. Upon notification by the Secretary-General that the amount of the fee is insufficient to cover the administrative costs incurred by the Authority in processing an application, the fee set out in paragraph 1 of this regulation shall be reviewed by the Council.

Discussion on the proposal

Brazil offered some amendments to proposal by The Netherlands, recommending that the total fee be paid by the contractor upon application, and that the percentages be deleted from paragraphs 3 and 4.

The representative of the United Kingdom urged the Council to be guided by certain “balancing considerations” in making a decision on the matter. Any decision made should be fair to both members and contractors. He urged his colleagues to bear in mind that the mandate of the Authority – that of ensuring and promoting deep seabed mining – would only happen if entities were willing to invest their own capital into such activities. Due care must be taken to avoid setting fees at a level that would deter such investment.

Fiji advocated for the adoption of a fixed fee, paid in full upon application to provide “some area of certainty” for contractors in a business that was very uncertain. Several delegations, including China, Germany, Japan Kenya, South Africa and Vietnam agreed with this simplified system, and Argentina suggested a periodic review of fees by the Council every two or three years to keep them at a level that would recover costs. The notion of a review met with support from a number of members, though the suggested review period varied.

With regard to the level of fees, some members supported the suggestion put forward by Brazil at the previous Council meeting that the fees should be raised to $750,000 to cover not only the costs of processing applications but also ongoing costs associated with managing the contracts. Russian Federation maintained, however, that applicants should only pay for specific costs attributable to the application process, not those costs associated with the review of plans of work (regulation 30). China voiced similar concerns regarding the connection between regulations 21 and 30.

Other delegations preferred to keep the fees at $500,000 as suggested by the Secretary-General in his report (ISBA/18/C/3), while China put forward a figure of $600,000 designed to cover costs relating to the periodic review of plans of work mentioned in regulation 30 of the draft regulations.

The Secretary-General reiterated the position set out in his report. He said that contractors applying to explore for polymetallic sulphides paid a fixed fee of $500,000 as specified in the sulphides regulations, and that this amount was sufficient to cover costs at this time. This fee is paid in full upon application. If the administrative costs of processing the application are less, the Authority refunds the contractor at the time of signing the contract. He expressed the view that the best way forward was to - more -
“keep it simple” and implement the same fee system for the sulphides regulations. If the costs had to be raised in the future, it would be based on the recommendation of the Finance Committee to the Council.

There were divergent views expressed on the matter of making refunds to contractors where processing costs were less than the fees paid. Brazil rejected the notion of refunds on the grounds that it was not common practice in commercial circles. This position was supported by South Africa and Vietnam. On the other hand, France, Japan, the Russian Federation, Senegal and the observer from the United States referred to language in the Convention which states that if the administrative cost incurred by the Authority in processing an application is less than the fees paid, “the Authority shall refund the difference to the applicant.” (Annex III, Article 13, para. 2)

The Legal Counsel of the Secretariat was called upon to give a perspective on the effect that the relevant Article of the Convention had on the Council’s ability to review the issue of fees and refunds. He explained that the text of the Convention had been transferred directly into the regulations for polymetallic nodules, but went on to point out that the General Assembly had made a departure from Article 13 by waiving the Pioneer Investors’ application fees altogether. He suggested that there might be circumstances where such departures could be acceptable while remaining consistent with the spirit of the Convention, given the evolutionary approach of the Authority in the development of its rules and regulations.

Towards the end of the meeting the representative of Brazil put forward new wording for regulation 21, retaining paragraph 1 and deleting all others. A second paragraph would then be included to indicate that the fixed fee mentioned in the first paragraph would be subject to review by the Council. Mexico and the Russian Federation were among the delegations agreeing to consider this proposal once it was available in writing.

The Council will resume consideration of the draft regulations when it meets this afternoon.

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