COUNCIL FAILS TO ADOPT FINANCE COMMITTEE PROPOSALS
ON SYSTEM OF COST RECOVERY FEES

To Meet Again Friday to Attempt to Reach Consensus

After a lengthy debate this afternoon, the Council was unable to reach a consensus on a Finance Committee recommendation for the institution of a system of cost recovery fees for the administration and supervision of exploratory contracts, and adjourned until tomorrow, Friday, 19 July to reconsider the issue on a priority basis.

Despite a common ground on a number of points, the meeting had to be adjourned before a draft reworked by Brazil and other delegations could be put before the Council in a written form. The decision was deferred.

The Finance Committee’s recommendation for a fixed overhead charge of $47,000 to be payable by contractors for each contract was embodied in a draft decision contained in its report both to the Assembly (ISBA/19/7) and the Council (ISBA/19/C/11).

Secretary General Nii Allotey Odunton (Ghana) emphasized that one effect of adopting the decision would be that, starting next year, the meeting time of the Legal and Technical Commission could be increased, enabling it to complete its agenda. Those fees, he added, would result in decreased payments by member States. He urged all Council members to seriously consider the decision before them.

Leading the discussion on the draft decision, the Chairman of the Finance Committee, Mr. Olav Myklebust (Norway), responded to the main points raised by representatives when the topic was first debated in the Council on Tuesday, 16 July. He referred to the proposed overhead charge of $47,000, which the Committee had concluded was the annual standard cost associated with administration and supervision of each contract.
Delegations had commented on the term “overhead charge”, which some felt was not the best way to describe the fee to be paid by contractors to offset the Authority’s expenses. The reason for using this term, he explained, was that it was applied by other international organizations, including the United Nations Development Programme.

Responding to a suggestion of a possible inconsistency between paragraph 4 of the draft decision and paragraph 10.6 of the annex to the Finance Committee report, Mr. Myklebust pointed out that the paragraphs in the annex were not part of the report and the draft decision, but were amendments to the standard clauses of each contract between the Authority and the contractor. It was therefore not necessary to describe the details of decision-making procedures of the Authority in those paragraphs.

Clarifying another query brought forward from the previous meeting about which contractors would be required to pay the fee, the Chairman said that all applications submitted following the adoption of the decision by the Council would be subject to this charge. Additionally, contracts that were entered into as a result of applications made before the date of adoption of the decision would be subject to renegotiation in accordance with section 24.2 of the standard clauses for exploration contract.

The Chairman reiterated that the Committee had sought guidance from the Secretariat and the Legal Counsel, and had done a thorough job in formulating and reviewing the draft decision.

The Legal Counsel observed that the relationship between the Authority and its contractors was unique in international law in that it was exclusively contractual. Amendments to contracts could only be made by contractors and the Secretariat. The purpose of section 24.2 of Annex 4 (Standard clauses for exploration contract) was to alert the contractor that the contract could be revised “to facilitate the application of any rules, regulations and procedures adopted by the Authority subsequent to the entry into force” of the contract.

**Discussion on the draft decision**

A number of Council members supported the draft decision of the Finance Committee as it stood. The representative of Germany deemed it to be clear and well-balanced, while Australia’s representative urged other members to make the adoption of the decision a priority to be completed before the close of the meeting. Uganda’s representative felt that the Finance Committee had recommended the sum of $47,000 after careful analysis of the administrative costs incurred in the supervision of contracts. The fees would benefit the contractors by enabling the Authority to review reports and complete its other tasks in a timely manner.

France, on the other hand indicated that the payment of $47,000 per year could cost each contractor $500,000 at the end of eleven years, which was equivalent to the fee paid upon submitting a plan of work. This measure would amount to a double penalty for contractors.

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Three delegations, namely, Mexico, Poland and China, circulated proposals to amend the draft decision formulated by the Finance Committee. Mexico proposed a new paragraph 6 as follows:

“6. Requests the Secretary-General to annually report on the implementation of all aspects of the present decision”.

Poland proposed changes to paragraphs 1 and 3 to read as follows:

“1. Decides to institute a fixed overhead charge or such sum as may be fixed in accordance with paragraph 3 or 4 to be payable in accordance with the present decision annually by each contractor in respect of each of its contracts with the Authority to cover the costs of the administration and supervision of the contract and of reviewing its annual report provided in accordance with the contract.

“3. Urges the secretariat to consult as soon as possible all contractors whose contracts were entered into as a result of applications made before the date of adoption of the present decision, with a view to renegotiating those contracts, in accordance with section 24.2 of the standard clauses for exploration contract, taking into consideration the provisions set out in the annex to the present decision.

China proposed a new paragraph 4bis as follows:

“4bis Decides that such expenditures shall be set off against eventual income from commercial production”.

There were no objections to Mexico’s proposal to add a sixth paragraph. Poland’s proposal drew support from China and from the representative of the Russian Federation, who was particularly in favour of the new drafting of paragraph 3.

China’s proposed amendment was the subject of much discussion. While it was supported by some members, including Poland and the Russian Federation, other delegations, including Argentina and Australia, felt that the amendment should be analysed by the Finance Committee. Japan sought guidance from the Legal Counsel in order to understand the proposal more fully. The Netherlands suggested that the wording should be changed from “such expenditures shall be set off…” to “such expenditures may be set off…” as some contractors might decide not to exercise that option.

China responded to comments from delegations, including Argentina and Japan, concerning the applicability of article 13 of annex 3 of the Convention to the issue of guidelines for contractors with regard to offsetting development costs. The representative acknowledged that section 8 of the 1994 Agreement relating to the Implementation of Part XI of the Convention in effect made Annex 3, article 13 of the Convention no longer applicable. However, he added, Annex 4, section 10 (c) of the standard clauses for exploration contracts had subsequently restored the applicability of the relevant Convention provision.

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The Legal Counsel, Mr. Michael Lodge confirmed China’s statement on the applicability of article 13 of Annex 3 of the Convention, and further explained that issue of development costs had been taken up some years ago by the Legal and Technical Commission. It was a general and well-known practice in mining industry to allow contractors to set off some costs against production, he said, and Annex 3, article 13 of the Convention detailed how much could be set off. Contractors were required to make a detailed statement of actual and direct exploration expenditures for the first accounting year of commercial production. Once that statement was accepted by the Commission, Annex 4 of the standard clauses stipulated that “Such expenditures may be claimed by the contractor as part of the contractor’s development costs incurred prior to the commencement of commercial production…”

Mr. Lodge made a suggestion in relation to China’s proposal to link Annex 4 of the standard clauses with the recommendations of the Legal and Technical Commission on the subject of exploration expenditure contained in ISBA/15/LTC/WP.1. The proposal would read as follows:

4bis Decides that such expenditure shall be treated as actual and direct exploration expenditure for the purposes of annual reporting under the contract.

This amendment did not meet with favour from the Chinese representative, who said it weakened the proposal. China went on to emphasise that deep seabed mining involved significant investment, and in order for future mining activities to generate income for the common heritage of mankind, the Authority should make efforts not to deter contractors from entering the exploitation phase.

Some delegations expressed concern that offsetting contractor’s expenditures might result in undoing the efforts now being made by the Authority to recover supervisory costs. Senegal pointed out that having asked contractors to bear costs that the Authority and its members could not bear, “we might end up reimbursing these costs.” Argentina envisaged a scenario where the Authority might be placed in a position of owing money to the contractor.

The representative of Brazil took the floor to formally withdraw the proposal for amending the Finance Committee’s draft decision which had been put forward by his delegation. He announced that a new text had been drafted in consultation with other delegations and suggested that it could be refined and distributed so that a decision could be adopted early at the Council’s meeting tomorrow morning.

In response to the determination on the part of the members to reach consensus before the next meeting, the President agreed to a brief suspension of the meeting to perfect the draft for an oral presentation to the Council. However, after it was presented some delegations expressed a preference for seeing the proposed changes in writing. Consequently the matter was deferred, and will be taken up when the Council next meets on Friday morning, 19 July.