SEABED COUNCIL CONTINUES DISCUSSION ON LTC REPORT; GETS EXPLANATORY NOTE ON KEY COMPONENTS OF EXPLOITATION REGULATORY FRAMEWORK; ADOPTS AMENDMENTS TO TWO REGULATIONS

The Council of the International Seabed Authority, at two meetings in Kingston today, examined procedures for possible extension of exploration contracts and mechanisms for the formulation of regulations for exploitation in the Area, as it continued deliberations on the summary report of the Chair of the Legal and Technical Commission (LTC) on its February and July sessions.

Also today, the Council adopted amendments to two separate Regulations - Prospecting and Exploration for Polymetallic Sulphides and Prospecting and Exploration for Polymetallic Nodules.

In other matters, the Council elected the Czech Republic to the remaining position for vice-president for the Eastern European Group, joining Argentina (Latin American and Caribbean States), Bangladesh (the Asian Group) and Netherlands (Western European and Others Group) who were elected at its first meeting.

Ahead of the debate, the 36-member Council received an Explanatory note on the “environmental management plan in the regulatory framework for mineral exploitation in the Area” (ISBA/20/C/13) prepared by the Netherlands.

Before the start of its substantive work, the Council observed a minute of silence in honour of the victims of Malaysia Airlines flight MH17 which was shot down over Ukraine on 17 July 2014.

Also this morning, the President of the Council, Tommo Monthe (Cameroon), reminded members that 18 July had been declared “Mandela Day” by the United Nations. The President recited poetry as he paid tribute to Nelson Mandela, the late South African President, describing him as “the great man who suffered for the good of humanity”.

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Members of the Council were invited to resume discussion on the summary report of the Chair of the Legal and Technical Commission (ISBA/20/C/20) on the basis of the Netherlands document.

Environmental management plan

The Netherlands note sets out the legal context, the role of the Authority and the specific obligations of the contractor in an environmental management plan in the regulatory framework for mineral exploitation in the Area. It also outlines the usefulness of environment impact assessments.

The Council is invited to request the Legal and Technical Commission to address the following issues in the development of the exploitation regulations:

(a) the compulsory establishment by the Authority of an environmental management plan as a requirement for granting contracts for exploitation in a designated area; and
(b) the obligation for the contractor to timely carry out a prior environmental impact assessment and an environmental impact assessment.

For the legal context of an environmental management plan, the Netherlands document cites, among others, specific provisions in the 1982 United Nations Convention on the Law of the Sea Agreement relating to the implementation of Part XI, as well as regulations and recommendations on prospecting and exploration, such as Part V in Regulations on polymetallic nodules, polymetallic sulphides and cobalt-rich ferromanganese crusts.

On the role of the Authority, it states that the organization should be charged with developing and establishing an environmental management plan for a specific area within the Area. The plan would be a precondition for concluding any exploitation contracts in relation to that specific area. It should contain information, which among others, include an evaluation of the potential cumulative environmental impacts on the marine environment of all mining activities in that specific area.

The document adds that the plan should contribute towards ensuring transparency and clarity on aspects of environmental impact assessment in the decision-making process of the Authority. A list of guiding principles of an environmental management plan is provided, with a reference also to a Legal and Technical Commission document ISBA/17/LTC/7.

The document also observes that specific obligations for the contractor should entail a number of components such as prior environmental impact assessment; evaluation of the likely environmental impacts of a proposed project or development; and monitoring, compliance, enforcement and environmental auditing.
Discussion

There was widespread support for the explanatory note submitted by the Netherlands in comments from Australia, Brazil, Kenya, Mexico, New Zealand, Norway, South Africa, and Trinidad & Tobago describing its recommendations as useful, timely, necessary, and valuable. Kenya and Uganda said they were aligned with delegations who supported the precautionary approach while China said it was ready for further discussion the paper on the basis of the balance between development of resources and environmental protection.

A number of members and observers contributed to the debate on the extension of contracts for exploration and preparation of the draft exploitation regulations. They included Argentina, Australia, Brazil, Canada, China, Cook Islands, Fiji, France, Germany, India, Jamaica, Japan, Kenya, Mexico, New Zealand, Netherlands, Norway, Senegal, South Africa, Trinidad and Tobago, Tonga, United Kingdom, Vanuatu, Deep Sea Conservation Coalition, and Interocean Metal Joint Organisation (IOM).

Extensions of contracts for exploration

Several delegations expressed concern about the time frame available for the Council to review, at its current session applications for extensions of contracts expiring in March. Some delegations wondered whether guidelines and procedures for contract extension were clear. They also had questions about the timeline for preparing draft exploitation regulations, and the role a stakeholder survey would play in helping to frame those regulations.

The Netherlands noted the Commission’s concern about implications of the anticipated applications for extension and supported the need to formulate draft procedures and criteria for such applications. The delegation pointed out that in considering applications for contract extensions, the Commission must have sufficient information duly supplied by the contractor as set out in paragraph 11.2 of the standard clauses for exploration contract. South Africa and Trinidad and Tobago echoed these concerns and said it would be useful to know to what extent contractors had fulfilled the requirements of their contract thus far.

Draft Regulations for Exploitation

On the preparation of the draft regulations for exploitation in the international seabed Area, the United Kingdom called for swift action to support the Legal and Technical Commission in its preparatory work. Australia, Canada, France, India, and Germany welcomed progress by the Commission in developing an approach to exploitation regulations. Australia said a workshop on the exploitation code should be prioritized and held within the next twelve months to inform the work of the Commission. Topics could include environmental management issues.

Responding to comments concerning Part IV of the report, the Commission’s chairman, Russell Howorth (Fiji), said the complexity in drafting regulations for exploitation in the Area became evident after the Commission considered a detailed technical study of the different
mining regimes and methodologies. He said the Commission would work towards producing a draft framework for the regulations by February, 2015 for the July session of the Council.

**Stakeholder survey**

The stakeholder survey conducted by the Secretariat in March 2014 was also the subject of some discussion in the Council. The survey focused on four thematic areas: financial terms and obligations; environmental management terms and obligations; health and safety and maritime security; and general considerations on stakeholder communication and transparency. The purpose of the survey was to allow the Authority to prioritize issues based on stakeholder responses. The Chairman reported that 55 responses were received - notably 20 from governments and nine from contractors.

Several delegations, including Canada, China, France, India, Japan, Mexico and Norway described the survey as useful and meaningful. Argentina expressed the concern at the relatively low level of response, which did not represent the “critical minimum” needed to make a valid analysis. The representative said it would be useful to allow more time for those stakeholders who had not yet responded to the survey to do so in time for the next meeting of the Legal and Technical Commission. Tonga agreed with this suggestion, saying that its government would be keen to respond to the survey.

In his response, the Chairman of the Commission agreed that the survey could remain open to allow more participation and the results be treated as “a living document”.

**Workload of the Legal and Technical Commission**

A number of delegations expressed concern about the inevitable increase in the workload of the Legal and Technical Commission, given that 26 contracts for exploration were expected to be signed by the end of 2014. In his response, the Chairman said the Commission intended to review the current template for contractors’ annual reports. The new format would encourage contractors to provide information using a more streamlined system that would allow the Commission to examine the reports in a more timely fashion.

Discussing Section C of Part V of the Commission’s report, dealing with monopolization of activities in the Area, several delegations, including Canada, Germany and the Netherlands sought clarification on the Commission’s reference to “a new way of doing business insofar as applications for plans of work for exploration were concerned, which was compliant with the Regulations.” The Chairman explained that with regard to some of the contracts that had been approved, the spirit of the Convention had been adhered to, but in the absence of the Enterprise, the “way of doing business” could be seen as somewhat different from what had been envisioned.

The Chairman also stated that the Commission had had difficulty finding a definition for monopolization but that the matter would be kept on its agenda. The Netherlands suggested that in defining monopolization, the discussion should focus not on dominant market position per se but on the abuse of the position. Argentina agreed, and added that definitions for terms such as

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effective control and monopolization could be sourced in OECD literature and some national legislation.

**Environmental management plan for the Clarion-Clipperton Zone**

An open meeting of the Legal and Technical Commission was held on Tuesday, 15 July to review the status of the implementation of the environmental management plan for the Clarion-Clipperton Zone which was adopted in 2012 for a period of three years. While the open meeting was welcomed, several delegations called for longer notice to be given when such sessions were planned to allow interested parties to attend. Australia, Mexico and New Zealand urged the Authority to move swiftly towards developing similar plans for other areas. Tuvalu supported the continuous review of the environmental management plan, saying it should be treated as a “living document” to be modified as new data became available.

Trinidad and Tobago reminded the Council of the existing synergies between work of the Authority and other bodies including the United Nations General Assembly. He drew attention to paragraph 51 of Resolution A/res/68/70, which “invites the Authority to consider developing and approving environmental management plans in other international seabed area zones, in particular where there were currently exploration contracts.

With regard to Part VI of the Commission’s report, dealing with guidelines for its members pertaining to conflict of interest, Brazil took issue with the last sentence which read that “it was primarily incumbent on each member of the commission to ensure that he/she complied with the obligations set out in the Convention in the interest of transparency and accountability.” The representative maintained that the Rules of Procedure of the Commission placed the responsibility on the Secretary General to assist the Commission and the Council to enforce the rules on conflict of interest. Argentina endorsed this view.

With regard to the data-management strategy of the Authority, New Zealand urged the on the issue of contractors reporting on environmental data. The representative said it should be clear that the “default position” is that environmental data is public and urged the Council and the Legal and Technical Commission to take a strong position towards contractors in this regard.

**Proposed amendments to regulation 21 of the Regulations on Prospecting and Exploration for Polymetallic Sulphides in the Area**

The Council decided to adopt the amendments to regulation 21 of the Regulations on Prospecting and Exploration for Polymetallic Sulphides in the Area recommended by the Legal and Technical Commission (ISBA/20/C/9). Regulation 21 deals with fees payable for processing an approval of a plan of work for exploration for the resource.

Under the new regulation, applicants will have to pay a fixed fee of 500,000 United States dollars upon submission of an application. If the administration costs actually incurred by the Authority to process the application are less than the fee amount, the difference shall be refunded to the applicant. If the costs exceed the fixed amount, the applicant shall pay the Authority the additional amount, up to a ceiling of 10 per cent of the fee.

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In notifying the applicant of the amount of such differences, the Secretary-General shall include a statement of expenditure incurred by the Authority. Refundable or additional amounts shall be paid within three months of the signing of the exploration contract. The regulation also states that the fixed amount shall be reviews from time to time by the Council to ensure that it covers the expected administrative costs of processing applications and to avoid the need for applicant to pay additional amounts.

The Council also decided to adopt an amendment to regulation 21 of Section 4 of the Regulations on polymetallic nodules. This regulation deals with the consideration by the Legal and Technical Commission of applications for approval of plans of work for exploration.

The amendment, contained in Annex III of the Legal and Technical Commission report, adds a new paragraph as follows:

6. bis The Legal and Technical Commission 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 monopolize the conduct of activities in the Area with regard to polymetallic nodules or to preclude other States Parties from activities in the Area with regard to polymetallic nodules.

Speaking further in the afternoon session, the LTC Chairman, Mr Howorth said that as the workload of the Commission grew there would be an urgency to balance issues relating to contracts requiring extensions. On extension versus expiration of exploration contracts, the Chairman referred to standard clauses in sections 10 (Annual report) and 11 (Data and information to be submitted on expiration of the contract) in regulations on prospecting and exploration. He said the draft framework, or skeleton of the exploitation regulation, would be presented to the Council in the first quarter of 2015 in the form of a work-package showing progression. He said workshops would become necessary once learning opportunities were presented.

Before the meeting concluded the Authority’s Legal Counsel gave an opinion on the criteria for applications for extension of contracts for exploration following a debate among Council members some of whom believed that some language could be regarded as ambiguous and subjective.

The Legal Counsel said the issues were not complicated as there were three distinct possibilities: 1) The contract is transformed into an exploitation contract; 2) the contract expires; or 3) the contract is extended in accordance with clause 3.2 in the standard clauses for exploration contract. He said if the contractor had acted in good faith then there would be an extension.

Part III of the Legal and Technical Commission report will be taken up on Monday, 21 July, when the Council considers applications for approval of plans of work for exploration in the Area.

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