SUMMARY RECORDS OF MEETINGS AT WHICH THE COUNCIL DISCUSSED ITEM 7 OF ITS AGENDA (INCLUDING THE LIST OF SPEAKERS)

Summary records of the 155th, 160th and 161st meetings of the Council of the International Seabed Authority at the sixteenth session of the International Seabed Authority

1. At its 155th, 160th and 161st meetings at the sixteenth session of the International Seabed Authority, the Council of the International Seabed Authority considered item 7 of its agenda, entitled 'Proposal to seek an advisory opinion from the Seabed Disputes Chamber of the International Tribunal for the Law of the Sea on matters relating to the responsibility and liability of Sponsoring States'. The three parts of this document include the summary records of those meetings prepared by the secretariat. The annex contains an index to the summary records of those meetings.

2. It is important to note that this is an unofficial account. The Authority does not publish official verbatim or summary records of meetings. Official accounts of the work of the Authority are contained in the statements of the Presidents of the Assembly and the Council on the work of those organs, in the annual reports of the Secretary-General and in the summary reports of the Finance Committee and the Legal and Technical Commission on the work of those organs. Nevertheless, it is the long-standing practice of the secretariat to take notes of meetings and to compile notes from a variety of secretariat sources so as to provide a near-verbatim account of the meetings for archive and research purposes.

I - 155th meeting of the Council on 3 May 2010 (afternoon)

3. The President of the Council declared the 155th meeting of the Council open and took up agenda item 7, indicating that the information relevant to this item was available in document ISBA/16/C/6. The President of the Council invited the delegate of Nauru to introduce its proposal as contained in that document.

4. The delegate of Nauru thanked the President and congratulated him on his election, and thanked the people and Government of Jamaica for their warm welcome and hospitality. In his presentation on Nauru's proposal contained in document ISBA/16/C/6, the delegate also recalled the background to that document in response to a request from some Members of the Council. He said that Nauru Ocean Resources Inc. (NORI), which the Government of Nauru had sponsored, was a subsidiary of Nautilus Minerals Incorporated, a world leader in deep sea mineral exploration and development. He indicated that discussions with Nautilus to define a partnership for the development of marine mineral resources started in 2008, and added that Nautilus had worked on this kind of activity for decades, resulting in significant benefits to Papua New Guinea. He indicated that his country, like other developing countries, was not in a position to carry out exploration for mineral resources in the Area on its own. Therefore, partnership with the private sector was and is of crucial importance to Nauru and other developing States. His country was very excited to be involved in the partnership project as this represented a valuable opportunity for development. The delegate also recalled that land-based resources in his country had been significantly depleted after 100 years of phosphate mining and there were no known living resources in its exclusive economic zone that were commercially viable. Therefore, partnership in the Area offered a second chance for his country to stand on its own two feet. This partnership involved significant benefits, including the payment of an annual mining production fee during exploitation, annual monetary contributions to health and education during exploitation, monetary payments during exploration, employment in the project for
Nauruan nationals, training and capacity building (in geology, engineering and environmental science), skills and technology transfer, and access to finance and technology that Nauruan entities would otherwise not have. For example, this project would provide the Government with sustainable resource for training and scholars. There would also be significant benefits to the Authority in having a company like NORI participate in activities in the Area. The delegate stated that the applicant, NORI, was a Nauruan registered company incorporated in Nauru on 6 March 2008. He stated that Government of Nauru was the sponsor of NORI and the controller of the partnership; NORI was under the effective control of the Government of Nauru. Whilst Nauru’s Sponsorship Agreement with NORI conferred numerous powers upon his Government, the delegate believed the Seabed Disputes Chamber might be able to clarify whether there were any additional measures the Sponsoring State must take. It was important that due diligence was carried out and that no stone was left unturned. As Nauru would like its application for a plan of work for exploration to be reheard by the Legal and Technical Commission in 2011, it was timely to seek an advisory opinion to incorporate into the sponsorship agreement any feedback from the Seabed Disputes Chamber this year. It would be in the interest of all developing States to obtain legal clarification to assist these States in fulfilling their sponsorship responsibilities and in identifying what terms they should impose in their sponsorship agreements with their private sector partners. A timely opinion would provide greater certainty to current and future State sponsorship of activities in the Area. It would also demonstrate to private sector investors that there was a procedure to follow and bodies to make rulings on the issue. The delegate stated that the current proposal was quite lengthy since the intent was to provide as much information as possible, and he was ready to revise it and create a much more succinct request. The delegate then introduced Robert Heydon as representative of NORI.

5. The representative of NORI expressed his thanks for being granted the privilege of addressing the Council. He also felt privileged to represent the first private enterprise to apply for a contract with the Authority and expressed his excitement over this landmark in the sustainable development of mineral resources. He recalled that the dialogue with the secretariat of the Authority to find ways for developing States to apply for mining in the Area started in 2007. The representative of NORI said that developing States did not have the financial or technical capacity to undertake such a high-risk venture without partnering with the private sector. He pointed out that a full-scale mining project represented a considerable investment that most of private sector companies were hesitant to make. However, the representative of NORI added that if the Nautilus initiative was successful, it would provide an example for others to follow and this would benefit developing countries. The representative of NORI recalled the experience of Nautilus with respect to polymetallic sulphides in the waters of Papua New Guinea and Tonga. He mentioned that Nautilus had carried out most of the environmental impact assessments in the waters of Papua New Guinea and this had increased understanding of the seafloor environment. He also stated that Nautilus provided training in geophysics to researchers from Papua New Guinea and Tonga, and that Nautilus was a member of the World Ocean Council. He emphasized that asking for a ruling was not an attempt to diminish responsibility, but to fulfill responsibility to the highest degree.

6. The delegate of Fiji was the first to take the floor in support of the Nauru delegation’s proposal contained in document ISBA/16/C/6. He stated that for over 30 years, the International Seabed Authority had been preparing for the day when minerals might be collected from the ocean floor. Those preparations had been diligently carried out, they had been inclusive and, indeed, with all those sessions over the years they had been costly for all. Throughout these preparations, this Council had shown
overriding concern to safeguard the ocean environment, and this respect for the planet’s environmental integrity must rule our efforts as we begin the move to the next phases of exploration and harvesting of seabed mineral resources.

7. The delegate of Fiji added that some of those who had been involved in this process since the 1970s have wondered if the day would come in their lifetimes when they could witness the harvesting of seabed minerals. But by many accounts, the time of harvest was closing in. It was timely therefore to recall that the International Seabed Authority is the guardian that ensures seabed resources are administered for the benefit of all mankind. The delegate also recalled that under that guiding principle, through the good offices of the Authority, specific provisions were adopted to give developing countries the opportunity to participate in the work and rewards of the process.

8. The delegate of Fiji also recalled that the Authority could issue licenses for the exploration and mining of seabed minerals to any of three categories of operators: to Member States to carry out their own work; to State-owned enterprises; or to the private sector operating in concert with a Sponsoring State. For Small Island Developing States such as Fiji and the 13 other Pacific Island countries that are State Members of the International Seabed Authority, their only foreseeable participation in the mining process was by State sponsorship of private sector enterprise. It was therefore very encouraging to observe the kind of cooperation evident in the agreement between the Government of Nauru and Nauru Ocean Resources, which is a Nauru incorporated subsidiary of Nautilus minerals, a world leader in deep sea mineral exploration. As they set off to explore the ocean’s last frontier, this was a reminder of the almost incredible human endeavour that took the first settlers of the Pacific Islands, such as Nauru, out over the vast Pacific Ocean in their frail sailing canoes.

9. The delegate of Fiji stated that the Small Island Developing States of the Pacific had few resources with which to support the aspirations of their people. It was thus that they looked to the potential of the seabed minerals of the wide waters surrounding their island countries with great hope. And it was because of those aspirations and that hope that they signaled their welcome to the international private sector to join with them, to get involved in the harvesting of seabed resources. In doing so, they sought to play a positive contributing role by their island countries serving as State Sponsors in the exploration and mining of seabed minerals. In this way, they were undertaking the role that was envisaged in the far-sighted, high principles of the founders of the International Seabed Authority.

10. Given the pioneering nature of Nauru’s partnership with the international private sector, a partnership that was taking the Authority into new phases of its work, the delegate of Fiji fully agreed that it was prudent, both on the part of Nauru and on the part of all Small Island Developing States, that there was clarity on the responsibilities and liabilities a Sponsoring State assumed under such a role. There was most certainly no element of evasion in that prudence. What the Nauru proposal represented was a call for clarity and certainty, so that all could faithfully fulfill their responsibilities to the international community and at the same time, to the vulnerable economies of Small Island Developing States. The delegate added that it was thus in a spirit of prudent responsibility that he spoke in support of the Nauru proposal before the Council.

11. Lest there be Members of the Council who thought those considerations were not pressing, the delegate of Fiji asked the President to allow him to say otherwise. In the case of Nauru Ocean Resources Inc., the Council was witness to a Sponsoring State and a very credible private sector entity being on the
cusp of committing substantial resources to advance polymetallic nodule exploration and harvesting in the Clarion-Clipperton Zone. As the delegate of Fiji understood it, once the Seabed Disputes Chamber gives its advisory opinion, if the advice is conducive to proceeding, Nauru Ocean Resources intends to request the Legal and Technical Commission to rehear its exploration license application at next year’s

seventeenth session of the Authority.

12. They were keen to get on with the job, and in doing so would be serving as pioneers. Through the International Seabed Authority, all Members would share in the rewards of their efforts, by way of greater understanding of the legal provisions of State Sponsorship agreements, by way of exploratory and environmental findings, by the technological advances involved, and by way of sharing in the resulting royalties. It was with those common benefits in mind that the delegate of Fiji supported this endeavor and respectfully called for timely action by the Council.

13. The delegate of Fiji stressed that deliberations on this matter would send an important message to the private sector, for it dealt with cutting-edge interaction between the Authority, the deep-sea mining private sector, and a developing country. If the International Seabed Authority system was seen to work efficiently in this case, it would send a clear message that it could work for private sector cooperation with any developing country. He stated that the Council could be sure of one thing, bogging the system down by inertia or dissension would be a major deterrent to private sector involvement in seabed mining in cooperation with Sponsoring States. Such an outcome could only be to the detriment of the interests of developing countries.

14. In the proposed approach to the International Tribunal for the Law of the Sea, the delegate of Fiji was greatly encouraged by Article 191 of the United Nations Convention on the Law of the Sea, which stated that such advisory opinions as those sought by Nauru should be given by the Seabed Disputes Chamber as a matter of urgency. The delegate of Fiji suggested that the Article’s specific call for urgency implied that the Council, too, should refer on such matters without delay.

15. In conclusion, the Nauru proposal was that an advisory opinion be sought from the Seabed Disputes Chamber of the International Tribunal for the Law of the Sea on matters relating to Sponsoring States’ responsibilities and liabilities. In speaking in support of the Nauru proposal, the delegate of Fiji suggested the immediate way forward for the Council was for the Secretariat of the Authority to prepare a draft decision that succinctly captured the essence of the Nauru proposal for presentation to the Council for discussion, and hopefully approval, in the aforesaid spirit of prudent and timely responsibility.

16. The delegate of Mexico thanked the delegation of Nauru for submitting its proposal to the Council, and stated that in principle the delegation of Mexico supported any initiative to reach certainty relating to provisions of the United Nations Convention on the Law of the Sea by any mechanism, including an advisory opinion. The delegate of Mexico believed that the proposal raised a series of questions and expressed the view that the proposal should be simpler in form. Although the delegation of Mexico supported the proposal for a request, it found it difficult for the Council to look at the proposal as drafted during that week since it was excessively complex. The delegate of Mexico suggested a reformulation of the proposal in more succinct terms with the assistance of the secretariat or a request to the Legal and Technical Commission to provide a new and simpler text. There was a need to ascertain the scope of the matters involved in a more succinct request.
17. The delegate of Germany thanked the delegation of Nauru for its comprehensive presentation of the proposal contained in document ISBA/16/C/6. The delegation of Germany found that the question was a legitimate one to ascertain the extent of liability of a Sponsoring State. This was relevant for all Sponsoring States and particularly for developing States with limited capacity. In the view of the German delegation, the Seabed Disputes Chamber was the most competent body to clarify the issue. Given the intent to rehearse the application at the meetings of the Legal and Technical Commission at the seventeenth session, this request was urgent. The delegate of Germany fully supported the request for an advisory opinion by the delegation of Nauru and called for a clear and concise wording of the request.

18. The delegate of New Zealand thanked Nauru for its helpful proposal and stated that the delegation of New Zealand was aware of the challenges facing Pacific Island Developing States. This raised very important and legitimate questions that deserved attention. The delegate of New Zealand offered to work with other delegations on the drafting or suggested that the secretariat could undertake that task.

19. The delegate of the Netherlands thanked Nauru for its presentation. The document presented issues of liability and responsibility in the Area by a Sponsoring State and its implications for developing States certainly merited consideration. Responsibilities and obligations were established in the Law of the Sea Convention. The delegate referred to article 4(4) of Annex III, and to article 139 of the Convention and added that these are specific obligations that are additional to overall obligations regarding responsibility in article 235 of the Convention, in particular its paragraph 5. The delegate thought that the proposal pointed to the fact that the Council was in the process of developing such a mechanism. In that regard, she also mentioned Regulation 30 of the Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area. She also noted that the issue raised in the proposal was broader in the sense that the questions also applied to minerals other than polymetallic nodules. The issues involved not only the law of the sea but also the law of State liability and responsibility. She said that this required more knowledge and understanding and more background and legal analysis to help Nauru and the Council. She noted that this was complex because it substituted State responsibility with contractor responsibility. The delegate found the request to be premature and believed that there was a need for a more specific formulation for advice. She suggested the secretariat commission a study on inter-state liability, adding that a precedent had already been set in the International Maritime Organization.

20. Although the delegate was absolutely sympathetic to the very important questions for all Sponsoring States that deserve serious consideration, more information and clarification should be provided to allow the Council to take informed decisions. Consequently, it was too early to endorse the proposal. The delegate suggested a step by step approach and suggested that the Legal and Technical Commission prepare a report on State liability, and referred to the recent ISA technical study on the implementation of article 82 of the Convention as a precedent.

20. The delegate of the Republic of Korea thanked Nauru for the background information, and observed that there was uncertainty in the Law of the Sea Convention. The proposal deserved a positive answer that would make full use of the Seabed Disputes Chamber. The delegate called for active interaction in response to Nauru's proposal, which his delegation supported. Bearing in mind, the delegate noted that addressing too many legal questions would delay the process and called for a request that would cover all matters involved while being as brief as possible.
21. The delegate of Spain stated that three issues arose in the proposal. The first issue questioned competence. Was the Council the competent body? He believed that the Council did have the competence to request for an advisory opinion as set out in the Law of the Sea Convention. This was a legal matter within the scope of activities that was referred to in article 191 and the delegate believed that this was a positive step to establish a degree of certainty for the public and private sectors. The second question related to the content of the proposal. The delegate stated that the content of the proposal was at present imprecise and broad. The third issue dealt with the procedure that should be followed. The first step would be to obtain a large majority to agree on the proposal and then to agree to make it more concise and precise. The Seabed Disputes Chamber would be the competent body to give an advisory opinion.

22. The delegate of the Russian Federation thanked Nauru for the initiative to raise fundamental issues of the implementation of the Law of the Sea Convention. Before discussing the issue, it would be helpful to see what an advisory opinion would look like. A request to the Seabed Disputes Chamber would need to be more concise than the present proposal. The delegate wondered whether the scope of the request would refer to State responsibility in general or would focus only on State responsibility in the seabed Area. The delegate wondered if the Council should discuss whether the request should distinguish between developed and developing countries, and observed that the Convention did not make such a distinction.

23. The delegate of Canada stated that the issue was very interesting and complex and required further consideration, which would benefit Nauru and future State sponsoring applications. This would be the first time to consider making a referral to the Seabed Disputes Chamber, and there was a need for more discussion, to avoid taking a decision in haste. The delegate agreed with the delegate of the Netherlands that a study should be commissioned in order to come up with options to help Sponsoring States in their negotiation of agreements with applicants.

24. The delegate of South Africa certainly supported the idea of submitting the legal question to the Seabed Disputes Chamber to give it some work. And more seriously, these were complex questions to be addressed and one way to do so was via the rendering of an advisory opinion. The fact that the matter was complex made it even more appropriate, and the matter was not too complex for the Seabed Disputes Chamber. The delegate did not share the view that because it was complex there was no need for an advisory opinion. He questioned the need to spend money on commissioning a study when a body has been established to render an advisory opinion. He added that the request was not in the format in which similar requests are made by the General Assembly. The proposal referred to conflicting views expressed by members of the Legal and Technical Commission but after discussion with some members of the Commission, this was not found to be the case. Therefore, the request should be formulated in more abstract terms and not in a way that reflected particular circumstances. The delegate thought very positively about the request but stated that there was a need to look more closely at how to draft it.

25. The delegate of Trinidad and Tobago wished to align with others in stating that an advisory opinion was very timely. This was not only relevant to developing countries, but to all States. Since the adoption of the Law of the Sea Convention and the qualification of the common heritage of mankind as part of customary international law, the delegate hoped that developing countries would be brave and bold enough to begin exploring for mineral resources belonging to all. The partnership was not different to that found in land-based mining. The matter was properly before the Council and the request was properly
drafted and not done in haste. The advisory opinion would provide the Council and the Authority as a whole with an answer to avoid any misunderstanding in the interpretation of the provisions. The establishment of the Seabed Disputes Chamber was made for matters as complex as those contained in the request and it was blessed with judges in whom the delegation had tremendous faith. There is a general obligation to protect the marine environment in article 145 of the Convention. Nauru had asked for assistance, and if its request contained some elements of complexity, it would benefit from being streamlined. The delegate referred to the provisions in the Convention and to the Legal Adviser in whom he had some degree of faith. The advisory opinion would not provide a binding ruling but would be highly beneficial to other States, including Trinidad and Tobago, and to the Authority in discharging its responsibilities. The delegate thanked Nauru for bringing the matter to the Council.

26. The delegate of Argentina congratulated the President on his election and recalled that the President had participated for many years in the negotiations with the Authority. The delegate was convinced that he would return home with the sulphides Regulations having been adopted. As a matter of principle, it was not that his delegation opposed that the Seabed Disputes Chamber be asked to clarify matters of the responsibilities and liabilities of States when conducting activities in the Area. The delegate shared the concerns expressed by others. Article 191 of the Law of the Sea Convention refers to advisory opinions given at the request of the Council on legal questions arising within the scope of its activities. However, technically the matter was still under consideration before the Legal and Technical Commission, and the delegate was concerned that this request would delay the Legal and Technical Commission in its consideration. The Legal and Technical Commission had not raised any legal matter and it was not even sure that there was any divergent opinion within the Commission, simply because this had not been discussed yet. It was not desirable for the Council to decide without first having the opinion of the Legal and Technical Commission. Otherwise, this would deprive the Legal and Technical Commission of some of its competence. The Legal and Technical Commission should make a recommendation to the Council. Article 187 of the Law of the Sea Convention gives the Legal and Technical Commission the power to make recommendations to the Council so the Commission should be given the possibility of having a voice on that. Furthermore, according to article 189 of the Law of the Sea Convention, the Seabed Disputes Chamber had no competence in matters involving the exercise of discretionary powers by the Authority. The delegate was not opposed in any way to the request but stated that the Council should hear what the Legal and Technical Commission had to say first.

27. The President of the Council thanked the delegation of Argentina for an interesting suggestion.

28. The delegate of the United States of America thanked Nauru for its explanation. This was quite a complicated issue, which deserved in-depth consideration in Council. The delegate suggested that there were two sets of issues to consider. The first was what the use of the advisory opinion would be; what it would mean, and what would happen procedurally. Secondly, whether there were additional options to turn to in order to deal with these questions, such as the Assembly and States. It would be helpful to know how States implement their obligations; what their best practices were; and what legislation they used to implement their obligations in that regard.

29. The delegate of Brazil congratulated the President on his election and expressed the satisfaction of the delegation in the enhancement of the participation of developing States in the session. The delegate stated that the proposal to seek an advisory opinion was not timely. There were no divergent views
regarding responsibility and liability and the Legal and Technical Commission had not discussed those questions at all. Furthermore, the two applicants requested the suspension of the consideration of their application. The delegate believed that the issue had not been sufficiently examined by the Legal and Technical Commission, and that neither the Council nor the ISA had examined it at all.

32. The delegate of Senegal fully understood the legitimacy of the request given what is at stake. Nevertheless, there were some procedural problems. The Council was not the forum in which to consider such a technical and legal issue. The delegate recalled that the organisation of the Authority was designed so that what comes to the Council are proposals that result from previous consideration, in the same way as the Finance Committee had submitted a proposal to the Council that morning. The debate should have continued within the Legal and Technical Commission, since even within the Commission there were divergent opinions. How can the Council come to a position? It would be wiser to refer the issue back to the Legal and Technical Commission for consideration, requesting it to provide a proposal for subsequent adoption by the Council. Perhaps a study should be commissioned, but as a last resort in this instance. In short, the issue should first be referred back to the Legal and Technical Commission with a request for a proposal to be submitted to the Council.

33. The delegate of Jamaica thanked Nauru for its proposal, and fully supported the proposal for an advisory opinion. The delegate recognized that State responsibility and liability was a very complex issue. The advisory opinion was meant to provide advice on complex issues, so complexity not a reason to prevent consideration by the Seabed Disputes Chamber. Article 191 of the law of the sea addressed the issue. The Council could spend some time addressing the issue and considering a more concise request; there was some guidance in the General Assembly on how to handle such requests. This was a timely and very important request by Nauru. The delegate hoped to focus on streamlining the request.

34. The delegate of Sudan supported the Nauru proposal, which was in line with article 191 of the Convention. He noted that the legal opinion of the Seabed Disputes Chamber would not be binding. The delegate remarked that setting up a committee would be the best way to bury the issue. The delegate agreed on the need to redraft the proposal, while reaffirming its legal merit, and said that a committee would be harmless and toothless.

35. The delegate of India stated that the proposal raised interesting questions that the Council should consider. The delegate recalled that article 191 of the Law of the Sea Convention provided that the Seabed Disputes Chamber should give an advisory opinion at the request of the Assembly or the Council on legal questions arising within the scope of their activities. The delegate stated that the interpretation of responsibility and liability of Sponsoring States and contractors was not within the scope of that article 191. The delegate recalled that the application submitted by NORI had been under consideration since 2008. In 2009, the Commission deferred its consideration at the request of the applicant. Therefore, the delegate questioned whether there would be an abuse of power since focus stand issues were involved. The delegate called for great care in drafting the request. In agreement with the delegations of Argentina, Brazil and Senegal, the delegate of India said that the Legal and Technical Commission should examine the request and make proposals for consideration by the Council on the future to proceed.

36. The delegate of Uganda quoted article 191 of the Law of the Sea Convention and believed that the Council must place emphasis on the last sentence and the phrase “as a matter of urgency”. So many activities and so much preparation would be held in hostage if the Council did not act. The delegate noted
that there was a Seabed Disputes Chamber and that the Council should give it some work to do, and believed it prudent to resort to the Chamber. The issues in the proposal in their complexity should no longer be viewed with speculation, and should be put before the competent Chamber. The delegate asked what there was to be afraid of, and what the Council was trying to protect them from, since this was only a request for an advisory opinion. The delegate stated that the Assembly and the Council were political organs that could take decisions based on advice. The Seabed Disputes Chamber is composed of experts to give an expert opinion and would have some work to do.

35. The delegate of the United Kingdom thanked Nauru for the document and its comprehensive explanation. He said that the proposal raised complex issues that deserved serious consideration, but wondered whether the Council had jurisdiction to deal with them. He referred to several provisions of the annex to the 1994 Agreement implementing Part XI of the Law of the Sea Convention that concern the consideration of an application for approval of a plan of work for exploration for polymetallic nodules. The delegate also wondered whether there was any disagreement within the Legal and Technical Commission. These issues needed clarification before continuing. The delegate asked about the procedure the Council should follow. Given the complexity of the issues, he suggested that the Secretariat report on them and hold a workshop on State responsibility in the context of sponsorship as set out in the Convention and concluded that his delegation was certainly open to other views.

36. The delegate of Nauru expressed his thanks to all Members. He wished to address a single issue. Referring to statements made by Brazil, Argentina and India, he apologized for any confusion that the Nauru proposal might have created. There was no divergent opinion within the Legal and Technical Commission.

37. The delegate of Sudan observed that there was a lack of certainty as to whether the Council was the right place to request an advisory opinion or whether the Legal and Technical Commission was the right organ to deal with those issues before coming before the Council. There was a syndrome that made things more complex than they were.

38. The delegate of Uganda stated that before the clarification by the Legal Adviser, his delegation was under the impression that the Legal and Technical Commission was a subsidiary organ of the Council, so if the Legal and Technical Commission was asked the question, then the Council was asked as well. Therefore, it was all right to petition the Seabed Disputes Chamber if the Council thought it fit.

39. The President of the Council asked to hear a legal discussion regarding article 191 of the Convention.

40. The Legal Adviser said that the subject of the debate related to the advisory jurisdiction of the Seabed Disputes Chamber. He underlined that there was no dispute for the Seabed Disputes Chamber to judge on. This was not a matter falling into the contentious jurisdiction of the Seabed Disputes Chamber. Some referred to articles 187 and 189 but those articles referred to the contentious jurisdiction of the Seabed Disputes Chamber. The purpose of the advisory jurisdiction of a court or a tribunal is to give an opinion not to a State but to the requesting body. The Legal Adviser added that private lawyers or the secretariat could give legal opinions but those would not bear the authority that the opinion of a body especially established with that competence under article 191 of the Law of the Sea Convention would have. With regard to whether the question fell under the scope of activities of the Council as set out in
article 191 of the Law of the Sea Convention, the Legal Adviser referred to the broad functions of the Council in article 162 of the Convention. In particular, he quoted subparagraphs (a) and (l) of paragraph 2 of article 162. He said that those powers were quite broad to bring all the questions raised in the proposal within the scope of activities of the Council. He added that his own interpretation was less important than that of the International Court of Justice. The Legal Adviser recalled that various opinions existed frequently among States concerning the interpretation of legal questions and the scope of activities of an organ requesting an advisory opinion. The Legal Adviser referred to the long-standing jurisprudence that defines a legal question (cf. the Western Sahara case). He also recalled the broad view taken with regard to the interpretation of the scope of activities (cf. the Nuclear Weapon case). Turning to the procedure, the Legal Adviser recalled that the advisory jurisdiction of the Seabed Disputes Chamber (articles 130 to 137 of the Rules of the International Tribunal for the Law of the Sea) was modeled almost entirely on the advisory jurisdiction of the International Court of Justice. Once the question is framed, the Secretary-General submits it to the Registrar with the relevant documentation, which would clearly include ISBA/16/C.6. Then there would be a notification to States and to international organizations, which would have an opportunity to provide written statements. After this, the Seabed Disputes Chamber would decide how to proceed and fix a time limit and date for oral statements. Subsequently, the Chamber would give its advisory opinion; maybe there would be dissenting and separate opinions. The opinion is delivered to the Secretary-General of the ISA and to States. The Legal Adviser noted that this procedure was relatively straightforward. He referred to the manner in which the General Assembly phrased requests for advisory opinion in simple and quite broad terms, with one or two sentences or paragraphs. Then the International Court of Justice would interpret the request, identify the principles that were applicable in the case and provide its answers. He also referred to the suggestion by the delegate of Fiji and others suggesting the streamlining of the questions contained in the proposal. The Legal Adviser said that the secretariat had given some thought to the drafting since the issuance of the proposal. It felt that the questions might fall into three categories: what were the obligations and responsibilities of states Parties to the Convention; what was the extent of liability for failure to comply with obligations and responsibilities; and perhaps one or two more questions. If the Council wished, the Legal Adviser believed that the secretariat could provide it with a draft the following morning that put the legal questions into the shorter form of a decision of the Council seeking an opinion, which would be modeled on analogous decisions of the General Assembly.

41. The delegate of Trinidad and Tobago renewed and elevated his degree of confidence in the Legal Adviser to provide the draft and suggested that the Council should agree to streamline the proposal for the Seabed Disputes Chamber as the General Assembly had regarding the Kosovo case. He stated that the Chamber was the competent body to render a persuasive opinion. The delegate emphasized that the Chamber would not deliver a binding legal ruling. This would provide an opportunity for the International Tribunal for the Law of the Sea ("the Tribunal") to do some work.

42. The delegate of Germany thanked the Legal Adviser for his comprehensive explanation. He noted that this had confirmed the legitimacy of the Nauru request. He said that he would be very interested in examining the redrafted request for discussion during that week.

43. The delegate of Nigeria asked for clarification on the procedure. If the Council decided to send a request for an advisory opinion to the Seabed Disputes Chamber, should the Council first get the opinion of the Legal and Technical Commission for some direction? He observed that there was a need to get a
clear view of which direction to take: the Seabed Disputes Chamber, the commission of a study or the
Legal and Technical Commission.

44. The delegate of Australia certainly empathized with the need for legal clarity, which would
provide a best chance of succeeding. There was no major legal obstacle provided there was brevity and
clarity, and the delegate was willing to work with the delegation of New Zealand and others for that
purpose. She added that it was premature to take a final position. She recalled that advisory opinions are
given to the requesting organ and not to a State, and also questioned whether Nauru would get the advice
it needed from the Seabed Disputes Chamber. The delegate expressed the view that the Council should
not limit its vision to an advisory opinion on issues of implementation, and endorsed the idea of collecting
good practices from other States on their way to implementing their obligations under their own
legislation.

45. The delegate of India had some associated questions to pose regarding the summary report of the
Legal and Technical Commission before considering the proposal further. He asked on what grounds the
Legal and Technical Commission could postpone the consideration of an application for approval of a
plan of work, how long it could be postponed, and on what grounds an application could be deferred.

46. The Legal Adviser responded that there was no rule providing that an application could be
defered or for how long. The Legal Adviser summarized the present situation and pending applications.
Two applications had been submitted; the Legal and Technical Commission did not complete its
consideration at the meeting that first featured the applications on its agenda. There was, then, no question
of deferring consideration of the applications, which remained on the agenda until its completion. The
Commission then took up the question at its next meeting the following year. However, the applicants had
requested that the Commission defer its consideration of their applications. Therefore, the Commission
stated that they remained pending until further notice, and it could not be predicted when consideration
would resume. Consideration took place in closed sessions and the Commission did not publicize its
deliberations on such matters. Perhaps the Commission should ask the applicants when they would be
ready. There is no rule on deferral and the consequences of deferring, and the applications remain
pending.

47. Referring to Australia’s statement, the delegate of South Africa understood that the secretariat
would provide a more abstract formulation of the draft. Therefore the question of pending or further
applications was irrelevant. He said that a general advisory opinion could still be useful for any Member
State of the Authority to justify its position even if such opinion was given to the requesting organ and not
to a particular State. The legitimacy of the questions should not affect the decision of the Council to
request an advisory opinion. That would have a tremendous influence. None of these matters should
negate asking the Seabed Disputes Chamber for an advisory opinion.

48. The delegate of India reacted to the Legal Adviser’s analysis that there was no rule on whether
an application could be considered or for how long. The Legal and Technical Commission was prevented
from considering the applications by the applicants’ request. He said that the procedure was for the
Commission to consider the applications and then for the Council to decide; there was no guidance
relating to how long a deferral could be in place or how this might ultimately affect the principal of “first
come, first served”. Therefore, the issue could remain pending for an indefinite period without being
subject to a ruling by the Council. The delegate favoured referring the matter back to the Legal and
Technical Commission for consideration and then brought to the Council. If the Commission had a different opinion on the issue of liability and responsibility alone, the Council could take a decision as to whether to refer to the Seabed Disputes Chamber. Taking a decision at the present time would be premature, as the Legal and Technical Commission should first pronounce on the merit of the issue.

49. The delegate of Spain stated that almost all Members were in agreement in respect of requiring clarification of this very complicated issue and asked whether Nauru could produce a new text.

50. The delegate of Finland thanked the President, the Secretary-General, the Legal Adviser and the delegation of Nauru, and agreed with previous speakers that the proposal was legitimate. The delegate concurred with the delegations of Germany and Spain regarding the need for a more streamlined and concise proposal from the delegation of Nauru.

51. The delegate of Argentina wanted to recall the standards of the Law of the Sea Convention. In particular, the delegate stated that the Legal and Technical Commission should make any recommendation to the Council that proceedings be instituted on behalf of the Authority before the Seabed Disputes Chamber, in accordance with Part XI and the relevant Annexes, taking into account particularly article 187. Therefore, the delegate felt that not only does the Convention gave a lot of leeway to the Seabed Disputes Chamber regarding this issue, but demanded the intervention of the Legal and Technical Commission in making recommendations, and this was common sense since members of the Commission possessed the relevant expertise. The delegate was of the view that the competence of the Commission to give an opinion was not limited to matters of contentious jurisdiction.

52. The delegate of Fiji disagreed with the idea of referring back to the Commission on the ground that the applications were still under consideration. The latter issue was a separate matter between the Commission and the applicants. The issue in the Council was different. It was for the Council to take up the matter with the Seabed Disputes Chamber to get clarity. The delegate of Fiji said that the Council should not go back down to an issue that was not related to the one under consideration that afternoon.

53. The delegate of South Africa wished to respond to the intervention of the delegation of Argentina. It was correct that the Commission could make recommendations; however, in the present case, in the delegate's view, the Council was competent to refer the matter to the Seabed Disputes Chamber without the Commission's recommendation. Likewise, the General Assembly makes resolutions that are not necessarily based on the recommendations of other organs. With or without a recommendation, the Council was competent to request an advisory opinion.

54. The delegate of Nauru thanked delegations for their comments and views. He said that some delegations might consider Nauru's proposal to be complex. Therefore, the delegate offered to submit a draft by the following morning and to work with the secretariat for that purpose.

55. The President of the Council thanked the delegation of Nauru for its suggestion.

56. The delegate of the Netherlands said that this had been a very interesting discussion. She agreed with the delegation of Australia that going before the Seabed Disputes Chamber for an advisory opinion could not be ruled out. The delegate also noted that there were eight contractors for exploration and that the issue of responsibility had not surfaced there; the issues at stake concerned all and she thanked the delegation of Nauru. She wondered whether, before asking the delegation of Nauru to redraft the
proposal, there was already an advisory opinion on liability and responsibility. There must be a need to formulate the questions in the request to include the issue of a third State's responsibility in addition to the responsibility of the contractor and that of the Sponsoring State. The issues involved were not restricted to those raised in the proposal.

57. The delegate of Sudan suggested that it would be more constructive to get a redraft in order to consider whether there was room for improvement.

58. In summarizing the views expressed, the President of the Council recognized that there were a number of divergent views but stressed that there was a need to find a way forward and invited delegations to hold informal consultations to that end. The President of the Council suggested that the Legal Adviser and the delegation of Nauru reformulate the questions to be considered later in the week, when a unanimous decision could be reached. Then the Council would decide on whether to go back to the Legal and Technical Commission for an opinion. The President of the Council adjourned the meeting at 5.37 pm.
II - 160th meeting of the Council on 6 May 2010 (morning)

59. The President of the Council declared the 160th meeting of the Council open and requested that the Council resume consideration of agenda item 7 on the proposal for an advisory opinion from the Seabed Disputes Chamber pursuant to article 191 of the Law of the Sea Convention. The President of the Council declared the floor open for comments and recognized the delegate of Fiji.

60. The delegate of Fiji did not hear clearly and checked whether the Council was looking at the advisory opinion.

61. The delegate of Fiji presented the perspective of his delegation and of that of other Pacific Island Developing States. He explained that he had prepared the statement jointly with the delegate of Nauru. The delegate also mentioned that it was his assigned duty, upon returning to New York, to brief the PDIS (the caucus of 11 Pacific Small Islands Developing States) on the deliberations and results of the sixteenth session of the International Seabed Authority. He added that he would have great pleasure in relating to the PDIS the thorough consideration given to the regulations governing the prospecting and exploration of minerals in the Area, and in reporting on the spirit of inclusiveness and consensus that had driven delegates' efforts at the session, which had been governed in the Council by the principle of "for the good of all mankind", for this was what bound the Council Members together.

62. The delegate of Fiji thanked the Secretariat and congratulated the Legal Adviser on the production of paper ISBA/16/C/L.4, and recalled that both the delegation of Nauru and the delegation of Fiji were in agreement with the succinct summary captured in the "draft decision". He also stated that both delegations would be very happy to consider any modifications to the draft decision that Council Members in their wisdom might wish to make by way of refining the questions to be asked of the Seabed Disputes Chamber.

63. The delegate of Fiji stated that during informal discussions held with Members of the Council over the previous couple of days, one of the misunderstandings that had been cleared up concerned the relationship between Nauru's application for an exploration license at the Legal and Technical Commission, and the proposal presently before the Council to seek an advisory opinion from the Seabed Disputes Chamber. The delegate trusted that all were now clear on the understanding that these were two very distinct and materially unrelated matters. The first was an ongoing piece of business between Nauru and the Legal and Technical Commission. The second — that of the request for an advisory opinion — was on the other hand, a matter relevant to all at the Council, particularly those developing countries present.

64. The delegate of Fiji referred to the suggestion that there was a lack confidence in the Tribunal system itself, and the argument that it might be better to soldier on regardless without seeking the advice of the Seabed Disputes Chamber. He said that, whatever the reasons, the Fiji and Nauru delegations could not follow that view, as it undermined the fundamental architecture of the Law of the Sea Convention.

The delegate asked where else to go for an expert advisory opinion on this subject, if not to the Chamber, and what would it say of the Council's faith in the integrity of the International Seabed Authority, if it had no faith in the Tribunal.

65. The delegate of Fiji then turned to a third concern that had arisen during informal discussions, put forward by those colleagues who would prefer to return the request to the Legal and Technical
Commission and who asked why the matter could not be given more consideration before the Seabed Disputes Chamber was asked about the liabilities and responsibilities of Sponsoring States. He said that the answer to that question was one of "development momentum".

66. The delegate of Fiji said that if the Council were to decide to throw the proposal back to the Legal and Technical Commission, it would condemn the process to a two-year delay. The next Commission meeting was to take place in one year's time. If the Commission were to then decide to present a recommendation to the Council that an advisory opinion be sought, and if the Council were to agree to so approach the Seabed Disputes Chamber, it would be another year before the resulting opinion could again be considered by the Council.

67. The delegate of Fiji turned to the reasons for the request for an advisory opinion, explaining that Small Island States, in their own efforts to lift their struggling economies, had begun developing partnerships with the private sector to sponsor the exploration and eventual seabed mining of the ocean surrounding them. He stated that there was nothing particularly audacious about that endeavour, and that the Sponsoring State's role was one envisaged for Members by the wise heads that put in place the provisions of the Law of the Sea. The request for the advisory opinion was made in response to the challenge before the Small Island Developing States of taking up that role in a prudent and responsible manner.

68. The delegate of Fiji returned to the importance of "development momentum". He said that the boards and management of private sector corporations had shareholders' interests to think of, and two years would be a long time to hang about. If those private sector boards observed that the Small Island Developing States did not collectively have the necessary weight at the International Seabed Authority to carry through even a relatively simple request, such as the request for the advisory opinion, he asked what message this would send about their place in the workings of the Authority, and their viability as State Sponsoring Parties.

69. The delegate of Fiji said that developing countries, more than most, must look to their windows of opportunity, and such windows were scarce for isolated island economies. As far as Pacific seabed minerals were concerned, positive industry investment sentiment currently existed for the development of State Sponsorship relations with the private sector. Accordingly, developing countries wanted to demonstrate that they could move in sync within the contingencies of economic cycles demonstrating responsibility for their international obligations, and bearing in mind their potential liabilities and risks. He said that developing countries were making progress, but that it would be untenable for them to go back to the private sector and asked it to wait for a couple of years while they tried to force a request for an advisory opinion through the UNCLOS system.

70. The delegate of Fiji reiterated that the request did not represent an evasion of responsibility, and stated that the opposite was true. He asked for the advisory opinion from the Seabed Disputes Chamber to enable the necessary measures relating to national legislation, inspection regimes, or any other required measures of sovereign responsibility to be made. This was an exercise of prudent responsibility, a search for the sort of clarity that would give further strength of will to those pioneering efforts, and prove that the Sponsoring State role envisaged for developing countries in the Law of the Sea would hold true.
71. The delegate of Fiji concluded by asking the Council for its assistance in the preservation of the development momentum that would be achieved by allowing the advisory opinion to be obtained in a timely manner. Whatever the opinion rendered, it would help developing countries to more effectively assess their risks and responsibilities, to get their houses in order so that they could properly work with the international private sector as Sponsoring States. This was the path that would lead to the participation of developing countries in the exploration and harvesting processes, a path of cooperation with the private sector, the only meaningful one open as envisaged for them in the Law of the Sea. He asked the Council to adopt the draft decision in affirmation that the system works for all Members, big and small.

72. The President of the Council thanked the delegation of Fiji, opened the floor for comments and recognized the delegation of Germany.

73. The delegate of Germany thanked the Legal Adviser and the delegation of Nauru for submitting a redraft of the proposal, which was clear and precise. He added that the liability of Sponsoring States was important to all and in particular to developing States with limited capacities. The delegate shared the view expressed by the delegate of Fiji as to the competence of the Council to make such a request, and fully supported the request. The time was right to support developing countries in getting clear guidance.

74. The delegate of the Ivory Coast thanked the authors of the new draft for their invaluable contribution, and noted that this presentation was drafted in a way that was appropriate to all legal requests. The delegate found it obvious that a request for an opinion should be received favourably. The journey that started with the text would not be without its problems. The Tribunal was established precisely to resolve and prevent conflicts. It was not conceivable that the Council would fail diligently to obtain a precautionary opinion outlining the rights of all States. The delegate added that he awaited the opinion with the utmost interest. Prevention is better than a cure. The questions raised seemed pertinent and would prevent a good many problems for Member States.

75. The delegate of the Russian Federation thanked the secretariat for the draft, which met the concerns that had previously been expressed. The issues were of a legal nature; they deserve to be interpreted and were in the scope of jurisdiction of the Seabed Disputes Chamber. The three questions in the new draft were very clear and the delegate had no comments on them and supported the draft.

76. The delegate of Spain supported the new draft and shared the views expressed by Germany and the Russian Federation. He said that the request was legitimate and that legal certainty was fundamental for investment from the private sector and the exploration for mineral resources. The delegate had no doubt about the capacity of the Tribunal.

77. The delegate of Mexico thanked Nauru and the Legal Adviser for their painstaking effort in submitting the new proposal. The delegate would support any initiative aimed at gaining uniformity and certainty regarding the interpretation of the Law of the Sea Convention, and recalled that on Monday the delegation of Mexico expressed its support as long as the questions could be simplified, reformulated and refined in proper terms. The new proposal effectively met the delegation’s expectations. The delegate stated that this was an excellent basis for discussion with a view to adoption of the proposal. This represented a unique opportunity for the Council to draw upon an opinion. The questions raised would provide answers in respect of applications and the content and scope of the liability of States Parties to the Convention. The draft decision constituted a very good basis and the delegate supported its immediate
adoption. The delegate observed that the draft decision referred to responsibilities in Part XI and wondered whether there were other provisions enshrined in the Convention that were equivalent but not necessarily in Part XI, and cited the example of article 209, paragraph 2, in Part XII of the Convention. The delegate added that this was mentioned in paragraph 9(b) of the original Nauru proposal. The delegate believed that this broad perspective was necessary and that it was convenient to make that clarification in the new text, in question number 1, by replacing “in accordance with Part XI of the Convention” with “in accordance with the Convention, in particular Part XI”.

78. The delegate of Trinidad and Tobago stated that the advisory opinion would be relevant to all States as it would assist in the interpretation and application of the Law of the Sea Convention, pursuant to article 191 of that Convention. The Council and other organs of the Authority could also benefit from the opinion, especially those involved in the protection of the marine environment. He said that the request would not interfere with the consideration of applications. The delegate commented on the new draft, which was in line with the format employed by the General Assembly to request an opinion from the International Court of Justice. He concluded that the request should be submitted to the Seabed Disputes Chamber.

79. The delegate of Jamaica fully supported the Nauru request. He observed that the request was made in the context of the Seabed Disputes Chamber but observed that similar requests were quite usual in the General Assembly. The fact was that such requests were treated as a usual course of action to obtain political and legal decisions. The delegate recalled that the opinion would carry no binding obligation, and would provide a context of understanding and legal explanation. The delegate fully supported and endorsed the draft proposal and expressed hope that it would be adopted by consensus. This would give due justice to Nauru. The delegate fully understood the proposal made by the delegation of Mexico, which he found acceptable and hoped that it was designed to strengthen the text rather than to open a debate.

80. The delegate of Argentina expressed gratitude to the Secretariat for providing the exact terms of the request, and thanked the delegate of Fiji for the explanation of why the request was submitted and why now. However, the delegate still remained to be convinced of the timeliness and would prefer to take up the issue after it was studied and analyzed. The delegate was not opposed in principle to obtaining an advisory opinion from the Seabed Disputes Chamber and expressed respect for international jurisdiction, including the International Tribunal for the Law of the Sea. The delegation of Argentina was not opposed as such to the request but thought that there had not been enough analysis from the Legal and Technical Commission and the Council, and suggested that the proposal be submitted to the Legal and Technical Commission once again. The delegate was afraid to disagree but understood that the Legal and Technical Commission had never discussed the advisory opinion, but had rather taken up a different subject. The delegate also found difficulties in the arguments that had been made. The delegate thanked the delegation of Fiji for providing a lot of information for discussion. Nevertheless, the delegation of Argentina was not convinced by the urgency of the matter. The delegate disagreed that not adopting a decision to make a request at the current session would result in a delay of two years, and believed that a mechanism could be used whereby States could study the text. The delegate did not think that many States had discussed the text with their capitals and believed that the Council could ask the Commission for advice and take a decision next year. The delegate added that the purpose of the decision was to address the situation of
developing countries unable to enter into contract because of difficulties in applying the Law of the Sea Convention. The delegate stated that this was a complex matter and although the advisory opinion was not binding, this did not mean that the opinion would carry no moral authority; on the contrary it would serve to guide the interpretation of the Law of the Sea Convention. The delegate reiterated that his delegation was not opposed but expressed the view that the secretariat should prepare a document to look at precedents. That document would be submitted and circulated to States, which would make written replies before the next session to see where the Council would stand. The matter should be referred to the Legal and Technical Commission, which had not taken it up earlier, for its recommendations. This was something not to deviate from. The delegate said that the Commission was a subsidiary organ, which was entitled to make recommendations and if the matter was submitted to the Commission, it would make use of its powers.

81. The delegate of the Republic of Korea appreciated the work done by the Legal Adviser and pointed out two things. As mentioned by the delegation of Fiji, Nauru’s application to the Commission and the request for an advisory opinion were two different issues. The delegate said that the Legal and Technical Commission had a mandate to review applications and to make recommendations but not a mandate to interpret the Convention; that was the work of the Seabed Disputes Chamber. Secondly, article 191 of the Convention did not appear to provide details of the procedure for a request made by the Council, in contrast to article 159, paragraph 10, of the Convention which related to the procedure for a request made by the Assembly. Thus, he wondered whether that procedure could be followed in the Council.

82. The delegate of Namibia was grateful that a pertinent issue that was important to Nauru and to other Members had been brought up. He found that this was important in order to reach clarity on legal responsibility. The Council should favourably consider acting on the issue of sponsoring activities. Although some delegations expressed the view that the issue should be referred back to the Commission, the delegate could not see why the Council should delay taking action. He joined other delegations in supporting the adoption of the draft decision at the present session. The delegation of Namibia was very flexible regarding point made by the delegation of the Republic of Korea on procedure. The most important thing was to support the draft decision at the present session.

83. The delegate of Norway congratulated the President on his election, and stated that the item deserved full attention while expressing concern over whether the question fell within the scope of activities of the Council. The delegate did not question the legitimacy of referring the issue to the Seabed Disputes Chamber, but wondered whether this was the proper procedure for making a request. As this was the first time a request for an advisory opinion had been raised, the delegate stated that more time was needed, and that the Legal and Technical Commission should be asked to prepare a background document, or that a workshop should be held for thorough consideration of the issue. The delegate added that the questions involved were of a national nature and could be addressed by capacity-building initiatives. The delegate stated that even if the Council were to adopt the decision at the present session, it was unlikely that the advisory opinion would provide certainty for Nauru and other developing countries, and suggested thinking about how to assist developing countries.

84. The President of the Council had some doubts. As far as the application was concerned, questions had already been addressed. Their examination was not yet complete and nobody knew how
long this would take or whether it would be accomplished next year. The legal opinion had been requested without knowing whether the application would be valid and fulfil all the criteria, but the Council wished to take action. It was the concern of all parties and not only the concern of Nauru.

85. The delegate of Trinidad and Tobago stated that the matter was still in debate and asked why concluding remarks had been made at that time, which might influence the discussion. He said that concerns were not so much about substance but about procedure. The matter should not be confused with a contentious procedure for which States needed to exhaust all internal remedies first. Secondly, if there was a disagreement or a failure to interpret the Law of the Sea Convention, the Legal and Technical Commission could not deal with that. The delegate believed that denying the request would be denying a member State one of its fundamental rights under the Convention. He also said that if an advisory opinion could not solve all the problems, it could be used as a guide for Member States.

86. The delegate of Sudan took the floor precisely to make the points that the delegation of Trinidad and Tobago had raised. He said that it was quite clear that the submission met all the criteria required by article 191 of the Convention. Whether this was a matter of urgency was stipulated in article 191. As to whether the advisory opinion would give answers, Member States should not rush to comment on that matter before hearing the advisory opinion. Comments on the opinion would be for another time. The delegate said that the Council should go ahead and adopt it, with the adjustment made by Mexico, which was not a problem for the delegation of Sudan. He added that he had consulted his capital and got the go ahead from it. The delegate said that the Council had many pressing items on its agenda and Member States should show flexibility. He said that no legal arguments made so far against the decision to request an advisory opinion were convincing him.

87. The delegate of Senegal recalled that, on Monday, when the question was first raised, there were reservations related to procedure. The question should be examined from both a procedural and substantive perspective. On Monday, the delegate of Senegal found and continued to believe that the question should first be reviewed by the Legal and Technical Commission in order to provide clarification to the Council, to ensure that the correct procedure was followed. The delegate would ensure that this would be the case in the future. Because Nauru stressed that this was an urgent case, the delegate could understand the legitimacy of this haste. It would be unfair to question Nauru’s belief that the situation is urgent. The delegate was of the view that the Council should proceed accordingly, and approach the competent organ for an opinion that would not be binding, on the understanding that in the future, if a similar situation arose, the question should be first reviewed by the Legal and Technical Commission. Given the urgency, the delegation of Senegal thought that the request should be addressed to the Seabed Disputes Chamber.

88. The delegate of India thanked the President of the Council who had precisely made the point that the delegation of India had submitted to the Council. The delegate said that the problem was that applications had already been submitted to the Legal and Technical Commission and their consideration had been postponed. However, the delegate did not want to be in the way of any consensus that the request should be submitted. He added that the drafting of the request should be in general terms and not related to a particular State so that the advisory opinion would be applicable to all. Therefore, the first paragraph of the preamble should be drafted in general terms. The delegate also suggested the insertion of another paragraph in the preamble reading, “Having considered the fact that developmental activities in
the Area have already commenced." The delegate fully supported Mexico's proposal regarding paragraph 1 of the decision since other obligations were required of Sponsoring States. Similar changes should also be made to question 2 ("with the provisions of the Convention, in particular Part XI") and in question 3. Question 3 was not about States Parties but about Sponsoring States, so a change should be made to reflect that; furthermore, Annex III contains relevant provisions in addition to that of article 4, so the reference referring only to article 4 should be deleted to make the question more general.

89. The delegate of Fiji stated that the delegations of both Nauru and Fiji supported the amendments made by Mexico and by India.

90. The delegate of Uganda stated his concern that the Council was not acting with the urgency required by article 191. The question was not about applications but about a request for an advisory opinion. He stressed that urgency should be born in mind and that it would be for the worse if the Council would not seek for an advisory opinion. The delegate supported India's and Mexico's amendments. Not only Nauru, but all States Parties are party to the principal of the common heritage of mankind, and the decision should not only refer to Part XI of the Convention. The delegate felt that organizing workshops and seminars was not the right way to go. There was business to do, and mineral resources needed to be taken care of. Seminars do not operate in tandem with how business works and the delegate disagreed with that idea. The delegate agreed with Senegal's view on procedure and substance and also found that this was the time to make the request. He said that there was an emerging consensus and that the Council should take this matter out of the way. As the delegate of Jamaica had said, there were other things for the Council to do so the delegate of Uganda left it to the President of the Council to lead the way.

91. The delegate of Belgium offered his sincere congratulations to the President of the Council on his election. He said that although Belgium was not a Member of the Council, and therefore would not be part of the decision it would take, the delegate nevertheless respectively invited the Council to bear in mind the interests at stake for all Members of the Authority. That the decision be taken without delay was a matter that would reflect upon the functioning and credibility of the organization and its Members.

92. The delegate of Germany supported Mexico's and India's amendments, which had led to the improvement of the text. As had been stated by the delegate of Uganda, workshop and capacity-building proposals were good ideas but they should not prevent the Council from petitioning the Seabed Disputes Chamber.

93. The delegate of Jamaica stated that in a spirit of compromise, his delegation was grateful to India and Mexico for their proposals. He said that there was a clear consensus and that the Council must be careful of what kind of precedent it would set. A State Party had made a legitimate request and an appropriate wording had been made. The delegate said that if the Council were to oppose the proposal, it would be comparable to a State asking the General Assembly to request the International Court of Justice for an advisory opinion and being told that it had to go to the sixth Committee first.

94. The delegate of New Zealand thanked the delegate of Nauru and the Secretariat for the preparation of the draft. The delegate very much understood the need for clarity and the challenges that were faced and was very keen to work with the delegate of Nauru. The delegate had no objection to the Assembly or the Council asking for a request, but such requests should be made sparingly and contain genuine legal questions. On this occasion, the delegate observed that the questions were quite broad and
might be difficult for the Seabed Disputes Chamber to answer, and added that the answer might not provide the clarity expected. For that reason, more time could have helped but of course this was not the case. The delegate added that capacity-building options needed to be addressed.

95. The President of the Council stated that there was quite a consensus in the room following the amendments by Mexico and India, and that there were also some concerns. The President of the Council called for progress with compromise. If the amendments were acceptable to the Council, the text would be revised accordingly by the Legal Adviser in order to put forward a revised draft decision for further consideration; this would enable Members of the Council to consult with their headquarters. The meeting was adjourned and the Council would consider the revised text at its afternoon meeting.
III - 161st meeting of the Council on 6 May 2010 (afternoon)

96. After the Council adopted the Regulations on Prospecting and Exploration for Polymetallic Sulphides in the Area, the President of the Council moved to the next item agenda and asked the Legal Adviser to introduce the new document.

97. The Legal Adviser explained that the secretariat had tried to take into account the proposals made at that morning’s meeting. The new text reflected those proposals in the preamble by changing two paragraphs and in the operative paragraphs by introducing more precise references. The Legal Adviser also made an oral editorial change regarding the deletion of article 4 after Annex III in the last line.

98. The President of the Council invited the Council to adopt the document and recognized the delegate of the United Kingdom.

99. The delegate of the United Kingdom wished to clarify the position of his delegation following the discussions in the morning. He believed that an advisory opinion might be requested in accordance with article 191 of the Law of the Sea Convention at the request of the Assembly or the Council on legal questions that arise within the scope of their activities. This meant that the request must be made by an organ and not by a requesting member. The delegate agreed with the delegation of Argentina on the need for further clarification and time. He was satisfied that legal questions had arisen from their discussions and supported the inclusion of the second paragraph in the preamble.

100. The delegate of India thanked the Legal Adviser and the Secretariat for the very good revised draft that took into account the proposals made and the different views expressed with respect to the scope of activities in article 191. The delegate found that the new draft was balanced and written in general terms, and supported the second paragraph and the reference to the 1994 Implementing Agreement since the Law of the Sea Convention and the 1994 Implementing Agreement must be read together.

101. The delegate of Japan had no comment on the wording of the draft decision. Before adopting the text, the delegate asked for a small clarification. Even if the advisory opinion requested by the Council as an organ was not binding, it would set standards for all Members, so the views of all Members must be presented. The delegate asked two procedural questions. Would there be submissions and oral hearings so that there would be an opportunity for Members’ views to be heard? How would this be organized since, pursuant to rule 131 of the Rules of the Tribunal, the request must be accompanied by all relevant documents? In this regard, would Members be consulted on which documents would be transmitted?

102. The Legal Adviser replied to the delegation of Japan regarding procedure. The practice within the United Nations in respect of an advisory opinion to the International Court of Justice was for the Office of Legal Affairs to prepare a dossier of what it believed was of relevance. The secretariat proposed to follow that practice. The Tribunal would require a dossier and notify all States Parties of such a submission and give them the opportunity to make statements in writing. The Legal Adviser added that oral hearings were held at the discretion of the Tribunal. If it so decided, all States Parties entitled to be represented at hearings and to make submissions would be notified of the date and place of such hearings. In the notes and recordings of the week’s proceedings that would be conveyed to the Tribunal, the
The secretariat would take note of the comments made by the Japanese delegation and this would assist the Tribunal in deciding on the organization of oral hearings.

103. The delegate of Germany, like the delegate of India, supported the draft decision as submitted by the Legal Adviser.

104. The delegate of Canada, like other delegations, had some concerns about the interpretation of article 191 of the Law of the Sea Convention. That article was never meant to provide a mechanism for individual States Parties to seek a legal opinion or to grant a right to access to the Chamber. However, seeing the new draft and the second paragraph of the preamble making the necessary link to article 191, the delegation of Canada would not stand in the way of consensus.

105. The delegate of Trinidad and Tobago accepted the draft and hoped that the Council would adopt it.

106. The delegate of Jamaica continued to support the draft decision; the amendments did not concern substance, but rather procedure, and the stage was set for the adoption of the draft decision.

107. The delegate of Australia could support the draft decision in its current form, although the Council could have benefited from more time. However, the delegate was still happy with the draft on the basis of legal clarity. In addition, the delegate stated that further benefit would be obtained by augmenting capacity-building in Sponsoring States. International private law, contracts and International Law Commission draft articles on responsibility would be important background documents.

108. The delegate of India had a query regarding clarification. He referred to the delegate of Japan, who had asked what kind of documents could be submitted. He pointed out that there was no dispute and no fact. The explanation by the delegate of Nauru should not be part of the dossier, as this was a general request rather than a request by an individual State.

109. The Legal Adviser made a brief clarification. The secretariat did not know yet what the dossier would contain. The dossier prepared would be strictly neutral, containing the Convention and all other relevant material and regulations. The dossier would not present the request in the context of one view or another. It would be impartial. The Legal Adviser said that the comments made by the delegation of India were also duly noted.

110. The President of the Council stated that the Council was unanimous.

111. The delegate of Namibia supported the draft decision.

112. The President of the Council invited the Council to adopt the decision in ISBA/16/C/L.4/Rev.1. It was so decided at 4:10 pm.

113. The delegate of Fiji would convey the decision to Fiji, Nauru and all other Pacific Island States. The delegate thanked the Council for its consensus on the decision to seek an advisory opinion.

114. The delegate of India wished to draw attention to a technical matter. What the Council had adopted was document ISBA/16/C/L.4/Rev.1, but document ISBA/16/C/L.4 had never been adopted; this was simply a draft. The delegate believed that document ISBA/16/C/L.4 should be withdrawn and
document ISBA/16/C/L.4/Rev. 1 should be renumbered as L.4 to avoid giving the impression that L.4 had been adopted.

1.5. The Legal Adviser replied that in accordance with practice, the draft decision would be adopted as document 13 in the list of documents of the Council for the sixteenth session.
Annex I

Index to the summary records of the meetings considering item 7 on the agenda of the Council at the sixteenth session of the International Seabed Authority

155th meeting – 3 May 2010 (afternoon)

Statements by the President of the Council, the delegate of Nauru, the representative of Nauru Ocean Resources Incorporated (NORD), the delegates of Fiji, Mexico, Germany, New Zealand, the Netherlands, the Republic of Korea, Spain, the Russian Federation, Canada, South Africa, Trinidad and Tobago and Argentina; the President of the Council, the delegates of the United States of America, Brazil, Senegal, Jamaica, Sudan, India, Uganda, the United Kingdom, Nauru, Sudan and Uganda, the President of the Council and the Legal Adviser, the delegates of Trinidad and Tobago, Germany, Nigeria, Australia and India, the Legal Adviser, the delegates of South Africa, India, Spain, Finland, Argentina, Fiji, South Africa and Nauru, the President of the Council, the delegates of the Netherlands and Sudan, and the President of the Council.

160th meeting – 6 May 2010 (morning)

Statements by the President of the Council, the delegate of Fiji, the President of the Council, the delegates of Germany, Ivory Coast, the Russian Federation, Spain, Mexico, Trinidad and Tobago, Jamaica, Argentina, the Republic of Korea, Namibia and Norway, the President of the Council, the delegates of Trinidad and Tobago, Sudan, Senegal, India, Fiji, Uganda, Belgium, Germany, Jamaica and New Zealand, and the President of the Council.

161st meeting – 6 May 2010 (afternoon)

Statements by the President of the Council, the Legal Adviser and the President of the Council, the delegates of the United Kingdom, India and Japan, the Legal Adviser, the delegates of Germany, Canada, Trinidad and Tobago, Jamaica, Australia and India, the Legal Adviser and the President of the Council, the delegate of Namibia, the President of the Council, the delegates of Fiji and India, and the Legal Adviser.