



International Seabed Authority

28th Session 2023

Co-Facilitators' Note on the webinar in the context of the informal intersessional dialogue to facilitate further discussion on the possible scenarios and any other pertinent legal considerations in connection with section 1, paragraph 15, of the annex to the Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea

Introduction

1. During the November meeting of its 27th session, the Council of the International Seabed Authority decided to establish an informal intersessional dialogue to facilitate further discussion on the possible scenarios foreseen in section 1, paragraph 15, of the annex to the Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea (the Part XI Agreement) and on any other pertinent legal considerations with a view to exploring commonalities in possible approaches and legal interpretations for the Council to consider in this respect (see ISBA/27/C/45). The Council further decided that the dialogue shall be convened using virtual means and be open to all members of the Authority, observers and their designated experts.
2. In accordance with the modalities of the dialogue as set out in the above-mentioned Decision of the Council, and as notified in the Secretariat's Note No. ISA/OLA/2023/038 dated 10 February 2023, the two Co-Facilitators of the dialogue (Mr Hugo Verbist (Belgium) and Mr Soo Tet Tan (Singapore)) will co-host a **webinar on 8 March 2023 which will be held from 9 am to 12 pm Jamaica time (GMT-5) via Microsoft Teams platform.**
3. The Co-Facilitators have prepared this Note to provide background information pertinent to the dialogue, as well as a set of questions to guide the discussions at the webinar (see paragraph 8), for the consideration of all members of the Authority, observers and their designated experts.

UNCLOS, the Part XI Agreement and the 'two-year rule'

4. The International Seabed Authority (the Authority), established under Part XI of the United Nations Convention on the Law of the Sea (UNCLOS), 'is the organization through which State Parties shall... organize and control activities in the Area, particularly with a view to administering resources of the Area.' Part XI of UNCLOS also affirms that 'the Area and its resources are the common heritage of mankind' and that 'all rights in the resources of the Area are vested in mankind as a whole, on whose behalf the Authority shall act'. Part XI of UNCLOS is to be interpreted and applied together with the Part XI Agreement.
5. Of particular relevance to the present dialogue is a provision known as the '**two-year rule**', which can be found in section 1, paragraph 15, of the annex to the Part XI Agreement. This provision allows any member State of the Authority whose national intends to apply for approval of a plan of work for exploitation to request that the Council complete the adoption of the rules, regulations and procedures (RRPs) relating to exploitation within two years of the request. Subparagraph (c) of the above-mentioned provision stipulates: '**If the Council has not completed the elaboration of the rules, regulations and procedures relating to exploitation within the prescribed time and an application for approval of a plan of work is pending, it shall none the less consider and provisionally approve such plan of work based on the**

provisions of the Convention and any rules, regulations and procedures that the Council may have adopted provisionally, or on the basis of the norms contained in the Convention and the terms and principles contained in this Annex as well as the principle of non-discrimination among contractors’.

6. On 25 June 2021, the Republic of Nauru invoked section 1, paragraph 15, of the annex to the Part XI Agreement, with an effective date of 9 July 2021, and informed the Authority that Nauru Ocean Resources Inc. (NORI), a Nauruan entity sponsored by Nauru, intends to apply for the approval of a plan of work for exploitation. In the light of this, **the prescribed ‘two-year’ timeline under the above-mentioned provision will expire on 9 July 2023.**

Questions to guide discussions on possible approaches and legal interpretations

7. The Council has been working to elaborate and adopt the RRP’s relating to exploitation by the prescribed deadline. Without pre-judging the Council’s work in this regard, it is worth examining and understanding the legal consequences and implications if the Council does not complete its work within the prescribed timeline (i.e., by 9 July 2023), as legal uncertainty in this respect would be detrimental to the interests of all members of the Authority. In particular, there is a need for further discussion on the potential scenarios and pertinent legal considerations that arise with the interpretation and potential application of subparagraph (c). **The aim is to explore commonalities in possible approaches and legal interpretations in this respect, with a view to finding a consensus within the Council.**

8. Without intending to be exhaustive or prescriptive, but in the interests of focusing discussions on the legal issues that appear to be the most pressing, the Co-Facilitators have set out the following questions for discussion at the webinar:

(1) What is the meaning of the phrase ‘consider and provisionally approve’ in subparagraph (c)? Can the Council disapprove a plan of work after having considered it? Can the consideration of a pending application be postponed until certain conditions are met? Does the use of the word ‘elaboration’ in subparagraph (c) carry any legal significance?

(2) What is the procedure and what are the criteria to be applied in the consideration and provisional approval of a pending application under subparagraph (c), in the light of, amongst others, article 145 of UNCLOS? In this regard, what roles do the Council and the Legal and Technical Commission (LTC) respectively play?

(3) What are the consequences of the Council provisionally approving a plan of work under subparagraph (c)? Does provisional approval of a plan of work equate to the conclusion of an exploitation contract?

Written and oral responses

9. **All members of the Authority, observers and their designated experts are invited to send written responses on the above questions prior to the webinar, through the webinar page at the address <https://isa.org.jm/event/informal-intersessional-dialogue> (where the responses will be uploaded), which may then be supplemented by oral remarks made during the webinar.** The written and oral responses will feed into the briefing note to be prepared and presented by the Co-Facilitators to the Council for further consideration during the March meeting of its 28th session, in accordance with the decision of the Council in ISBA/27/C/45.

10. We are very much looking forward to your participation.