

Contribution by the Advisory Committee on Protection of the Sea (ACOPS; www.acops.org.uk) to 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 to be held online on 8 March 2023

ACOPS appreciates the opportunity to contribute to this dialogue and offers the following thoughts with regard to the questions proposed in the Note by the Co-facilitators.

(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?

1. ACOPS is concerned that the members of the Authority may consider it necessary to “elaborate and adopt” or at least “complete the elaboration” of RRP (as defined in the Note) for exploitation in general, and facilitation of approval of plans of work specifically, before the end of the two-year deadline – or given the current schedule, by the end of the upcoming Council session on July 31. ACOPS finds no basis in the Convention or in the Implementation Agreement (IA) to support this possible interpretation. ACOPS recommends that the members of the Authority take the time necessary to produce the required measures to implement LOSC Article 145 and related provisions to protect the marine environment fully and correctly in accordance with sound science and the rule of law. This recommendation is further supported in the comments below.
2. The phrase ‘consider and provisionally approve’ cannot be interpreted on its own: it must be interpreted in its full context in the IA, i.e., applying the requirements set out in the immediately following phrase “based on ... contractors.” This following phrase, not separated from ‘approve’ by a comma in the IA text, which underlines its criticality, places a specific set of conditions/criteria/requirements that must be met in the process of consideration of a plan of work and in deciding whether an application for provisional approval may be granted under the Convention.
3. Just as a plan of work may be disapproved under the LOSC with the appropriate justifications (see, *inter alia*, Art. 162 2(x) and Art. 165 2(l)), so too can a plan of work submitted in the context of Art. 15 be disapproved with the appropriate justifications. The IA does not derogate from these requirements; indeed, by specifically referring to the Convention in this context, it underlines these requirements.
4. In this context it is also crucial to consider the difficulty of applying ‘the principle of non-discrimination between contractors’ as required in the IA. One immediate issue is that the circumstances set out in Art. 15 can only apply to contractor(s) applying for approval for a plan of work for exploitation, opening up the possibility that contractors could be

applying for and being considered for approval of such plans of work under different regulatory regimes, especially if the RRP are (even if only provisionally) adopted in between two sets of applications. This scenario also opens up the following interesting question: in the period during which the Council has not at least provisionally adopted the RRP, could another State make another request under IA Art. 15, with all the consequences thereof?

5. ACOPS respectfully requests clarification of what is meant by the question on the legal significance of the term ‘elaboration’.
6. With regard to the postponement question, a formal written procedure for consideration of the plan of work in light of the requirements set out in the ancillary phrase “based on ...contractors” will need to be prepared before this consideration could occur. It would seem likely that such a procedure would need to go through at least the standard LTC/Council approval procedure before it could be implemented.

(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?

1. ACOPS addressed the ‘criteria’ part of the first question in its discussion in 1(2) above: these criteria are set out in the phrase immediately following “consider and provisionally approve”, namely the phrase “based on ... contractors.” As pointed out above, this following phrase, which is not even separated from ‘approve’ by a comma in the IA text, which underlines its criticality, places a specific set of conditions/criteria/requirements that must be met in the process of consideration of a plan of work and in deciding whether an application for provisional approval may legally be granted. No parts of the Convention are excluded from consideration. ACOPS finds no basis in the Convention or the IA to apply a different procedure to a – what we might call ‘an Art. 15 application for approval of a plan of work’ - than the one set out for the LTC and the Council in the Convention for non-Art. 15 applications for plans of work. Here again application of the principle of non-discrimination between contractors is essential.

(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?

ACOPS has no comments on these questions at present.
END OF COMMENTS

Respectfully submitted, on behalf of the Advisory Committee of Protection of the Sea
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