

Comments relating 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

Our delegation is still considering the possible scenarios and other pertinent legal considerations in connection with section 1, paragraph 15, of the annex to the 1994 Agreement.

Furthermore, it is our understanding that exploitation activities cannot commence in the Area until a robust legal framework is in place, including the necessary measures for the conservation and protection of the marine environment, as well as definitions regarding the financial model to be adopted, the benefit-sharing mechanism, the operationalization of the Enterprise, among others pending issues.

Accordingly, the following should be considered only as preliminary considerations as we remain open to discuss other options.

(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?

First of all, the phrase “*consider and provisionally approve*” should be interpreted in its full context: “*(...) 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*”.

In our understanding, the imperative language used in this article (“*shall none the less*”) means that the Council has a mandatory obligation to consider any plan of work (PoW) submitted according to this article, but it doesn’t mean that it has an obligation to automatically approve it if it doesn’t comply with the Convention, the Agreement and any rules, regulations and procedures that the Council may have adopted provisionally.

By definition, the verb “to consider” implies “thinking about something carefully in order to make a decision”, this language would not make any sense if an approval should be automatically granted. Consequently, the Council needs to consider the PoW and decide - according to the criteria established in the Convention and any rules, regulations and procedures that the Council may have adopted provisionally - whether it should be approved.

As for the use of the word “provisionally”, we understand that it implies that the provisionally approved PoW needs to comply with all the corresponding legal framework for exploitation, once adopted, in order to have a final approval instead of a “temporary” one.

Regarding the possibility for the Council to postpone the consideration of a pending application until certain conditions are met, we fail to find a legal basis for that interpretation.

(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?

In our view, the consideration and provisional approval of a pending application under subparagraph (c) should be 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*”.

The phrase “provisions of the Convention” includes, but is not limited to, the provisions contained in Article 145 of the Convention.

Regarding the procedure for the consideration of the PoW, we would like to highlight that the role of the Legal and Technical Commission in providing recommendations and the function of the Council as the organ in charge of granting (or not) the provisional approval, should be fully respected in compliance with UNCLOS provisions (in particular, Art. 153.3 and 165.2.b). In this sense, we need to be extremely careful as the Convention cannot be amended by a Council’s decision.

That said, we do understand that it would be very difficult for the LTC to provide a recommendation for the approval or disapproval of a PoW for exploitation without the corresponding legal framework in place. Consequently, our delegation would be open to consider other options, as long as the LTC intervenes in the decision-making process and provides the Council with a technical basis for its decision.

(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?

We don’t have any comments at this stage.