

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

Written Comments submitted by Australia

Australia thanks the Co-Facilitators for their paper and guiding questions and for hosting the webinar on 8 March 2023. Australia submits the following comments.

Guiding Questions

(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?

The phrase ‘shall ... consider and provisionally approve’ in paragraph 15(c) of Section 1 of the Annex to the Implementation Agreement does not require the Council to automatically approve an application for approval of a plan of work for exploitation if one is submitted. The general rule of interpretation in Article 31, paragraph 1 of the *Vienna Convention on the Law of Treaties* is that a treaty ‘shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.’ The ordinary meaning of ‘consider’ includes to ‘weigh merits of (course of action ...); give mental attention to; ... made after careful thought.’ Thus, the use of the word ‘consider’ requires the Council to make a substantive assessment of the application. Council, having conducted its assessment, must then decide whether to approve or disapprove the application on a provisional basis.

Provisional approval of a plan of work does not equate to final approval. This is clear from the ordinary meaning of ‘provisional’ which means ‘temporary’, and ‘likely to be changed’. Thus, the use of the word ‘provisional’, indicates that any provisional approval will be subject to review. In other words, a provisional approval does not equate to a final approval of a plan of work and a contract for exploitation cannot be negotiated between the Secretary-General and the potential contractor until a plan of work is finally approved.

In the circumstances contemplated by the Implementation Agreement, Annex, Section 1, paragraph 15(c), if an application for a plan of work for exploitation is submitted and Council has not completed the rules, regulations and procedures, then Council is to assess the application against the provisions of UNCLOS and the Annex to the Implementation Agreement, any rules regulations and procedures the Council may have adopted provisionally and the principle of non-discrimination among contractors. The consideration of the pending application cannot be postponed until certain conditions are met.

The word ‘elaboration’ means the process of developing or adding detail to something. In this context, it means the development of the detailed rules, regulations and procedures to govern exploitation of the mineral resources of the Area. ‘Adoption’, in this context, is the formal act by which those rules, regulations and procedures are finalised, pending final approval by the Assembly. The elaboration of the rules, regulations and procedures to govern exploitation and their adoption are distinct processes.

(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?

Subparagraph 15 (c) of Section 1 of the Annex to the Implementation Agreement lacks clarity on the role of the Legal and Technical Commission ('LTC'), in the event that an application for approval of a plan of work for exploitation is submitted before the rules, regulations and procedures to govern exploitation are adopted. Australia acknowledges that there are different views on the roles of the LTC and the Council. However, Australia considers the better view is that the Convention's provisions and the procedures for review of applications for plans of work apply, notwithstanding the uncertainty raised by the lack of reference to the LTC in paragraph 15(c). Article 153, paragraph 3 provides for approval of a plan of work by the Council after review by the LTC. Article 165, paragraph 2(b) provides that the LTC shall 'review formal written plans of work for activities in the Area in accordance with article 153, paragraph 3, and submit appropriate recommendations to the Council'. The Implementation Agreement, Annex, Section 3, paragraph 11(a) provides for the possibility that the LTC may not make a recommendation to approve or disapprove an application for a plan of work.

Practically, there are advantages to the LTC reviewing an application for approval of plan of work lodged in the circumstances contemplated in paragraph 15(c), including the LTC's scientific and legal expertise and its obligations to protect confidential information.

If an application for approval of a plan of work is submitted prior to adoption of the rules, regulations and procedures to govern exploitation, among the important obligations in UNCLOS against which the application is to be assessed are Article 145 to ensure the effective protection of the marine environment, and Article 146 to ensure the effective protection of human life.

(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?

Provisional approval of a plan of work is temporary only and does not equate to the conclusion of an exploitation contract. The approval of a plan of work by the Council and the negotiation of a contract between the ISA Secretary-General and a potential contractor are separate and distinct procedures. Final approval of a plan of work is required before the Secretary-General can be requested or directed by Council to negotiate an exploitation contract.

What is less clear is whether a provisionally approved plan of work requires reassessment once the Exploitation Regulations are adopted. Australia considers the better view is that, if a plan of work is provisionally approved by the Council and the Exploitation Regulations are subsequently adopted, the provisionally approved plan of work will need to be considered against the Exploitation Regulations and resubmitted to Council for approval. This would also give effect to the principle of non-discrimination among contractors, as it would be inequitable to have one plan of work for exploitation assessed and approved on one set of rules, while an application submitted by another potential contractor after the Exploitation Regulations are adopted would be assessed against the subsequently adopted rules, regulations and procedures.