

Written comments submitted by the delegation of Canada for the Informal intersessional dialogue to facilitate further discussion in connection with section 1, paragraph 15, of the Annex to the Agreement relating to Part XI, UNCLOS

8 March 2023

Members of the Authority are invited to submit written responses to a series of questions prior to the March 8 webinar in the interests of focusing discussions on the legal issues that appear to be the most pressing. The responses submitted by the Canadian delegation, which are further detailed following each set of questions, can be summarized as follows:

- The Council has an obligation to consider a plan of work but can decide not to approve it;
- The Council cannot postpone the consideration of a plan of work;
- The Authority would be justified to disapprove a plan of work which would be inconsistent with article 145 of UNCLOS;
- Following its review of a plan of work, the LTC has an obligation to submit appropriate recommendations to the Council, it does not have to recommend the approval or disapproval of a plan of work;
- A provisional approval is an interim measure until the Council can approve the plan of work once the elaboration of the rules, regulations and procedures relating to exploitation is completed;
- A provisionally approved plan of work is not in the form of a contract as an approved plan of work would be.

(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 delegation of Canada considers that “shall consider and provisionally approve” does not lead to the automatic provisional approval of a plan of work and that the obligation to provisionally approve in this context, does not deprive the Council of its capacity to disapprove. Otherwise “consider” would be devoid of any meaning, as would the criteria in the last part of section 1 (15) (c) on which the Council is to base its consideration and provisional approval. If an automatic provisional approval was the desired outcome in this provision, a much simpler formulation would have sufficed. Our interpretation is that this provision obliges the Council to consider a plan of work with a view to either provisionally approving it, or not approving it.

If the Council has not completed the elaboration of the rules, regulations and procedures relating to exploitation within the prescribed two years, its obligation to consider and arguably render a decision to provisionally approve or disapprove a plan of work based on the criteria in section 1 (15) (c) is only conditional upon two requirements: 1) the Council not having completed the elaboration of the rules, regulations and procedures relating to exploitation, and 2) an approval for a plan of work being pending. If those two requirements are met, absent any other condition in UNCLOS or the Agreement, it is our view that the Council could not postpone the consideration of a plan of work. That being said, such consideration by the Council would follow a number of previous steps and normal delays (e.g. delay for taking up for consideration a plan of work by the Authority, review by the LTC and transmission for consideration to the Council).

(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?

Section 1 (15) (c) provides that the Council shall consider and provisionally approve a 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 [the] Annex [to the Agreement] as well as the principle of non-discrimination among contractors”. In both instances there is a duty on the Council to base its consideration and decision on the provisions or the norms of UNCLOS, which includes the obligation to take necessary measures to ensure effective protection for the marine environment from harmful effects which may arise from activities in the Area, pursuant to article 145. In addition, article 6 (3) of Annex III of UNCLOS provides that the proposed plans of work shall comply with the relevant provisions of the Convention, which we believe would necessarily include article 145, and the Authority is only obliged to approve a plan of work if it complies with the provisions of the Convention. As such, we believe that the LTC would be expected not to recommend the approval of and the Council justified to disapprove a plan of work which would be inconsistent with the obligation to take necessary measures to ensure the effective protection for the marine environment from harmful effects of exploitation activities.

Pursuant to article 165 (2) b) of UNCLOS, the LTC has an obligation to review formal plans of work for activities in the Area and submit appropriate recommendations to the Council. As such, we believe that the review of the LTC is a mandatory step before the consideration and provisional approval of a plan of work by the Council pursuant to Section 1 (15) (c). We note however that article 165 (2) (b) of UNCLOS requires the LTC to submit “appropriate recommendations” to the Council, and not simply to recommend the approval or disapproval of a plan of work, which is an important nuance. Only a recommendation of the LTC to the Council to approve a plan of work would trigger the mechanism in Section 3 (11) (a) of the Annex to the Agreement requiring the Council to approve such plan of work, unless it disapproves of such plan by a two-thirds majority of its members present and voting, including a majority of members present and voting in each of the chambers. Section 3 (11) (a) also recognizes explicitly the possibility of the LTC not making a recommendation to the Council, in which case the LTC would presumably only share the results of its review but not recommend any course of action to the Council. In submitting appropriate recommendations to the Council, the LTC could be expected or even directed to refrain from recommending the approval of a plan of work absent applicable rules, regulations and procedures relating to exploitation.

(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?

The “provisional approval” of a plan of work in Section 1 (15) (c), is not mentioned anywhere else in the Convention or the Agreement. Our view is that the provisional approval is necessarily a different concept than a regular approval of a plan of work and implies that the approval is only transitory or temporary in nature, until the Council can reconsider and approve the plan of work once the elaboration of the rules, regulations and procedures relating to exploitation is completed.

The view of the delegation of Canada is that the requirement in article 3 (5) of Annex III of UNCLOS that upon its approval by the Authority, a plan of work be in the form of a contract, does not apply in the case of a provisional approval of a plan of work. Whatever form the provisional approved plan of work takes, it should be temporary and transitory in nature and be amenable to changes based on adaptive management principles or other required changes arising from developments in the regulations.