Permanent Mission of the Republic of Chile
To the International Seabed Authority

Kingston, Jamaica, W.I.

Note No. ISA/005/2023

The Permanent Mission of the Republic of Chile presents its compliments to the International Seabed Authority and has the honour to attach the submission of the Republic of Chile 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.

The Permanent Mission of the Republic of Chile would appreciate that the document as an annex will be transmitted to the Co-Facilitators of the informal intersessional dialogue.

The Permanent Mission of the Republic of Chile avails itself of this opportunity to renew to the International Seabed Authority the assurances of its highest consideration.

EMBAJADA DE CHILE
JAMAICA

KINGSTON, March 14th ,2023.

TO THE INTERNATIONAL SEABED AUTHORITY
KINGSTON

Submission of the Republic of Chile 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

(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?

Regarding the first question, the meaning of "consider and provisionally approve" (of Subparagraph c) of Paragraph 15 of the Annex to the 1994 Agreement), from our technical point of view, must be understood in the manner set forth below.

The word "consider" means that the ISA should evaluate the work plan that is submitted to it; therefore, it is impossible to automatically approve it. On the other hand, Part XI of UNCLOS repeatedly refers to the word "examine and approve" as the power of the Assembly to determine rules, regulations, and procedures that are applied by the ISA. The ISA has understood until today that said wording does not mean that it must pass after examination, but rather that it must examine the work plan to determine if it is approved or rejected. And we defend this perspective.

In relation to the second question, the positive or favorable terms in which this expression is written ("consider"), should not be understood in the sense that the approval of the work plan is the only possible result, but rather , there are two options for the Council regarding this work plan: approve; or disapprove. So, paragraph 15 c) would not create a new procedure and associated criteria.

The foregoing exposes certain requirements that must be met, and those would be established in the rules, regulations and procedures issued by the ISA. In other words, the expression "approval" in this case would cover the decision-making process, and does not necessarily mean "approving" as such a specific work plan.

It should be clarified that Annex I Paragraph 15 c) already mentioned, contemplates the provisional approval of a "work plan" for exploitation. In general terms, under UNCLOS and the 1994 Agreement, a "work plan" is different from the "exploitation contract" itself. Specifically, according to the current Exploitation Draft Regulation, the "work plan" contains information on the exploitation activities proposed by the applicant. The objective of the work plan is for the applicant contractor to demonstrate that the exploitation activities that he proposes will comply with UNCLOS and the Mining Code, allowing the ISA to enter into negotiations with the applicant contractor for an exploitation contract.

Thus, a provisionally approved "work plan" could not necessarily lead to an exploitation contract under Annex I Paragraph 15 c). It is necessary to remember that this last instrument will be the one that will establish the contractual rights and obligations.

For Chile, in the current situation of nonexistence of the necessary rules, norms, and procedures that regulate exploitation in the Area, it is legally possible to postpone the consideration of a pending application until certain conditions are met. Although the rule of Paragraph 15 c) of the Annex to the 1994 Agreement contains a right to opt for approval of a work plan under these conditions, this right is not absolute since its application is subject to the existence and respect of other restrictions of the legal system in which it is located (i.e., International Law), such as: the existence of other rights of third parties; the obligations that the ISA must assume, for example, by international environmental law, or the rights of the coastal States that could be affected by the exploitation. This right of paragraph 15 c), then, can only be understood subject (depending on) to the conditions of current International Law.

In this regard, the UNCLOS regulations for the protection of the marine environment must be interpreted in harmony with the international environmental protection system that has been generated with greater force since 1994, always keeping in mind the consequent international responsibility for non-compliance with said regulations.

We believe that the enormous development that international environmental law has had is an element that must be taken into account, since this regulation is more complete than the one that existed at the time of the entry into force of Part XI of UNCLOS. This fact forces us to seek a harmonious or systematic interpretation, among all the international regulatory instruments on the matter.

There are the UNCLOS regulations that give the ISA the task of providing for the equitable distribution of financial benefits and other economic benefits derived from activities in the Zone through an appropriate mechanism. Said norms have not been elaborated, nor has there been provisional approval of similar norms, nor is the matter regulated by the Convention itself. If a work plan is approved without these regulations, it is worth asking ourselves: How would the distribution of the benefits of the exploitation of the Zone be regulated? This is an argument powerful enough to paralyze any pronouncement on a work plan, in view of the nature of the common heritage of humanity in the Zone, a characteristic that makes essential the existence of regulations that regulate the distribution of benefits. It should be remembered that the ISA is in charge of organizing and controlling the activities in the Zone in accordance with Part XI, particularly with a view to the administration of the resources of the Zone.

In this way, we consider that the possibility of leaving an application pending would not contravene UNCLOS.

Regarding the expression "elaboration", we understand that this is intended to reflect the end of the regulatory process required for the purposes of the provision.

(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?

Consistent with the above, regarding the procedural part, we are of the opinion that there is a predetermined approval process for some articles, such as Paragraph 3 of Article 153 of the Convention, regarding the Exploration and Exploitation System, whose text is as follows:

'Activities in the Area shall be carried out in accordance with a formal written plan of work drawn up in accordance with Annex III and approved by the Council after review by the Legal and Technical Commission"

This provision, along with using the expression "work plan" in a generic way, without specifying whether it is a work plan for exploration or an exploitation plan, indicates that these should be approved by the Council. But for this to be reviewed by the Council, it must first be examined by the Legal and Technical Commission.

On the other hand, Paragraph 15 c) analyzed, does not refer to this procedure (of article 153), but it does indicate that the work plan presented must be examined and approved by the Council. Under the understanding that the 1994 Agreement and Part XI should both be interpreted and applied jointly as a single instrument, it would only mean that both the Council and the LTC have to fulfill their functions with respect to this submission (i.e., the workplan). We do not see that there is a discrepancy between the two standards, since they both complement each other.

Regarding the criteria that must be applied in the examination and provisional approval of an exploitation application under Paragraph 15 c), the absence of regulation is an important factor in determining them, considering that there is an obligation of article 145 Faced with this, it would be useful to set a threshold, which could be applied for the examination of said work plan for exploitation. This threshold would consist of determining whether the applicant demonstrates that it has an effective system to protect the marine environment from the harmful effects of exploitation activities.

This threshold, to which we refer, must be technically objective and requires that both the applicant and the ISA, through the Council, participate in a very complete identification of the risks and uncertainties of the proposed exploitation activity, for the marine environment of the Zone, and the proposed plans must be previously attached, and then studied to address them. If this threshold is not met by the work plan submitted for provisional approval, it must be rejected.

We believe that this threshold reflects the spirit and objective of article 145 of the UNCLOS and the other norms of the same Agreement that were already cited in this document, and would be aligned with the responsibility for environmental protection that corresponds to the ISA.

The work of the LTC is fundamental within the process of analysis of a work plan, since it is the technical body of the ISA, which ultimately advises on the Council's decision-making, an issue that is even reflected in the rules of procedure of the latter.

However, and without prejudice to the aforementioned, we are facing a current scenario, which shows the following elements: the absence of regulation of exploitation; the non-absolute nature of this right (established in Paragraph 15 c) of the Annex); the existence of such basic principles in environmental matters as the precautionary principle; and the lack of sufficient scientific information to support this activity. In this scenario, it could be argued that the Council could interpret the functions of the LTC upon submission of the work plan under Paragraph 15 c) of the Annex to the 1994 Agreement. This is a clear consequence of its function of establishing the specific policy that the ISA will follow in relation to any question or matter within its competence, among which is the approval of a work plan. Likewise, the absence of regulations in the case leaves the LTC in a situation where it is impossible to fulfill its functions, therefore, an interpretation of its function is necessary.

(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?

Under article 16 of Annex III to UNCLOS, provisionally approving a plan of work under subparagraph (c) of paragraph 15 of Annex I of the Agreement entails the granting of provisional exclusive rights to *exploit the area covered by the plan of work*, that need to be confirmed once the relevant rules, regulations and provisions are adopted. However, this does not mean that an exploitation contract will be concluded.

In its ordinary meaning[1] "provisional" means *arranged, but not yet definite*.[2] In this sense, considering that a provisional approval of the plan of work in the terms of paragraph 15(c) of Annex I of the Agreement is, by its nature, subject to confirmation once the rules, regulations and procedures are adopted, a provisional approval cannot be granted in the form of a contract.

In fact, under UNCLOS, once contracts are issued they cannot be terminated or suspended unless the contractor fails to comply with its obligations,[3] and cannot be revised without the consent of the parties.[4] Therefore, a contract issued under the circumstances of paragraph 15(c) that after the adoption of the relevant rules, regulations and procedures is deemed to

[1] Article 31 of the Vienna Convention on the Law of Treaties.
[2] Oxford Advanced Learner's Dictionary.
[3] Article 18 of Annex III of UNCLOS.
[4] Article 19 of Annex III of UNCLOS.

make it impracticable or impossible to achieve the objectives set out in (...) Part XI cannot be modified without the consent of the contractor, which, in essence, defeats the purpose of the provisional approval.

This interpretation is confirmed by the fact that paragraph 15(c), unlike the other relevant rules that expressly establish that the approval of a plan of work shall be in the form of a contract,[5] does not include such a requirement. Thus, it is clear that the intention of the drafters was that in the circumstances of paragraph 15(c) a provisional approval should not take the form of a contract.

Furthermore, subsequent practice[6] of the International Seabed Authority has shown that when a plan of work has been approved without the adoption of the relevant rules, regulations and procedures, the contract cannot be issued until such rules are adopted.[7]

[5] See, Article 153(3) of UNCLOs, Article 3(5) of Annex III of UNCLOS, and
[6] Article 31(3)(b) of the Vienna Convention on the Law of Treaties.
[7] Report of the Secretary-General of the International Seabed Authority under article 166, paragraph 4, of the United Nations Convention on the Law of the Sea, para. 31 (6 June 2000), UN Doc. ISBA/6/A/9.