Deep Sea Conservation Coalition
submission 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

7 March 2022

The Deep Sea Conservation Coalition unites over 100 civil society organisations from across the globe, all committed to the protection of unique and fragile deep-sea ecosystems. On the understanding that deep-sea mining will result in irreversible damage to the marine environment when we are already in the midst of an environmental crisis, we believe that the only response to this speculative new industry is a moratorium. For more information, please read our Policy Brief.

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(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. The phrase "consider and provisionally approve" should be read according to its ordinary meaning. Consequences of this are as follows:

a) A function of approval must include disapproval, which must be the response in light of the lack of scientific information and damage which will be caused by commencement of deep sea mining. Indeed Article 145 requires necessary measures to ensure effective protection for the marine environment from harmful effects which may arise from any seabed mining. Such measures are not currently in place and cannot be implemented under the current lack of scientific knowledge and understanding of deep-sea ecosystems and the impacts of deep-sea mining.

b) Paragraph 15 is clearly a *sui generis* (special) procedure: it contemplates a plan of work to be 'provisionally' approved in the absence of adopted regulations. In the context of this *sui generis* procedure, the 'normal' process does not apply: it is not specified that the LTC makes a recommendation, as it would under Section 3 Paragraph 11 which applies to 'normal' approvals, but instead that *Council* considers and provisionally approves or disapproves an application.

c) Part of that unusual procedure is the 'provisional' approval. A provisional approval of a plan of work in the absence of regulations is "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 wording of this Paragraph would exclude consideration of the draft regulations, since they have not been adopted (or agreed by Members).

d) Based on the above considerations, Paragraph 15 of Section 1 intended to put into place a *sui generis* regime where it is indeed Council that considers and provisionally approves the plan of work, rather than the Section 3 Paragraph 11 procedure of the LTC reviewing and recommending, prior to Council's approval of the plan of work. Furthermore, the Council can disapprove a plan of work after having considered it, and indeed must do so if approval would breach the Convention and other international commitments to protect and preserve the environment and to halt and reverse biodiversity loss.

(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?

Criteria

Firstly, with respect to the criteria, Article 145 requires that necessary measures shall be taken in accordance with the Convention with respect to activities in the Area to ensure effective protection for the marine environment from harmful effects which may arise from such activities.

The term "ensure" means "deploy adequate means, to exercise best possible efforts, to do the utmost, to obtain this result": ITLOS Advisory Opinion para. 110. The ISA must then do the utmost to ensure effective protection for the marine environment from harmful effects. This means not approving a plan of work when we know that effective protection cannot be ensured. This is particularly the case when the precautionary approach is applied, as it must be (ITLOS Advisory Opinion para 122 etc).

- The lack of science and damage that seabed mining will inevitably cause is well documented as is set out in the Deep Sea Conservation Coalition's fact sheet.
- The ISA is not currently equipped to properly fulfil its mandate to ensure the effective protection of the marine environment. There are no standards or rules for the conduct of an environmental impact assessment, and such a task is currently impossible in the absence of sufficient science to establish an environmental baseline. Nor are adequate stakeholder consultation procedures in place.
- Fundamental issues in the regulations have not been addressed including fundamental principles. The financial arrangements including royalties or profit sharing and sharing of benefits are far from being agreed. There is no adequate definition of effective control and no liability regime. There is no fund for compensation and redress in the (likely) event that environmental damage is caused and the contractor cannot pay for it.
- Transparent and accountable structures and procedures are not in place. There is no scientific committee.

In these circumstances, the provisions of Section 1 Paragraph 15 for consideration and provisional approval cannot be fulfilled. No RRPs have been adopted provisionally. And the norms contained in the Convention notably include Article 145 on effective protection of the marine environment, which as we noted above, cannot be achieved.

For the same reasons, a moratorium or precautionary pause on deep-sea mining is required in these circumstances, consistent with the IUCN resolution 122 and called for by a growing number of States, scientists, Indigenous groups and leaders, and private companies.

Under UNCLOS, there is no automatic obligation for the ISA to award exploitation contracts: on the other hand, there is a clear obligation in Article 145 to prevent damage to marine flora and fauna and ensure effective protection of the environment from harmful effects of activities in the Area. A recent legal opinion by Matrix Chambers requested by Pew Charitable Trusts found that a "moratorium or precautionary pause is not only consistent with UNCLOS but is actually required by it. It is a core obligation of State Parties to protect and preserve the marine environment; it would be a violation of that obligation to enable the commencement of exploitation of the Area at a time when scientific understanding of the deep sea, the existing regulatory arrangements, and the ISA's institutional capacity are insufficient to ensure that outcome". A suspension of deepsea mining is necessary at this critical moment in history.

On the role of the LTC in considering an application for a plan of work:

a. We note that there is no mention of the role of the LTC in Paragraph 15.
b. Consideration and approval under Paragraph 15 is an appropriate role of the Council as it involves numerous issues of policy. It is Council that has the task of adopting and applying provisionally, pending approval by the Assembly, the rules, regulations and procedures of the Authority, under Article 162(2)(o)(ii) of the Convention, as well as recommending to the Assembly rules, regulations and procedures (RRPs) on the equitable sharing of financial and other economic benefits derived from activities in the Area under Article 162(2)(o)(i). If it has not completed those tasks, it is appropriate that Council is given the role of considering and provisionally approving (or disapproving) a plan of work.
c. The Council in determining the procedure to be followed could request the LTC to advise on parts of the application e.g. financial aspects.

(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 ordinary meaning of the term provisional approval, as used elsewhere, is provisional pending something else - it is not therefore a final approval and as such should not result in the issue of an exploitation contract by the Secretary-General. Noting Annex III Articles 18 and 19, a plan of work could lead to a potentially irrevocable contract and inevitable harm to the marine environment. Likewise, a provisional approval could not lead to a contract, for the same reasons: a contract would grant security of tenure, and thus would not be provisional.

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