



Informal Intersessional Dialogue (ISBA/27/C/45)

Written submission
by the
International Union for Conservation of Nature (IUCN)

14 March 2023

General response

IUCN, The International Union for Conservation of Nature welcomes this opportunity to submit written comments and support the work of the informal intersessional dialogue to facilitate further discussion on the possible scenarios and any other pertinent legal considerations in connection with section 1(15) of the annex to the 1994 Implementing Agreement of Part XI of the UN Convention on the Law of the Sea (UNCLOS).

At the outset, the IUCN wishes to reiterate its position, as reflected in Resolution 122 adopted at the 2021 IUCN Congress in Marseille, calling for a moratorium on deep-sea mining unless and until:

- the risks of mining are comprehensively understood and effective protection can be ensured;
- rigorous and transparent impact assessments are conducted based on comprehensive baseline studies;
- the Precautionary Principle and the 'Polluter Pays Principle' are implemented;
- policies incorporating circular economy principles to reuse and recycle minerals have been developed and implemented;
- mechanisms are in place to consult with the public throughout decision-making;
- the governance of deep-sea mining is transparent, accountable, inclusive, effective and environmentally responsible.

In our view, Part XI of UNCLOS should be interpreted in a manner that gives effect to the above. Hence, in approaching the possible scenarios and legal considerations in connection with section 1(15), we encourage the member states of the Authority to adopt interpretations to this provision that disallows the commencement of any mining activities until the above conditions are met. It would be unacceptable to allow mining activities to commence in the absence of the above, particularly when it is obvious that the majority of Council member states have expressed their hesitance and concerns.

Specific response

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

¹ For a comprehensive analysis on this topic, please see: Pradeep Singh, *The Invocation of the 'Two-Year Rule' at the International Seabed Authority: Legal Consequences and Implications*, *International Journal of Marine and Coastal Law*, 2022, 37:3, 375-412; and Pradeep Singh, *"What If" Revisited: Open legal questions in light of*

- “Consider” and “provisionally approve” should not be read together as being one and the same. Indeed, the Council is obliged to “consider” an application but it can decide to disapprove it if a plan of work fails to meet the standards set out in the provisions of the Convention or any rules, regulations and procedures the Council may have adopted provisionally.
 - The Council is in a position to postpone the consideration of an application. Section 3(6) of the annex to the 1994 Implementing Agreement accords the Council the discretion to “defer the taking of a decision in order to facilitate further negotiation whenever it appears that all efforts at achieving consensus on a question have not been exhausted”. This applies equally to the consideration of a plan of work under section 1(15).
 - There is no reason to conclude that the interchanging use between the word “elaboration” and “adoption” in section 1(15) is accidental. Rather, this is deliberate and consequently, the provision should be interpreted to give effect to this intention. As such, having completed the elaboration of the regulations, the Council may decide to postpone the adoption of the regulations until such time as other elements, including but not limited to the necessary standards and guidelines, the financial terms of an exploitation contract, or appropriate mechanisms for equitable benefit sharing, are in place. Finally, there are no legal repercussions of the Council missing the deadline, with the exception that subparagraph (c) comes into play, which means that the Council would not be in violation or breach of its responsibilities if it fails to adopt the regulations by 9 July 2023. In fact, the Council is clearly not in any position to adopt the regulations this year and allow mining activities to commence in the near future.
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?²
- The Authority is obliged to ensure the effective protection of the marine environment from the harmful effects of mining activities. As such, the Authority must develop procedures and criteria to evaluate mining applications that would meet this responsibility. Currently, the Authority has not established such measures. In fact, there are no relevant environmental thresholds and standards in place against which exploitation activities can be evaluated and assessed. In the absence of the above, it would not be possible for the Authority to make an informed decision.
 - Section 1(15) is largely silent about the consideration and evaluation process. However, it is clear that it only speaks to the Council, and it is not clear whether the LTC plays a role. Given this ambiguity, it is for the Council to agree upon the applicable process and determine the role of the LTC. Moreover, given that the word “consider” is used here in relation to the Council, it is arguable that the Council should be the one doing the bulk of the consideration, although this could be done with support from the LTC. In this respect, the Council can issue directives that the LTC should play a more informal role and that it would not be appropriate for the LTC to

the two-year rule at the International Seabed Authority, RIFS Discussion Paper, March 2023, https://publications.rifs-potsdam.de/rest/items/item_6002727_1/component/file_6002728/content

² See again, *ibid.*



recommend the approval of a plan of work in the absence of regulations as well as environmental standards and thresholds.

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?³
- This question would only arise if the Council decides to provisionally approve an application, which the Council can/may refrain from doing under section 1(15) for reasons explained earlier.
 - The provision is silent about the consequences of a provisionally approved plan of work, but the use of the word “provisionally” here clearly shows that such an approval is temporary and does not necessarily confer the right to start mining.
 - Moreover, the omission to use the word “contract” here is intentional, since it is the contract that confers the right to mine and security of tenure, whereas section 1(15) only speaks to the provisional approval of a “plan of work”. Since a contract can only be awarded once the regulations are in place, the Council is empowered to withhold the awarding of a contract by directing the Secretary-General to not enter into negotiations with the successful applicant until the regulations are adopted or until such time directed by the Council.

Conclusion

Considering the rationale behind why section 1(15) was introduced, the Council is not bound to embrace interpretations that would allow mining activities to commence especially in the absence of the applicable regulations. IUCN reiterates its position that the best way for member states to implement their responsibilities and obligations under UNCLOS is to impose a precautionary pause or moratorium.⁴ Section 1(15) does not change anything in this respect.

For enquiries, please contact:

Minna Epps, Head, Ocean Team, IUCN. minna.epps@iucn.org.

Pradeep Singh, Lead of the Deep Seabed Mining Thematic Group of the IUCN Commission on Ecosystem Management, and Deputy Chair of the Ocean Law Specialist Group of the IUCN World Commission on Environmental Law. pradeep@uni-bremen.de.

³ See again, *ibid*.

⁴ Pradeep Singh, *What Are the Next Steps for the International Seabed Authority after the Invocation of the ‘Two-year Rule’?* International Journal of Marine and Coastal Law, 2022, 37:1, 152-165.