

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

Japan's 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?**

The condition clause in subparagraph (c) ("if the Council has not completed the elaboration of the rules, regulations and procedures relating to exploitation within the prescribed time and an application for approval of a plan of work for exploitation is pending") presupposes that application for approval of a plan of work will not be normally processed, if rules, regulations and procedures have not been elaborated. In order to avoid such situation where applications are pending because of the delay in preparing rules, regulation and procedures, subparagraph (c) exceptionally allows a plan of work to be reviewed provisionally by using the Convention and other criteria, even if rules, regulations and procedures have not been elaborated (cf. it shall "none the less" consider). Such procedure is exceptional, and "provisionally" means that a plan of work should be properly dealt with in accordance with rules, regulations and procedures, once they have been formally elaborated.

According to subparagraph (c) and the use of the term "shall", the Council has an obligation to "consider and provisionally approve" a plan of work for exploitation, even if it has not completed the elaboration of the rules, regulations and procedures relating to exploitation. Given the fact that subparagraph (c) specifies the criteria by which the Council reviews a plan of work, the Council can make a decision of "disapproval" as well as "approval" of a plan of work as a result of its consideration. Moreover, the word "consider" would not have been necessary, if a plan of work could be automatically approved.

In accordance with Art. 6.1 of Annex III, which stipulates that the Authority shall take up for consideration proposed plans of work each forth month, the consideration of a pending application cannot be postponed.

- (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?**

With regard to the procedure, an application for a plan of work is to be reviewed by the LTC, before the Council decides its approval or disapproval based on the recommendation of the LTC, in accordance with Art. 153 (3) and 165 (2)(b). The decision making procedure for approving/disapproving an application for a plan of work is provided in Sec. 3 (11)(a) of 1994 Agreement.

With respect to the criteria, Art. 6.3 of Annex III provides that a plan of work shall comply with and be governed by the relevant provisions of the Convention and the rules, regulations and procedures of the Authority. If the rules, regulations and procedures of the Authority have not been elaborated by the time of submission of the first plan of work, the criteria written in paragraph 15 (c) should be applied, which is, inter alia, the provisions of UNCLOS including the criteria for the protection of marine environment.

(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 logical consequence of the provisional approval of a plan of work is to enter into a negotiation of a contract between the applicant and the ISA.

However, a contract which incorporates a provisionally approved plan of work is only a provisional contract. To commence activities, a formal contract based on a formal written plan of work is required as provided for in Art. 153(3).