



REPUBLIC OF NAURU

The Republic of Nauru's response to the indicative questions contained in Co-Facilitators' Note on the webinar in the context of 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 1994 Agreement

Introduction

1. The Republic of Nauru (**Nauru**) expresses its appreciation to the Co-facilitators of the webinar concerning further discussion on the possible scenarios and other legal considerations pursuant to Section 1, Paragraph 15 of the Annex to the 1994 Agreement (**Paragraph 15**).
2. Nauru looks forward to participating in the webinar and provides its written response to the Co-facilitators questions below (the **Response**). The Response adopts well established principles of treaty interpretation contained in Vienna Convention on the Law of Treaties (**Vienna Convention**).
3. The Vienna Convention is widely accepted as customary international law and requires an interpretation of Paragraph 15, the United Nations Convention on the Law of the Sea (**UNCLOS** or the **Convention**) and the Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea (the **1994 Agreement**) that: (i) is based on good faith; (ii) accords with the ordinary meaning of the treaty's terms; (iii) accords with context of the treaty's terms; and (iv) is made in light of the object and purpose of the treaty.

Opinion Paper

4. To aid and further supplement the below Response, Nauru has prepared a detailed opinion paper concerning the interpretation of the regulatory steps and decision-making for a plan of work for exploitation submitted to the Authority pursuant to Paragraph 15 (the **Opinion Paper**).
5. The Opinion Paper also proposes a road map for the Authority's consideration of a plan of work pursuant to Paragraph 15 contained in Annexure.

Response

Question One - 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?

6. The provisions of the Convention and the 1994 Agreement are explicitly clear, a plan of work for exploitation is firstly considered by the Legal and Technical Commission (the **Commission**) and recommendations submitted to the Council.¹
7. Paragraph 15 requires that if the Council has not completed the elaboration and adoption of the Regulations by 9 July 2023, the Council “*shall none the less consider and provisionally approve*” a plan of work for exploitation. Based on accepted principles of treaty interpretation, Paragraph 15 and the use of the term “*shall*” clearly imports a mandatory obligation on the Council to consider and approve a plan of work for exploitation in accordance with the decision-making procedure for the consideration and approval of a plan of work contained in the Convention and the 1994 Agreement.
8. The combined effect of Articles 153(3) and 165(2)(b) of the Convention and Annex, Section 3, Paragraph 11(a) of the of the 1994 Agreement, is that an application for a plan of work submitted under Paragraph 15 must first be reviewed by the Commission and recommendations concerning the approval of the plan of work submitted to the Council. This is an explicit role and function of the Commission contained in the Convention and the 1994 Agreement and cannot be derogated or amended unilaterally by the Council.
9. If positive recommendations are submitted by the Commission to the Council concerning the approval of a plan of work, the Council is required to approve the Commission's recommendation. The Council may decide to reject the Commission’s recommendations for approval of a plan of work if a two-thirds majority of the Council’s members present and voting, including a majority of members present and voting in each of the chambers of the Council, decides to disapprove the recommendations.²
10. There are no provisions contained in the Convention or the 1994 Agreement that permits the Authority to impose “*certain conditions*” to postpone the consideration of a plan of work pursuant to Paragraph 15. Paragraph 15(c) acts a circuit breaker to

¹ For example, see: Articles 153(3) and 165(2)(b) of the Convention and Annex, Section 3, Paragraph 11(a) of the 1994 Agreement.

² Annex, Section 3, Paragraph 11 of the 1994 Agreement.

protect the rights of applicant contractors and sponsoring States should the Council fail in its mandate to provisionally adopt the exploitation regulations and any additional rules, regulations and procedures necessary to facilitate the approval of plans of work for exploitation by 9 July 2023.

11. Any conditions or measures adopted by the Authority and its member States that seek to postpone or prevent the Commission's consideration of a plan of work for exploitation circumvents the explicit rights of applicant contractors and sponsoring States contained in Paragraph 15(c) and is clearly *ultra vires* to the Convention and the 1994 Agreement.
12. We note that the terms "*elaborate*" and "*adopt*" are used interchangeably in Paragraph 15. Paragraph 15(b) requires the "*adoption*" of exploitation regulations and any additional rules, regulations and procedures necessary to facilitate the approval of plans of work for exploitation by 9 July 2023, whereas Paragraph 15(c) uses the term "*elaboration*".
13. Applying an interpretation of Paragraph 15 consistent with the Vienna Convention and interpreting the text in good faith and in its ordinary meaning, we do not consider that the term "*elaborate*" or more specifically "*completed the elaboration*" in Paragraph 15(c) has any legal significance.
14. Paragraph 15 contains a cascading framework of regulatory steps and must be interpreted as a whole rather than interpreting terms in isolation. For example:
 - (a) Paragraph 15 contains the legal requirement under the 1994 Agreement for the Authority to "*elaborate and adopt*" the exploitation regulations and any additional rules, regulations and procedures to facilitate the approval of a plan of work for exploitation.
 - (b) Paragraph 15(a) provides the circumstances as to when the elaboration of the exploitation regulations and any additional rules, regulations and procedures necessary to facilitate the approval of plans of work for exploitation is to commence.
 - (c) Paragraph 15(b) contains the deadline as to when the Council must "*adopt*" the exploitation regulations and any additional rules, regulations and procedures necessary to facilitate the approval of plans of work for exploitation that were commenced under Paragraph 15(a); and
 - (d) Paragraph 15(c) contains a circuit breaker to ensure that in the event the Council and its member States fail to complete its legal mandate under Paragraph 15(b) that a plan of work for exploitation is none the less considered and provisionally approved.

Question Two - 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?

15. The procedure and roles of the Commission and Council for the consideration of a plan of work under Paragraph 15(c) is outlined in Annex, Section 3, Paragraph 11 of the 1994 Agreement and Articles 153(3) and 165(2)(b) of the Convention.
16. The Commission is to review the plan of work based on the criteria contained in Paragraph 15(c) and submit recommendations to the Council. The Council shall approve a recommendation by the Commission for approval of a plan of work unless by a two-thirds majority of its members present and voting, including a majority of members present and voting in each of the chambers of the Council, the Council decides to disapprove a plan of work.
17. Article 145 of the Convention and other articles concerning the protection of the marine environment, do not alter the decision-making framework contained in the Convention and the 1994 Agreement. Rather, articles concerning the protection of the marine environment are to be considered by the Commission as part of its consideration of the plan of work under Paragraph 15(c). Any alternative decision-making procedure is *ultra vires* to the explicit framework contained in the Convention and the 1994 Agreement.
18. The criteria to be used by the Commission in considering a plan of work and issuing recommendations to the Council is contained in Paragraph 15(c) and is to be based on:
 - (a) the provisions of the Convention; and
 - (b) any rules, regulations and procedures the Council may have adopted provisionally; or
 - (c) on the basis of norms contained in the Convention; and
 - (d) the terms and principles contained in the Annex to the 1994 Agreement and the principle of non-discrimination among contractors.
19. A further explanation concerning our interpretation of the criteria outlined in Paragraph 15(c) is contained in the Opinion Paper.

Question Three - 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?

20. If after the prescribed time, an application for a plan of work for exploitation conforms with the criteria outlined in paragraph 15(c) and the plan of work is “*provisionally approved*” by the Council, we consider that the Council is required under the Convention to instruct the Secretary-General to issue the provisionally approved plan of work in the form of a provisional contract.
21. Pursuant to Article 153(3) of the Convention, all activities in the Area shall be carried out in the form of a contract in accordance with the Authority’s approved plan of work. Specifically, “[...] *In the case of activities in the Area carried as authorised by the Authority by the entities specific in paragraph 2(b), the plan of work, shall, in accordance with Annex III, article 3, be in the form of a contract [...]*”. (emphasis added).
22. The majority of lawyers understand and use the word “*shall*”, to signal a positive obligation and negate optionality on the part of the obligor. Similarly, the decisions of international tribunals confirm that the term “*shall*” imparts a mandatory obligation. This interpretation is also confirmed in the infamous commentary to the Convention where, based on the Convention’s *travaux préparatoires*, the intent of Article 153(3) was to ensure that an approved plan of work was “*rendered*” in the form of a contract.³
23. We are aware that previously the Authority, under the pioneer investors scheme contained in Section 1, para. 6(a)(ii) of the 1994 Agreement, issued exploration contracts for an approved plan of work under Section 1, para. 6(a)(ii) of the 1994 Agreement only after the Authority provisionally adopted and approved the Regulations for Prospecting and Exploration for Polymetallic Nodules, including the standard form and clauses for exploration contracts.
24. We do not consider there was any legal basis or requirement under the 1994 Agreement or the Convention for the Authority to take such an approach and that pursuant to Section 1, para. 6(a)(ii) of the 1994 Agreement an exploration contract should have been issued at the time the plan of work was approved.
25. Applying the Latin maxim *ut res magis valeat quam pereat* requires that an interpretation of a term should be preferred which gives it some meaning and role rather than one which does not. If at the conclusion of the regulatory steps contained in Paragraph 15, an applicant contractor is left merely with a provisionally approved plan

³ M. H. Nordquist, *United Nations Convention on the Law of the Sea 1982: A Commentary*, ed S. N. Nandan, M. W. Lodge and S. Rosenne (Martinus Nijhoff Publishers), Volume VI, p. 307.

of work but no provisional contract this would devoid Paragraph 15 of any meaning or role and leave the contractor with a provisionally approved plan of work in a regulatory vacuum. This would be a manifestly absurd and unreasonable interpretation of Paragraph 15 for not only the contractor but also the sponsoring State(s).

26. There is no legal basis under the Convention, or the 1994 Agreement for a plan of work provisionally approved by the Authority under Paragraph 15 to not be issued in the form of a provisional contract. Any interpretation to the contrary would be inconsistent with Article 153(3) of the Convention, the Vienna Convention and well-established rules of treaty interpretation.