

Informal Intersessional Dialogue in connection with section 1, paragraph 15, of the annex to the Agreement relating to Part XI UNCLOS, 8 March 2023

Legal starting points for the analysis

Prepared by Norway

Section 1, 15 of the Annex to the 1994 Agreement specifies what the ISA Council “shall” do if 1) the Council has not completed its elaboration of the rules, regulations and procedures relating to exploitation; 2) the prescribed time has lapsed, which is two years from a request is made by a State whose national intends to apply for approval of a plan of work for exploitation; and 3) an application for approval of such a plan of work is “pending”.

The wording “pending” indicates that the application for approval of a plan of work has been submitted to the ISA for review. The provision thus dictates the Council’s actions in a situation where the Council has failed its obligation to elaborate and adopt rules, regulations and procedures related to exploitation (cf. letter a), within the prescribed time-limit, and an application has been submitted.

According to letter c, the Council is then obliged to (cf. “shall”) nevertheless (cf. “none the less”) “consider and provisionally approve” such an application for approval of a plan of work.

The inclusion of the word “consider” clarifies that a subsequent provisional approval is not automatic, as a duty to provisionally approve would leave the duty “to consider” without meaning. The ordinary meaning, read in its context and based on its object and purpose, of the phrase “consider and provisionally approve” indicates that the Council is indeed required to *assess* a pending application for approval of a plan of work based on the legal sources enumerated in the final sentence of letter c.

This has several implications. First, it means that the Council does not have the discretion *not* to consider a pending application for approval of a plan of work, assuming the other conditions in letter c are satisfied. The briefing note asks whether the consideration of a pending application for approval of a plan of work can be postponed “until certain conditions are met”. Any postponements would need a clear legal basis in the Convention. Norway has thus far not identified any legal grounds for such postponement (beyond the criteria listed in letter c).

Second, it means that an application for approval of a plan of work that comports with the requirements in the legal sources enumerated in letter c, shall be provisionally approved by the Council. Third, and conversely, it means that an application for approval of a plan of work which does not comport with these requirements must be disapproved by the Council.

It is critical to note that article 145 of the Convention is one of the “provisions of the Convention” that will form part of the legal sources based on which the Council shall consider the application for approval of a plan of work. Article 145 encompasses both the precautionary principle and the ecosystem approach.

The use of the word “provisionally” in “provisionally approve” implies that any (provisional) approval granted under Section 1, 15 is temporary, and therefore not final. Any provisional approval should require that the plan of work comports with the full body of rules, regulations and procedures once these are finalized.

Generally, the Convention’s system is such that all plans of work are reviewed by the Legal and Technical Commission before final approval or disapproval is provided by the Council. The object and purpose of this two-tiered system is to ensure that the Council bases its decisions on a prior scientific

assessment by its designated expert organ. This system also ensures that confidentiality requirements are complied with. Norway has not yet seen any convincing legal reasons to depart from this system in the context of Section 1,15 c. Any Council decision on approving or disapproving an application for approval of a plan of work, including on “provisional approval” (or not) under Section 1, 15, should thus be based on a prior assessment by the Legal and Technical Commission.