3 March 2022

Comments from the Pew Charitable Trusts in response to the Co-Facilitators' request for written submissions on 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

(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?*

In our understanding, the meaning of the phrase "consider and provisionally approve" is an approval that is temporary and an interim measure. It would mean that the Council would have provisionally approved a plan of work but would not be able to direct the Secretary General to execute an exploitation contract giving the contractor security of tenure[1]. The Council can only give its final approval after the rules, regulations and procedures (RRPs) have been adopted by the Assembly, therefore any "provisional approval" of the plan of work cannot be considered final and would be subject to change.

Consistent with the position articulated by New Zealand, we consider the two-year rule imposes a "best endeavours" obligation on States to complete the adoption of RRPs within two years of the trigger. Notwithstanding the use of the word "shall" in section 1(15)(b) of the Annex to the 1994 Agreement, we do not consider the two-year rule requires the adoption of RRPs by July 2023; such a mandatory requirement would render section 1(15)(c) of the Annex superfluous. Consequently, while States must strive in good faith to adopt RRPs by July 2023, they are entitled to continue negotiating beyond that date if it is simply not possible to reach agreement on UNCLOS-consistent RRPs before then.

We share the interpretation of the usage of the term "elaboration" with recent legal analysis on the subject[2]. Section 1(15) of the Annex to the 1994 Agreement distinguishes between the "adoption" of RRPs in section 1(15)(b) and their "elaboration" in section 1(15)(c). We think this distinction is intentional and signals that the Council is not obligated to consider a plan of work in the absence of RRPs if it has made good faith attempts to finalize the RRPs but has not been able to adopt them. The legal requirement on the Council is to elaborate on the RRPs within the deadline imposed, but is not technically bound to assess applications till the RRPs have been formally adopted by the Council and Assembly.

If section 1(15)(c) applies, and the Council has not provisionally adopted any RRPs, we consider the ISA would be bound to disapprove a plan of work when assessed against the norms contained in UNCLOS (those norms being the relevant benchmark under section 1(15)(c) in the absence of RRPs). This view arises as a result of the current context in which the decision would arise. We note in particular:

- the paucity of rigorous scientific information concerning, ecology and connectivity of deep-sea species and ecosystems, as well as the ecosystem services they provide;
- the various gaps in the regulatory regime that would impair the ISA's ability to assess objectively and fairly a plan of work for exploitation e.g. lack of criteria for establishing an adequate baseline, lack of criteria for evaluating an EIA, no clear definition of key terms such as

[1] Per UNCLOS Article 153 (6)

[2] See Pradeep Singh, The Invocation of the "Two-Year Rule" at the International Seabed Authority: Legal Consequences and Implications

"effective protection", "harmful effects", "serious harm", lack of agreed environmental thresholds for specific impacts; and

- limited capacity within the ISA to assess new plans of work, lack of systems or structures to monitor and inspect activities, nor to enforce compliance;

In this specific context, it is clear that no plan of work could currently describe an adequate environmental baseline or demonstrate to a precautionary standard that it would not have "harmful effects" on, cause "damage to the flora and fauna of", or unacceptably "interfere with the ecological balance of" the marine environment. In those circumstances, member States could not be satisfied they could approve a plan of work consistently with their obligation to protect and preserve the marine environment, nor with their obligation to ensure activities in the Area are carried out for the benefit of mankind as a whole. Therefore, the ISA could not reasonably conclude that a plan of work is consistent with the norms contained in the Convention[3]. In our view, the LTC would be legally obliged to recommend disapproval, and the Council legal obliged to disapprove, any application for a plan of work for exploitation received in this context.

(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?

Procedure and criteria for assessment: In the absence of environmentally precautionary and robust RRPs, the Council would have to have rely on normative criteria to assess any applications. This would include the obligation of state Parties to uphold Article 145 and the precautionary principle. Member States would also be bound by the duties contained in Part XII of UNCLOS, as well as other international commitments (e.g. relating to biodiversity and human rights) to which States are signatories, as Part XI of UNCLOS cannot operate in a vacuum. As stated above, in current circumstances where scientific knowledge and regulatory rules are lacking, we believe member States could not be satisfied they could approve a plan of work consistently with their international law obligations, including those to protect and preserve the marine environment, and the ISA therefore could not reasonably conclude that a plan of work is consistent with the norms contained in the Convention. So disapproval would be the is the only option.

Role of the organs: On the basis of subparagraph 1(15)(c) of the Annex to the 1994 Agreement, it would appear that the Council is the sole organ that shall "consider and provisionally approve" any plan of work. However, as the technical body in charge of advising the Council on applications for plans of work, there is seemingly a role for the Legal and Technical Commission (LTC) as well. As stated above, we believe both the Council and the LTC would be bound to recommend disapproval of any pending application.

Having said that, we are concerned about the voting rule established by the 1994 Agreement (Annex, s.3(11)(a)), which requires a super-majority of Council to disapprove an application for a plan of work, if the LTC has recommended its approval. We do not consider this to be an appropriate procedure to apply, during the two-year rule situation, where the Council has not set specific and clear evaluation and recommendation criteria for the LTC in their review of an application for a plan of work. We would therefore recommend that the Council direct the LTC to review plans of work of any pending application but not provide a recommendation to the Council. The final approval or disapproval of an application

[3] Although the language of section 1(15)(c) is that the Council must "consider and provisionally approve" a plan of work, disapproval is plainly available. We agree with the analysis of Pradeep Singh, amongst others, on this point: see ibid.

should remain in the hands of the Council. Contrary to a common misconception, neither UNCLOS nor the 1994 Agreement requires the LTC to make a recommendation for approval or disapproval of a plan of work[4]. Instead, pursuant to Article 165(2)(b) UNCLOS, the LTC is required to "review" plans of work and "submit appropriate recommendations to the Council… [based] solely on the grounds stated in Annex III". Appropriate recommendations could include recommendations on the relevant factors for the Council to consider when determining an application for a plan of work, having regard to the grounds in Annex III and the LTC's technical analysis, without a specific recommendation to approve or disapprove the plan of work. A situation in which the LTC makes no specific recommendation is also expressly countenanced within the existing legal framework for ISA decision-making (see the Annex to the 1994 Agreement, section 3(11)(a)).

(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?

We consider that the application of section 1(15)(c) should not result in the issue of an exploitation contract by the Secretary-General. Even if the Council were to provisionally approve a plan of work in accordance with section 1(15)(c) of the Annex to the 1994 Agreement (which we consider would be unlawful in current circumstances, as indicated above), we consider the Council could not direct the Secretary-General to issue an exploitation contract until the Assembly has approved the RRPs and the Council has given the plan of work its final approval. That is the necessary implication of "provisional" approval; that is, approval that is temporary only and subject to change. The Secretary-General cannot issue a contract giving the contractor security of tenure[5] if the Council's approval of the plan of work is not secure and subject to change. That approach is consistent with the precedent set in relation to the issue of exploration contracts to the Pioneer Investors[6].

[4] See Articles 153(3), 165(2), and Annex III to UNCLOS, none of which require the LTC to recommend approval or disapproval of an application for a plan of work. Where a recommendation to approve is made by the LTC, then a two-thirds majority of the Council is required to overrule it: s3(11)(a) of the Annex to the 1994 Agreement.
[5] See UNCLOS Art 153(6)
[6] The Pioneer Investors' plan of work was approved by the Council in August 1997 under paragraph 8 of Resolution II of the UNCLOS Final Act and paragraph 6(a), section 1 of the Annex to the 1994 Agreement. However, the first exploration contract was not signed until March 2001, following the Assembly's approval of the first exploration regulations in July 2000 and the Council's subsequent request for the Secretary-General to issue a contract "in accordance with the regulations on prospecting and exploration for polymetallic nodules in the Area and a standard form of contract to be approved by the Council": see ISBA/3/C/9. (Aug 1997).