

Mexico's comments on intersessional dialogue to facilitate further discussion in connection with section 1, paragraph 15, of the annex to the Agreement relating to Part XI, UNCLOS

Kindly find below the comments from the Permanent Representation of Mexico to the International Seabed Authority on the document "2023-02-09 Non-paper with draft decision on what-if"

- In general, the proposed draft would be premature and unnecessary. First, an application for a plan of work for exploitation could, theoretically, be submitted at any time, for which the applicant would need to count with the sponsorship of a State Party. Second, such decision – to sponsor an applicant – is the right of a State, as provided for in the Convention.
- In addition, to date, not only there is no certainty as to if and when an application for a plan of work could be formulated. Also, there would be other substantive factors which would be relevant for an application to be submitted – ideally including the finalization of the Exploitation Regulations and associated norms – such as results of exploration work (both on the resources and environmental issues), environmental impact statements, among others. As things stand, it would be remote that an application would be submitted before the 2-year deadline.
- Regarding the draft decision, none of the three options presented would be compatible with the Convention, for different reasons. Should a decision be presented, it would need to be strictly consistent with the Convention. It is key that States Parties act in accordance with international law and that the applicable norms are adhered.
- The name of the resolution suggests that procedural issues will be addressed under Section 1, paragraph 15, subparagraph c) of the Annex to the Agreement to the Implementation of Part XI of UNCLOS (the Agreement). If this proposed decision is aimed at giving content to the "What if scenario" in the event that the Council exceeds the two-year term that expires on June 9, 2023, the name of the resolution should refer to this objective or, where appropriate, follow the line of the Council resolution in ISBA/27/C/45.

Option I.

- **Preamble.** A decision to “not apply” a procedure provided for in the Convention (that provided for in Article 152, para. 3) would constitute an arbitrary exception to the application of the UNCLOS and thus, not consistent with international law.
- **Operative part.** The proposal would circumvent the procedures provided for in the Convention, overlooking the role of the LTC. Thus, any Council decision or action in that regard would be ultra vires and may even give rise to grounds for liability.
- **Operative part** (last para.). If what the proposal suggests is to devise a procedure for the consideration of a plan of work, it would need to refer to the relevant provisions of the Convention and the institutional settings of the Authority (including decision-making). Should that be the intention of the proposal, it should be clarified and not be limited to environmental and financial viabilities, but overall formal and substantive requirements for an application (for example, as provided for in the Exploration Regulations, as applied *mutatis mutandis* for a case of an exploitation application).
- The starting point of the proposal is subparagraph c) of Section 1, paragraph 15 of the Agreement, which refers to the provisional approval of a request for a plan of work for exploitation (PoW) when the Council has not finalized the development of rules, regulations and procedures (RRPs) for exploitation within two years.
- The proposal would seek to clarify the interpretation and application of the aforementioned provision, referring to the fact that, in the absence of RRP, art. 153. 3 of the UNCLOS. However, this statement would not be entirely correct since article 153.3 establishes that the activities in the Zone will be carried out in accordance with an official written PoW, prepared in accordance with Annex III and approved by the Council after its examination by the Legal and Technical Commission (LTC).
- In Mexico's opinion, this article 153.3, together with Rule 70 of the Rules of Procedure of the Council, establish that the PoW for exploitation must be approved by the Council, prior to an examination carried out by the LTC and under the recommendation of the latter to an approval or a disapproval.
- Although subparagraph c) of paragraph 1 of provision 15 of the Annex of the Agreement does not expressly refer to the participation of the LTC, the

reference to UNCLOS and the 1994 Agreement, it should be considered that all requests for the approval of a PoW must be reviewed, firstly, by the LTC - technical-scientific body-, then submit its recommendations to the Council in accordance with UNCLOS and its 1994 Agreement.

- This option would aim at:
- When a request for approval to the PoW is submitted when there are no RRP, the Council must apply the rules of section 3, paragraphs 2, 5 and 6 of the Annex of the Agreement for its consideration and provisional approval.
- The Secretary General, upon receiving the request, must transmit it to the President of the Council so that he/she can forward it to the LTC, who must provide the Council with an exhaustive report with the implications of the PoW, including environmental implications and financial viability of the project.

Conclusions: It is understood that this Option I is unnecessary because it would be the ordinary process for the review of the request for approval to the PoW, a process that would be subject to section 3, paragraphs 2, 5 and 6 of the Annex of the Agreement, articles 153.3, 165 and other applicable provisions of UNCLOS.

Option II.

- It is contrary to the Convention for the Council to prejudge the role of the LTC as to its competence to assess applications (“is not in a position to make a recommendation to the Council”).
- Unlike Option I, this proposal is based on paragraph 2b of Article 165 of UNCLOS, which establishes the function of the LTC to examine the PoWs and make the appropriate recommendations to the Council. The foregoing, based exclusively on Annex III of UNCLOS.
- This Annex III, in its article 6, establishes that the PoW must comply with the relevant provisions of UNCLOS and the RRP of the ISA, including the requirements of operations, financial contributions and the obligations of

transfer of technology. In addition, this article indicates that PoWs must meet these requirements so that the ISA can approve them under uniform and non-discriminatory requirements. The exceptions of numeral 3 of this article are not applicable for the analysis of this option.

- Under the assumption of the two-year rule, this option would consider that the LTC does not have the RRP for exploitation on which it can base its recommendation. Therefore, it is proposed that the Council decide that the LTC makes a comprehensive report with the implications of the PoW, including the environmental implications and the financial viability of the project.
- It is Mexico's opinion that UNCLOS explicitly requires that all PoWs conform to its provisions and to the RRP, therefore any PoW must be subject to this regulatory framework in order to submit it for possible approval.

Paragraph c of provision 15 of the Annex of the Agreement indicates that the Council must consider and adopt the PoW in accordance with:

- i) the provisions of UNCLOS and of all RRP that the Council has provisionally approved;
- ii) or based on the norms contained in the UNCLOS and the terms and principles contained in the Annex to the 1994 Agreement, and;
- iii) the principle of non-discrimination between contractors^{1[1]}.

This shows us that the provisional approval has a legal basis on which it must be reviewed and that, therefore, it will not be approved outright.

Items i and ii are disjunctive, empowering the Council to revise the PoW in accordance with either UNCLOS and the provisionally approved RRP or with UNCLOS and the terms and principles of the Annex to the 1994 Agreement

For its part, iii must be considered independently and jointly with any of the options i and ii, so the principle of non-discrimination, understood as one that establishes similar and no less favorable conditions, must be taken into account, in the consideration and possible adoption of the PoW. This would imply that all PoWs submitted for consideration, evaluation, and adoption must be reviewed under the same regulatory framework.

- If the above assumptions are not updated, the PoW and its review process would suffer from an original defect because compliance with the applicable legal framework could not be updated. In other words, the review of a PoW

can only be done under the corresponding regulatory framework when it is approved.

Notwithstanding the foregoing, Mexico does not agree that the LTC could not be in a position to make a recommendation to the Council, since it could be in a position to analyze the PoW, including the environmental and financial implications, and recommend its non-approval due to lack of the basic requirements demanded by the CONVEMAR.

- From the analysis carried out by Mexico, it can be concluded that the LTC would not have a legal basis to recommend the approval of a PoW that has been presented before having the entire applicable legal framework, so it would be expected that it would issue a recommendation in the negative.

Conclusions: This option is contrary to the Convention for the Council to prejudge the role of the LTC as to its competence to assess applications.

Currently, there is no applicable legal framework for a possible revision of a PoW for exploitation. However, from an interpretation of subsection c) of paragraph 15, numeral 1, this does not limit the possibility that the PoW may be submitted to a LTC assessment at the request of the Council to comply with the process towards a possible provisional approval. Notwithstanding this, it is our view that there are no legal or technical bases on which the LTC can recommend the provisional approval of a PoW prepared and presented prior to the existence of the applicable legal framework.

Option III.

- This option seems to be not necessary.
- Operative part. Instructs the LTC to act in a way that is not compatible with the Convention and would prejudge and qualify its competencies.
- This option, like Option I, starts from subparagraph c) of Section 1, paragraph 15 of the Agreement, which refers to the provisional approval of a request for a PoW when the Council has not finalized the elaboration of the RRP's related to exploitation and seeks to clarify their interpretation.
- Its goal is to establish that the LTC has no basis to make a recommendation to approve a PoW submitted under this two-year rule and instead directs the LTC to make a comprehensive report with the implications of the PoW,

including the environmental implications and the financial viability of the project, as in the previous options.

- Although Mexico agrees that in the status quo the LTC could not be in a position to make a recommendation to the Council due to the same considerations as for options I and II, it is also considered that this does not limit the possibility that the PoW can undergo a LTC assessment at the request of the Council to comply with the process towards a possible provisional approval.

Conclusions: This option seems to be not necessary.

It is understood that the resolution proposal in question tries to address a scenario in which, when the 2-year term expires, the Council can decide on how a PoW presented under said provision should be considered.

It agrees with the delegations that have expressed that there are neither technical nor legal considerations to review, much less approve a PoW for the award of a Contract, since, otherwise, it would be in contravention of the UNCLOS regulations; its terms and principles, including the due protection and preservation of the marine environment and the principle of non-discrimination.

Notwithstanding these considerations, the resolution proposal goes beyond the provisions of the Agreement, which could be considered as an interpretation that would be indirectly modifying it.

In this regard, an alternative resolution proposal is shared, to address these concerns from another perspective of the two-year rule that, in Mexico's opinion, would not contravene the provisions of UNCLOS.