

Written comments submitted to the Informal intersessional dialogue to facilitate further discussion in connection with section 1, paragraph 15, of the Annex to the Agreement relating to Part XI of UNCLOS

Delegation of Canada - May 26, 2023

The delegation of Canada welcomes the opportunity to provide further comments to contribute to the intersessional dialogue. Our responses to the two questions, which are detailed below, can be summarized as follows:

1. If the Council has not completed the rules, regulations and procedures for exploitation, it should decide on the provisional approval of a plan of work for exploitation in accordance with its rules of procedure for decision-making on questions of substance. If the Council is not able to agree on using this procedure, it would be justified in postponing its decision on the plan of work and refer the issue to the International Tribunal on the Law of the Sea (ITLOS) for an advisory opinion. Furthermore, if an application for a plan of work is before the Council, and it has not decided what form a provisional approval of a plan of work would take, the Council would be justified in postponing its consideration and decision until this issue can be decided, including following a referral to ITLOS.
2. The Council cannot provide guidelines and directives that are inconsistent with specific provisions of UNCLOS on the process to be followed by the LTC. However, the Council can provide substantial guidelines and directives on the nature of the appropriate recommendations it expects from the LTC following its review of a formal application for a plan of work, pursuant to article 165 (2) (b) of UNCLOS, using in particular the other functions of the LTC listed in article 165.

Now, let us answer the two questions in more details.

(1) Is there a legal basis for the Council to postpone (i) the consideration and/or (ii) the provisional approval of a pending application of a plan of work under subparagraph (c), and if so, under what circumstances? [paragraph 25 (a) of the briefing note]

1. Before addressing the question above, it is important to discuss the applicable decision-making procedure for the Council to consider and provisionally approve an application for a plan of work, pursuant to section 1, paragraph 15, of the Annex to the Agreement relating to Part XI, UNCLOS:
2. In its decision ISBA/28/C/9, the Council emphasizes that in submitting appropriate recommendations to the Council pursuant to article 165, paragraph 2(b), “the Commission is under no obligation to recommend approval or disapproval of a plan of work, pursuant to section 3, paragraph 11(a), of the Annex to the Agreement, which provision also envisages a scenario in which the Commission does not make a recommendation”.
3. Section 3, paragraph 11 (a) provides that if the Commission recommends the disapproval of a plan of work or does not make a recommendation, the Council may nevertheless approve the plan of work in accordance with its rules of procedure for decision-making on questions of substance. Only a recommendation of the LTC to the Council to approve a plan of work would trigger the mechanism in Section 3, paragraph 11 (a) requiring the Council to approve a recommendation by the LTC for approval of a plan of work, unless it disapproves of such plan by a two-thirds majority of its members present and voting, including a majority of members

present and voting in each of the chambers. This special decision-making procedure, as referred to in section XI of the Rules of Procedures of the Council, requires a very high threshold for the Council to overturn a recommendation of the LTC. It clearly applies in the context where the LTC recommends the approval of a plan of work once rules, regulations and procedures are in place and the Council is effectively in a position to be able to approve such a plan of work.

4. There are at least three scenarios however where it is not explicitly clear from Section 3, paragraph 11 (a) which of the two Council decision-making procedures, the normal or the special one, would apply:

- a) **If the LTC submits appropriate recommendations to the Council which do not constitute a recommendation to approve or disapprove a plan of work.** In such case, it could be argued that such recommendations would be tantamount to not making a recommendation under Section 3, paragraph 11 (a). More convincingly, it would seem logical that since the special decision-making procedure is only applicable in the case of a recommendation to approve a plan of work, the default normal decision-making procedure would be the one applying to any recommendations that are not a recommendation to approve.
- b) **If the LTC recommends the provisional approval of a plan of work to the Council.** The recommendation of a provisional approval of a plan of work is not one of the possibilities contemplated in Section 3, paragraph 11 (a). As mentioned in paragraph 21 of the Co-Facilitators' Briefing Note to the Council on the informal intersessional dialogue established by Council decision ISBA/27/C/45: "there is broad agreement that provisional approval of a plan of work under subparagraph (c) is not the same as, and does not amount to, final approval". As such, there is an argument to be made that such recommendation to provisionally approve a plan of work is a recommendation which does not constitute a recommendation to approve or disapprove a plan of work, and consistent with the paragraph above, would trigger the normal decision-making procedure on questions of substance. It can be further argued that the criteria mentioned in section 1, paragraph 15, of the Annex to the Agreement to be used by the Council in its consideration and provisional approval of a plan of work (the provisions of the Convention and any rules, regulations and procedures that the Council may have adopted provisionally, or the norms contained in the Convention and the terms and principles contained in this Annex as well as the principle of non-discrimination among contractors) support the use of the normal decision-making procedure, where the Council is arguably more involved in the substance of the decision, and that the special procedure should be reserved for recommendations for approval only.
- c) **If the LTC recommends the approval of a plan of work but the Council has not completed the elaboration of the rules, regulations and procedures for exploitation.** In such case, the Council would not be in a position to approve the recommendation by the LTC pursuant to Section 3, paragraph 11 (a) ("the Council shall approve the recommendation by the [LTC] for approval of a plan of work"). This is because the Council can only provisionally approve a plan of work if it has not completed the rules, regulations and procedures for exploitation. In such a case, given the Council is only able to provisionally approve the plan of work, a strong argument can be made that the special decision-making procedure cannot apply. In such a scenario, the Council would be justified in returning the matter to the LTC and asking it to provide another recommendation, or the Council could consider the recommendation to be without effect or tantamount to a recommendation to provisionally approve and proceed to decide the matter pursuant to the normal decision-making procedure on questions of substance

5. If any of the three scenarios envisaged above were to occur, the Council would have a number of options:

- a) It could decide the matter by consensus, as per normal practice, avoiding the need to take a decision on the applicable decision-making procedure;
- b) It could take a decision on the applicable decision-making procedure to address a specific scenario;
- c) It may need to refer the matter to the seabed dispute chamber for an advisory opinion if the Council is unable to decide on the applicable decision-making procedure or if there is a dispute on which procedure is applicable.

6. Turning now to the question at hand, we do believe there is a strong legal basis for the Council to postpone the provisional approval of a pending application of a plan of work under section 1, paragraph 15, subparagraph (c) of the Annex to the Agreement should the Council require time to determine which decision-making procedure is applicable. Section 3, paragraph 11 (a) provides that the Council has 60 days to take a decision on a recommendation for approval, unless the Council decides otherwise. As we have described in paragraphs 1 to 5 above, it could be that there is a dispute regarding the applicable decision-making procedure or the Council is unable to decide on the decision-making procedure to follow for scenarios which are not contemplated in Section 3, paragraph 11 (a). In such case, we believe the postponement of the decision of the Council to seek clarity from the International Tribunal on the Law of the Sea on which decision-making procedure is applicable, would be justified. We do not believe, however, that the same argument can be made for postponing consideration of a plan of work by the Council. For one, Section 3, paragraph 11 (a) only foresees the possibility for the Council to decide on extending the 60-day period for the Council to take a decision, not to consider such plan of work. Secondly, the justification for postponing a decision to provisionally approve a plan of work would be to seek clarity on the decision-making procedure applicable to the decision, which should have no bearing on the consideration of the plan of work by the Council, except for extending that process while the Council awaits a decision from the Tribunal.

7. There is another issue that we believe could also give the Council a basis to postpone its decision to provisionally approve a plan of work and could arguably postpone consideration of a plan of work, as it would definitively have an impact on such considerations. During the first phase of the informal intersessional dialogue established by Council decision ISBA/27/C/45, there seemed to be general agreement that provisional approval of a plan of work under section 1, paragraph 15, subparagraph (c) of the Annex to the Agreement is not the same as, and does not amount to, final approval. There was no agreement, however, on what form a provisionally approved plan of work would take: a contract, a provisional contract or something else. This issue will be crucial for the Council when it considers an application for a plan of work with a view to provisionally approve it or not. The Council could take a decision to resolve the matter or refer the question to the Tribunal on the Law of the Sea in advance of having to consider a plan of work for exploitation. Otherwise, it could be justified in postponing the consideration and the provisional approval of a pending application of a plan of work to refer the question to the Tribunal.

(2) What guidelines or directives may the Council give to the LTC, and/or what criteria may the Council establish for the LTC, for the purpose of reviewing a plan of work under subparagraph (c)? [paragraph 25 (c) of the briefing note]

8. Pursuant to article 163, paragraph 9 of UNCLOS, the LTC “shall exercise its functions in accordance with such guidelines and directives as the Council may adopt”. Canada considers that the capacity of the Council to influence the exercise of the functions of the LTC is circumscribed by other provisions of UNCLOS and decisions of the Assembly. Article 162, paragraph 1 of UNCLOS provides that: “The Council shall have the power to establish, in conformity with this Convention and the general policies established by the Assembly, the specific policies to be pursued by the Authority on any question or matter within the competence of the Authority.” Canada’s view is that the Council cannot provide guidelines and directives that are inconsistent with specific provisions of UNCLOS on the process to be followed by the LTC, for example, instructing the LTC not to issue a recommendation one way or another.

9. Canada believes however that the Council could provide substantial guidelines and directives on the nature of the appropriate recommendations it expects from the LTC following its review of a formal application for a plan of work, pursuant to article 165 (2) (b) of UNCLOS. We suggest that other functions of the LTC listed in article 165 could be solicited by the Council when the LTC is reviewing a formal application for a plan of work in the absence of rules, regulations and procedures relating to exploitation, in particular, the Council could ask the LTC to:

- a) make recommendations to the Council on the protection of the marine environment, taking into account the views of recognized experts in that field; 165 (2) (e) - (e.g. how a specific recommendation of the LTC would be consistent with the precautionary approach or article 145 of UNCLOS on the protection of the marine environment);
- b) make recommendations to the Council regarding the establishment of a monitoring programme to observe, measure, evaluate and analyse, by recognized scientific methods, on a regular basis, the risks or effects of pollution of the marine environment resulting from activities in the Area, ensure that existing regulations are adequate and are complied with and coordinate the implementation of the monitoring programme approved by the Council; 165 (2) (h);
- c) recommend to the Council that proceedings be instituted on behalf of the Authority before the Seabed Disputes Chamber, in accordance with this Part and the relevant Annexes taking into account particularly article 187; 165 (2) (i) – (e.g. recommend specific questions for an advisory opinion, which could include the various aspects of the consideration and provisional approval process at the Council, following a recommendation of the LTC);
- d) make recommendations to the Council to disapprove areas for exploitation by contractors or the Enterprise in cases where substantial evidence indicates the risk of serious harm to the marine environment; 165 (2) (l)