

**Submission of the Republic of Chile to the questions raised on the Co-Facilitators’
Note on the Webinar on 30 May 2023 in the context of the informal international
dialogue established under Council decision ISBA/27/C/45 and Council decision
ISBA/28/C/9**

(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]

Pursuant to Article 162(1) of the Convention, the Council is the executive organ of the Authority and has the power to establish the specific policies to be pursued by the Authority on any question or matter within the competence of the Authority.

In this regard, the Council, as supervisor and coordinator of the implementation of the provisions contained in Part XI of the Convention,¹ has the power to adopt decisions that guarantee due compliance with the obligations undertaken by States Parties. Particularly relevant for this issue are the obligation to protect the marine environment enshrined in Article 145 and Part XII of the Convention, and the obligation under Article 140 of the Convention to ensure that activities in the Area are carried out for the benefit of humankind as a whole.

Therefore, in the absence of appropriate rules, regulations and procedures that regulate exploitation activities in the Area, it is legally possible for the Council to postpone the consideration and/or the provisional approval of a pending application of a plan of work for exploitation until certain requirements to guarantee compliance are met.

Indeed, the consideration and provisional approval of a pending application provided for in subparagraph 15(c) of Section I of the Annex of the Agreement is subject to the obligations the Authority has under the Convention. Under Article 2(1) of the Agreement, its provisions shall be interpreted and applied together as a single instrument with Part XI of the Convention, unless there is an inconsistency between the two. In relation to subparagraph 15(c) however, there cannot be any inconsistency since it explicitly states that any provisional approval must be based on the provisions of the Convention.

In this regard, the consideration and/or approval of a plan of work under subparagraph 15(c) must transpire in accordance with, amongst others, the obligation to protect the marine environment and the obligation to ensure the exploitation is carried out for the benefit of humankind as a whole included in Part XI of the Convention. Hence, if the Council were to find that by granting a provisional approval of a plan of work under subparagraph 15(c) compliance with other obligations under the Convention cannot be ensured, then it could decide to postpone the consideration or approval of the pending request.

If we consider that the rules relating to the protection of the marine environment must be

¹ Article 162(2)(a) of UNCLOS.

interpreted taking into account the rules of international environmental law,² including, and in particular, the precautionary principle/approach,³ then we can conclude that it is not possible to ensure protection of the marine environment without robust and effective rules, regulations and procedures that regulate exploitation activities in the Area

In fact, according to the International Tribunal for the Law of the Sea, *where scientific evidence concerning the scope and potential negative impact of the activity in question is insufficient but where there are plausible indications of potential risks*, the general obligation of due diligence would not be met if these risk are disregarded.⁴

In this sense, considering that the obligation to ensure effective protection of the marine environment is a due diligence obligation, and that current scientific knowledge has shown that there are many potential negative impacts from seabed mining that we do not properly understand, provisionally approving any plan of work before adopting rules, regulations and procedures that regulate such activity is tantamount to disregarding potential risks and, thus, the obligation to ensure protection of the marine environment would not be met.

Furthermore, the obligation to provide for the equitable sharing of financial and other economic benefits derived from activities in the Area, as required for the benefit of humankind as a whole, would also be unfulfilled if a plan of work is provisionally approved without a clear mechanism in place for the sharing of economic benefits.

Consequently, since the Council has the power to adopt decisions to guarantee compliance with the obligations under the Convention, and approval of a plan of work without the proper rules, regulations and procedures in place would fail to meet some of those obligations, there certainly is a legal basis for the Council to postpone the consideration and/or approval of a pending application of a plan of work under subparagraph 15(c).

(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]

As aforementioned, under Article 162(1) the Council has the power to establish specific policies on any question or matter within the competence of the Authority. Said policies can take the form of a directive under which the Legal and Technical Commission (“LTC”) must exercise its functions.⁵

Indeed, the Council has the power to adopt any directive within its mandate, which includes the supervision and coordination of the implementation of the provisions of Part XI of the Convention on all questions and matters within the competence of the Authority.⁶

² Article 138 of UNCLOS and Article 31(3)(c) of the Vienna Convention on the Law Treaties.

³ ITLOS, *Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area*, Advisory Opinion, 1 February 2011, para. 135.

⁴ ITLOS, *Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area*, Advisory Opinion, 1 February 2011, para. 131.

⁵ Article 163(9) of UNCLOS.

⁶ Article 162(2)(a) of UNCLOS.

It is unquestionable that the provisional approval of a plan of work under subparagraph 15(c) falls within the competence of the Authority, as does the protection of the marine environment and the obligation to ensure that exploitation of the seabed is carried out for the benefit of humankind as a whole. In this sense, it is clear that the Council has the power to adopt directives that safeguard the protection of the common heritage of humankind when considering a pending application for approval of a plan of work for exploitation under subparagraph 15(c).

Furthermore, subsidiary organs of the Council, such as the LTC, are established with the purpose of aiding the Council in the exercise of its functions.⁷ In this regard, it is only logical that the Council is entitled to adopt directives to instruct the work of such organs, including those that interpret their functions.

Thus, the Council has the power to adopt directives that guide the LTC in its review of any pending plan of work under subparagraph 15(c) in a way that ensures compliance with the aforementioned obligations.

This means that the Council can adopt a directive instructing the LTC that, in the situation of subparagraph 15(c), an “appropriate recommendation” would not entail a recommendation to approve or disapprove a plan of work, but rather, for example, a technical analysis that details the elements the Council should consider when making that decision.

Indeed, considering that we do not currently possess sufficient scientific knowledge to ensure the prevention of all risks associated to the exploitation of the Area and its consequences on the marine environment, and that the LTC is not obliged to submit a recommendation to approve or disapprove a plan of work,⁸ such recommendation would not be appropriate without the proper rules, regulations and procedures that guarantee the protection of the marine environment,⁹ the equitable sharing of financial and other economic benefits derived from exploitation in the Area,¹⁰ and adequate inspection, compliance, and enforcement mechanisms.

⁷ Article 162(2)(d) of UNCLOS.

⁸ Subparagraph 11(a) of Section 3 of the Annex to the Agreement.

⁹ Article 145 of UNCLOS.

¹⁰ Article 140 of UNCLOS.