

May 26 2023

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

The Council could adopt decision(s) to postpone the consideration and provisional approval of a pending application of a plan of work under subparagraph (c). The following are a non-exhaustive list of potential decisions that the Council could take -

- (1) Adopting a general policy of the Assembly and/or specific policies of the Council to defer the consideration of an application, until the regulatory framework is in place and the regulations are adopted
- (2) Adopting an Assembly or Council decision to not consider or provisionally approve an application:
 - a. By imposing a pause or moratorium on commercial exploitation
 - b. Until the regulations and subsidiary instruments have been adopted
 - c. Until sufficient scientific knowledge for decision making is available
- (3) Extending the period of time that the Council has to make a decision on an LTC recommendation: Section 3, paragraph 11, of the annex to the Part XI Agreement provides that "If the Council does not take a decision on a recommendation for approval of a plan of work within a prescribed period, the recommendation shall be deemed to have been approved by the Council at the end of that period. The prescribed period shall normally be 60 days unless the Council decides to provide for a longer period". The Council could thus extend the 60 day period of time until the exploitation regulations are in place, to make a decision on an LTC recommendation/provisionally approve a plan of work.

(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]

The regular procedure for applications for plans of work is for the LTC to review them and to report to Council. However, the LTC is specifically required by UNCLOS to 'base its recommendations solely on the grounds stated in Annex III and shall report fully thereon to the Council;'. The Annex III grounds refer multiple times to criteria and requirements contained in 'relevant RRP's'. The LTC therefore cannot discharge the duty to review plans of work, as prescribed by UNCLOS, without those RRP's.

Similarly, Articles 4 and 6 of Annex III expressly requires an applicant to follow procedures and meet qualification standards that are set out in the RRP's of the ISA, and that the ISA should ascertain that this has been done 'first' before considering an application further. Without RRP's, it would be impossible for an applicant to meet those requirements and make such an undertaking, or for the ISA to ascertain that it has done so.

It would seem an abdication of duty for the Council, as the executive body of the ISA, not to act proactively to address this matter. The Council is the organ of the ISA with the power to constitute the membership of the LTC, to establish specific policies to be pursued on any matter within the competence of the ISA, and to guide and direct the LTC. It should use those powers to prevent a situation where the LTC or an applicant is placed in the position of being legally required as a matter of international law to follow a process that it is not possible for them to follow.

Operative paragraph 4 of the March 2023 Council decision ISBA/28/C/9, which in turn reflects and references Article 163(9) of UNCLOS, affirms that UNCLOS expressly gives the Council the responsibility and the power to guide and direct the work of the LTC.

We believe such a guideline or directive should be issued by the Council to assist LTC members and prevent the LTC from making a specific recommendation for approval or disapproval for any application for a plan of work for exploitation received before adoption of the relevant RRP, noting also that the possibility for the LTC *not* to make a recommendation is already clear from UNCLOS, and this point was emphasized in the March 2023 decision of Council as well (<https://www.isa.org.jm/wp-content/uploads/2023/04/2306127E.pdf>).