

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

Italy's submission

(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?

Italy believes that, while there is legal basis for the postponement of provisional approval there is not for consideration of a plan of work.

a) Postponement of provisional approval

There is a 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. Section 3, paragraph 11 (a) of the Agreement provides that the Council has 60 days to take a decision on a recommendation for approval by the LTC, unless the Council decides otherwise. This entails that the Council is entitled to take a decision to postpone the approval of a plan of work until such time as it deems appropriate. This does not imply that the approval shall be delayed indefinitely. The ratio of the mentioned provision is to give the Council a reasonable time to take its decision. It is not to be forgotten that the decision the Council would be required to take is based on a recommendation of the LTC, which as independent scientific body, should be duly taken into account to take a final decision on approval.

b. Postponement of provisional consideration

Contrary to the postponement of provisional approval, under UNCLOS and 1994 Agreement there is no legal basis for postponing consideration of a plan of work. Section 3, paragraph 11 (a) only foresees the possibility for the Council to decide on extending prescribed period in case of approval of a plan of work. Postponing consideration would indeed be contrary to one of the main functions UNCLOS assigns to the Council and would also undermine the carefully balanced institutional architecture of ISA organs, which recognizes specific functions to the Council and the LTC when it comes to the consideration and approval of a plan of work for activities in the Area.

(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)?

The Council may provide guidelines and directives to the Legal and Technical Commission (LTC) for the purpose of reviewing a plan of work under Subparagraph 15(c) of the UNCLOS. Indeed, the Council can establish specific policies on any matter within the Authority's competence, including the supervision and coordination of the implementation of Part XI of the Convention. While considering a pending application for approval of a plan of work for exploitation under Subparagraph 15(c), the Council may adopt any directive within its mandate in the interest of protecting the marine environment and safeguard the common heritage of humankind.

This does not mean that the Council should provide any suggestion on how to approach and eventually evaluate a plan of work. This would in fact undermine the responsibilities UNCLOS attributes to ISA's different organs. It would be instead acceptable and indeed welcomed that the Council provides guidance to clarify some environmental aspects before the assessment of the LTC and its recommendations. The LTC might also consider making use, as appropriate, of outside sources of expertise as necessary for the evaluation of a plan of work.

Italy believes that in case a (provisional) mining code is lacking, the directives the Council might issue should also aim at clarifying those provisions of the Convention and any rules, regulations and procedures that the Council may have adopted provisionally, or on the basis of the norms contained in the Convention and the terms and principles contained in the 1994 agreement, referred to in paragraph 15 (c), it considers necessary for the LTC to take into account to ensure the protection of the marine environment.

In other words, the Council's guidelines and directives to the LTC should clarify the context within which the LTC is requested to operate in making its independent evaluation and not to replace the fundamental role of its subsidiary organ nor undermine its independent work.