

Mexico´s written comments submitted to the Informal intersessional dialogue in connection with section 1, paragraph 15, of the Annex to the Agreement relating to Part XI of UNCLOS established under Council decisions ISBA/27/C/45 AND ISBA/28/C/9

1. The purpose of these written comments is to address the questions suggested by the co-facilitators on their briefing note with the aim to continue making progress in the areas of divergence as identified in paragraph 25 of such note.
2. **A. 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?**
3. Mexico has not identified legal grounds for the Council to postpone either the consideration or the provisional approval of a pending application of a Plan of Work (Pow).
4. *There is no ambiguity in the 1994 Agreement (Section 1 (15), paragraph 3, subparagraph c) of the Annex). It is clear when stating*

“If the Council has not completed the elaboration of the rules, regulations and procedures relating to exploitation within the prescribed time and an application for approval of a plan of work for exploitation is pending, it shall none the less consider and provisionally approve such plan of work based on the 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 this Annex as well as the principle of non-discrimination among contractors”.
5. Accordingly, the interpretation of this provision shall follow the rules of the 1969 Vienna Convention on the Law of Treaties (VCLT) based on the general rule of interpretation contained in Article 31 according to which all treaties shall be interpreted in good faith, in accordance with the ordinary meaning of their terms, and in the context and light of the treaty’s objective and purpose.
6. According to this provision, there is an obligation of the Council to consider and provisionally approve a PoW that is pending of approval. The use of the verb “shall” before “consider and approve” expresses this mandatory conception of what is expected from to Council to do whether there is a pending PoW. The adverb “none the less” confirms this mandate. It denotes that despite the Council has not completed the elaboration of the rules, regulations and procedures (RRPs) relating to exploitation within the 2 years, it is required to evaluate and decide upon a pending PoW submitted under this provision.
7. *The aim of (Section 1 (15), paragraph 3, subparagraph c) of the Annex of the 1994 Agreements was to preview a scenario where the Council has not finished the RRP’s relating to exploitation. Thus, postponing a decision until such RRP’s are in*

force, is not only contradictory but out of the context and light of the purpose of the 1994 Agreement.

8. It is important to point out that approvals are not automatic. From such an evaluation performed by the Council, it would still decide not to approve it whether the PoW does not comply with the relevant provisions of UNCLOS, the 1994 Agreement, and the existing and applicable¹ RRP. In this context, the reflections of the Council of the 2 Years Rule shall include a discussion on what are the basis for considering the PoW and on which the Council should approve the request, as well as the Council's responsibilities around the adoption of RRP, possible liabilities, the contractors' legitimate and legal expectations, and dispute resolutions.
9. This mandate, of the Council, however, shall not imply obligation to execute a Contract and shall not be construed as to authorize exploitation activities. There is a difference between this obligation of the Council to consider and provisionally approve a PoW and the consequences from such consideration which shall not be misled.
10. A provisional approval of a PoW is only a step towards obtaining a contract with ISA, as activities in the Area can only be carried out under a valid contract between ISA and the contractor². It is the contract, not the PoW *per se*, the legally binding and enforceable instrument that regulates the terms, conditions, rights and obligations of the contractors.
11. Consequently, the provisional approval of a PoW does not automatically guarantee the award of a contract and, by no means, prejudices the commencement of exploitation activities which shall comply with provisions of UNCLOS & the 1994 Agreement, including those or effectively protect and preserve the marine environment and manage the resources on behalf the humankind.
12. ISA's previous experience with the pioneer investor regime is relevant as a precedent. Prior to the adoption of the mining regulations, a number of PoW for the exploration of polymetallic nodules were submitted. Although all such applications were considered approved in 1997, contracts were only awarded after the polymetallic nodule exploration regulations were adopted in 2000.³
13. According to this practice, contracts can only be executed until the regulations for the exploitation and those for the approval of PoW have been adopted and are in force.⁴ This is important for several reasons, including the fact that the

¹ In the context of Part XI of UNCLOS, the use of the phrase "consider and approve" has been used to indicate that it is necessary for the relevant body of ISA to exercise its judgment in making decisions. See, e.g., UNCLOS, arts. 160(f)(i), (ii) and (h), 172, 314(1). If the intent of section 1(15)(c) was that all applications would be approved by virtue of mere compliance with formalities, it would have been explicitly made clear in the text. For example, section 1(6)(a)(ii) of the 1994 Agreement provides, in the case of the pioneer investor regime, that: "[A]n initial registered investor may apply for approval of a plan of work for exploration [...] Such plan of work shall be deemed approved."

² In practice, after the Council approves a plan of work, the Secretariat of ISA would elaborate a draft contract incorporating the approved plan of work that the parties have to negotiate and accept.

³ 1994 Agreement, Annex, Section 1(6)(a)(ii)

⁴ This supports the assertion that, although the elaboration of the regulations may have been completed, their adoption and entry into force are a separate matter and, consequently, contracts (which will incorporate the approved plan of work) can only be implemented once the regulations are adopted.

forthcoming operating regulations are expected to include “standard terms and conditions” that must be included in all contracts, as well as the financial terms of exploitation contracts before the execution of the contract. Indeed, UNCLOS stipulates that exploration or exploitation shall be carried out only through plans of work that have been approved by the Authority in accordance with the Convention and the relevant RRP of the Authority and that any plan of work shall⁵ be under UNCLOS and with RRP of the Authority.⁶

14. B. Is Article 165(2)(b) applicable and is the LTC therefore required to review a plan of work and submit appropriate recommendations to the Council as part of the process of consideration of such plan of work under subparagraph (c)?

15. Yes. Although subparagraph (c) does not expressly refer to the participation of the LTC, it requires that the Council decides, “*based on the provisions/norms of the Convention*”.
16. Article 165.2.b provides for the powers of the LTC to review formal written plans of work for activities in the Area per Article 153, paragraph 3 -that refers that a PoW is a prerequisite for the activities in the Area- and submit appropriate recommendations to the Council.
17. This provision states that all applications for the approval of a PoW shall be reviewed by the LTC -as the technical-scientific⁷ body-, and then submit its recommendations to the Council under the decision-making process of Section 3 of Annex of the 1994 Agreement⁸. This interrelated process involves the legal basis, the technical-legal review, and an institutional decision-making process.
18. Thus, in terms of articles 153 & 165 of UNCLOS and 70 of the Rules of Procedure of the Council, the LTC shall review a PoW.

19. C. 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)?

20. It is Mexico’s understanding that Article 163.9 of the Convention allows the Council to adopt guidelines and directives for the LTC to exercise its functions. Such guidelines shall be consistent with UNCLOS and the 1994 Agreement and shall not undermine the mandate of the LTC nor prejudice or influence its decisions.
21. On the other hand, the LTC, as an independent and technical subsidiary body of the Council, shall comply with its mandate. In terms of articles 153 & 165 of UNCLOS and 70 of the Rules of Procedure of the Council, the LTC shall review a PoW prior to a decision of the Council related to the activities in the Area. According to article

⁵ CONVEMAR, Annex III, art. 3(3).

⁶ Ibid. Annex III, art. 3(4)(a).

⁷ If the evaluation process is left solely in the hands of the Council, the decision to be taken would practically become a political decision that would cause doubts as to whether the application would be reviewed objectively and thoroughly, especially from a technical and scientific perspective.

⁸ For example, Article 153(3) of UNCLOS expressly provides that: Activities in the Area shall be carried out in accordance with a formal written plan of work, drawn up in accordance with Annex III and approved by the Council after review by the Legal and Technical Commission. Furthermore, Rule 70 of the Rules of Procedure of the Council clearly sets forth without exception that the Council shall act on the recommendation of the LTC when dealing with the approval of plans of work.

165.2.b, the LTC shall review formal written PoW for activities in the Area based on the grounds of Annex III (articles 4 and 6).

22. These articles shall be read jointly with Subparagraph c) which states that the Council should consider and adopt the PoW by:

(i) the provisions of UNCLOS and any rules, regulations and procedures provisionally approved by the Council.

(ii) or on the basis of the rules contained in UNCLOS and the terms and principles contained in the Annex to the 1994 Agreement, and

(iii) the principle of non-discrimination between contractors.⁹

23. Accordingly, the provisional approval of a PoW has a legal basis on which it shall be submitted and reviewed.

24. Whether the Council decides to adopt guidelines or directives for the purpose of reviewing a PoW under subparagraph (c) such guidelines must comply with this legal basis. In the current situation, we risk either being redundant since the legal framework is already outlined, or to act *ultra vires* affecting the mandate, functions, powers and independence of the LTC. For such considerations, for Mexico is not necessary nor desirable that the Council adopts guidelines for the purposes of reviewing a PoW.

25. Finally, we need to bear in mind that the discussions on the 2 Years Rules imply that; i) That the Council has not completed the elaboration of RRPs and ii) there is actually a PoW pending for adoption. Until there is not a submission of PoW for adoption, the Council still has to comply with its mandate to elaborate the RRP. If the Council decides to adopt the guidelines or directives those shall take into consideration the RRP in place at the moment any PoW is submitted.

26. D. What considerations and procedures apply after a plan of work for exploitation has been provisionally approved and leading up to the conclusion of a contract for exploitation?"

27. Section 1, paragraph 15, of the Annex to the 1994 Agreement only applies exceptionally when the Council has not elaborated the RRP and only for the consideration and provisional approval of the PoW. Thus, the provisions of UNCLOS, the 1994 Agreement and the RRP of the Authority are the legal framework to award a Contract on an ordinary basis and to authorize exploitation activities. Please refer to our comments for Q.A. Paragraphs 9-13.

28. For Mexico, it is required to fulfil not only the "formal" requirements (Art, 4 & 6 of Annex III) but also the substantive obligations and objectives of the Convention, which are not independent of art. 162.

29. UNCLOS shall be read jointly with the 1994 Agreement as an "integral part" of the Agreement (Art. 1.2). Thus, in order to award a Contract and authorize exploitation activities requires that other obligations, such as the obligation to protect and

⁹ The 1994 Agreement, Annex, Section 1(6)(a)(iii).

preserve the marine environment and to ensure the management of resources for the benefit of humankind¹⁰, shall be complied.

30. To ensure these other obligations and objectives of the Authority is required to consider other substantive requirements. This includes assessing the adequacy of baseline environmental data and the robustness of applicants' environmental plans and assessing them in relation to ISA's overall environmental objectives, including those set out in Regional Environmental Management Plans, as well as ensuring that benefits are fairly and equitably distributed.
31. To this end, it is necessary to have RRP's that give clarity to the general provisions of UNCLOS on the protection and preservation of the marine environment and fair and equitable sharing of benefits, among other important aspects.
32. The 1994 Agreement foresaw that, between the entry into force of UNCLOS and the adoption of the first plan of work for exploitation, ISA would be primarily concerned with the approval of rules, regulations and procedures on the protection and preservation of the marine environment. This clearly demonstrates that UNCLOS intended to prioritize the appropriate environmental measures and establish robust requirements and standards that would apply to exploitation activities before their commencement.
33. The absence of specific regulations and related standards and guidelines containing the necessary operational and regulatory requirements related to exploitation activities would make the LTC's task of conducting rigorous assessments almost impossible and its recommendations to lack legal and technical certainty. Consequently, no contract can be executed no exploitation activity shall be authorized until those RRP's are in force.

¹⁰ In fact, section 3(12) of the Annex to the 1994 Agreement provides that any dispute that may arise with respect to the rejection of a plan of work shall be submitted to the dispute settlement procedure established in UNCLOS. Article 187(d) of UNCLOS, in turn, provides that the Seabed Disputes Chamber shall have jurisdiction over disputes between the Authority and a prospective contractor who has fulfilled the conditions referred to in articles 4.6 and 13.2 of Annex III to UNCLOS.