

Informal intersessional dialogue

Comments by Portugal

(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]

In Portugal's view, section 1, paragraph 15, of the Annex to the 1994 Agreement does not entail a duty to approve a plan of work. Accordingly, we do not see the relevant provisions contained therein as leading – inevitably and necessarily – to an automatic and foregone conclusion. On the contrary, an integral and comprehensive reading of the relevant provisions of the Convention and the 1994 Agreement suggests that the Council has different options which can and should be considered upon submission of a plan of work for exploitation, including not approving such plan of work, particularly if the necessary rules, regulations and procedures relating to exploitation (RRPs) are not in place. As a corollary of the aforementioned, we consider that circumstances may warrant a longer period of consideration of a plan of work and possible deferral of a decision, including in order to allow for the necessary RRP's to be in place. That possibility is clearly stated in Paragraph 11(a) of Section 3 of the Annex to the 1994 Agreement.

(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]

In Portugal's view, it is clear that the Council can give guidelines or directives to the Legal and Technical Commission (LTC) and that the issuance of such guidance is fully consistent with the Convention, including Article 163, paragraph 9. In fact, we go one step further. In our view, in the circumstance where the RRP's have not been adopted, the Council must issue such guidance.

This is so because, in our view, in the absence of the mining code, the LTC *is not* in a position to make an appropriate recommendation on a plan of work, within the meaning of Article 165, paragraph 2, subparagraph (b). Indeed, under this provision, the Commission is tasked with reviewing plans of work and submitting appropriate recommendations to the Council. Most importantly, those recommendations must be based “solely on the grounds stated in Annex III”.

According with Article 6, paragraph 3 of the said Annex III, the plans of work that the Commission is supposed to evaluate “shall comply with and be governed by the relevant provisions” of the Convention and “*the rules, regulations and procedures of the Authority*, including those on operational requirements, financial contributions and the undertakings concerning the transfer of technology” [emphasis added]. Such RRP’s are also indispensable for the purpose of informing the determination of the qualification of the applicants (Article 4(1) of Annex III) and, above all, securing the effective protection of the marine environment from harmful effects (Article 17(2)(f) of Annex III). Moreover, in accordance with Article 137(2), the minerals recovered from the Area “may only be alienated in accordance with this Part [Part XI] and *the rules, regulations and procedures of the Authority* [emphasis added]. This determination is an essential element of the principle of the common heritage of humankind and the base for the sharing of benefits, which according to Article 140 shall be carried out through a mechanism yet to be established.

As a corollary of the above, it is Portugal’s view that, in the absence of a mining code, the Commission is left without the precise substantive criteria and conditions against which it can – rigorously and sufficiently – assess a plan of work and evaluate whether such plan of work complies with all relevant provisions of the Convention, and it is thus prevented from fulfilling the duties deriving from Annex III, in the sense that it cannot assess the conformity (or lack thereof) of plans of work with the Convention and the relevant rules, regulations and procedures of the Authority – including (and necessarily) the RRP’s on exploitation.

It thus follows that, without the mining code, the LTC is not able to make an appropriate recommendation on a plan of work within the meaning of Article 165, paragraph 2, subparagraph (b) of the Convention.

It is in this context that guidance from the Council becomes not only important, but – more than that – absolutely necessary to help fill a gap that otherwise would prevent the Commission to carry out its mandate when presented with a plan of work for exploitation.

What should that guidance look like? We believe that the guidelines and directives to be issued by Council could take different forms, all of which meant to clarify the procedure (and the nature of such procedure) whereby the Commission is to carry out an assessment of a plan of work when it is not able to rely on substantive criteria and conditions against which such assessment *necessarily has to be made* in accordance with the Convention, as well as to clarify the procedure (and the nature of such procedure) whereby such an assessment is to be shared with the Council.

To summarize: firstly, we believe it is appropriate for the Council to issue guidance to the Commission; secondly, more than that, in the absence of a mining code, we believe it is necessary for the Council to issue guidance to the Commission on how to proceed *if and when* presented with a plan of work for exploitation; thirdly, we believe such guidance could take different forms, all of which meant to clarify the procedure (and the nature of such procedure) whereby the Commission is to carry out an assessment of a plan of work when it is not able to rely on substantive criteria and conditions against which such assessment *necessarily has to be made* in accordance with the Convention, as well as to clarify the procedure (and the nature of such procedure) whereby such an assessment is to be shared with the Council.