

**Co-Facilitators' Second Briefing Note to the Council on the  
informal intersessional dialogue established under  
Council decision ISBA/27/C/45 and Council decision ISBA/28/C/9**

Introduction and background

1. On 25 June 2021, the Republic of Nauru invoked 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 (the 'Part XI Agreement'), with an effective date of 9 July 2021, and informed the Authority that Nauru Ocean Resources Inc. (NORI), a Nauruan entity sponsored by Nauru, intends to apply for the approval of a plan of work for exploitation. In the light of this, the prescribed timeline pursuant to what is known as the 'two-year rule' under section 1, paragraph 15 will expire on 9 July 2023. Subparagraph (c) of the said provision ('subparagraph (c)') stipulates: *'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 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.'*

2. By Council decision ISBA/27/C/45 dated 11 November 2022, the Council of the International Seabed Authority decided to establish an informal intersessional dialogue to facilitate further discussion on the possible scenarios foreseen in section 1, paragraph 15, of the Annex to the Part XI Agreement and on any other pertinent legal considerations with a view to exploring commonalities in possible approaches and legal interpretations for the Council to consider in this respect. Pursuant to Council decision ISBA/27/C/45, the two Co-Facilitators of the dialogue, Mr Hugo Verbist (Belgium) and Mr Tan Soo Tet (Singapore), co-hosted a Webinar on 8 March 2023 and presented a briefing note to the Council on 24 March 2023 ('First Briefing Note'), during the March 2023 meeting of its 28<sup>th</sup> session.

3. Following the presentation of the First Briefing Note, the Council decided, by Council decision ISBA/28/C/9 dated 31 March 2023, to continue the informal intersessional dialogue, building on the emerging consensus on some of the issues, as identified in paragraph 24 of the First Briefing Note, and with a view to continuing making progress in the areas of divergence, as identified in paragraph 25. Within the framework set out in Council decision ISBA/28/C/9, the Co-Facilitators co-hosted a follow-up Webinar on 30 May 2023 ('30 May 2023 Webinar'), which focused on discussing the questions identified by the Co-Facilitators ('Co-Facilitators' questions') as reflecting the two areas of divergence on which a consensus is most urgently needed, with reference to paragraph 25 of the First Briefing Note, namely:

- (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 25a of the First Briefing Note]**
- (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 25c of the First Briefing Note]**

4. During the 30 May 2023 Webinar, which was attended by more than 150 participants, an important number of oral interventions were made. Additionally, all members of the Authority,

observers and their designated experts were invited to send written responses on the Co-Facilitators' questions by a deadline of Friday, 9 June 2023. Written responses were received from Canada, Chile, China, Germany and the Netherlands (jointly), Italy, Japan, Republic of Korea, Mexico, Nauru, New Zealand, Portugal, Singapore, Deep Sea Conservation Coalition (DSCC), Greenpeace International, Pew Charitable Trusts and WWF. All written responses submitted, along with the Co-Facilitators' introductory note, can be found on the webpage created for the dialogue: <https://isa.org.jm/event/follow-up-webinar-informal-intersessional-dialogue>.

### Objectives of this Briefing Note

5. In accordance with Council decision ISBA/28/C/9, the Co-Facilitators have prepared this Briefing Note ('Second Briefing Note') to be presented to the Council for consideration during the July 2023 meeting of its 28<sup>th</sup> session. The Second Briefing Note seeks to summarise and objectively reflect the views expressed by all delegations and participants through the oral interventions made at the 30 May 2023 Webinar and the written responses to the Co-Facilitators' questions. Where appropriate and useful, remarks made in plenary or in the informal working group on the intersessional dialogue during the March 2023 meeting of the 28<sup>th</sup> session of the Council were taken into account too. **In line with the Co-Facilitators' mandate, the Second Briefing Note further seeks to identify areas where there may be scope for common ground between delegations, as well as to narrow down the key and pressing unresolved issues, so that these may form the focus of further discussion by the Council, with a view to adopting a Council decision.**

6. In preparing this Second Briefing Note, the Co-Facilitators are guided by the fact that the Council is working diligently to elaborate and adopt the rules, regulations and procedures ('RRPs') relating to exploitation. At the same time, it is vital to examine and understand the legal consequences and implications of the Council not completing its work by the prescribed deadline (i.e., 9 July 2023), as legal uncertainty in this respect would be detrimental to the interests of all members of the Authority. In particular, there is a need to reach a consensus on the legal interpretation and potential application of subparagraph (c) within the context of UNCLOS and the Part XI Agreement, which form the legal framework to be upheld. In the interests of focusing on the two areas of divergence on which a consensus is most urgently needed, the Second Briefing Note adopts a similar structure and approach to the Co-Facilitators' questions which were discussed at the 30 May 2023 Webinar.<sup>1</sup>

---

<sup>1</sup> In their written submissions, a couple of delegations provided responses to the two other questions set out in paragraph 25 of the First Briefing Note, but which were not discussed at the 30 May 2023 Webinar, namely:

- 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)? [*paragraph 25(b) of the First Briefing Note*]
- 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? [*paragraph 25(d) of the First Briefing Note*]

The Co-Facilitators express their appreciation to these delegations for their contributions. However, as the invitation for oral and written responses had only been addressed in relation to the two Co-Facilitators' questions eventually discussed at the 30 May 2023 Webinar, and in fairness to other delegations who did not provide their responses, this Second Briefing Note will not delve into the above-mentioned questions at paragraphs 25(b) and 25(d) of the First Briefing Note.

Discussions and views expressed on the Co-Facilitators' questions

- (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 25a of the First Briefing Note]
7. **There remains a divergence in views on whether or not there is a legal basis under UNCLOS and the Part XI Agreement for the Council to postpone the consideration and/or the provisional approval of a pending application for a plan of work under subparagraph (c).**
8. **On the one hand, various delegations considered that there is a legal basis for such postponement under UNCLOS and the Part XI Agreement:**
- (a) It was argued that, as the executive organ of the Authority, the Council has the power to adopt specific policies and decisions to postpone the consideration and/or provisional approval of a pending application for a plan of work under subparagraph (c), if necessary to ensure compliance with the obligations under UNCLOS. The Council 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 (pursuant to article 162(1) of UNCLOS<sup>2</sup>), as well as the obligation to supervise and coordinate the implementation of the provisions of Part XI of UNCLOS on all questions and matters within the competence of the Authority and invite the attention of the Assembly to cases of non-compliance (pursuant to Article 162(2)(a)<sup>3</sup>). It was recalled that subparagraph (c) explicitly requires the consideration and provisional approval of a plan of work to be based on, amongst others, the provisions of UNCLOS. Hence, if the Council were to find that, by granting a provisional approval of a plan of work under subparagraph (c), compliance with the other obligations under UNCLOS cannot be ensured, then it could decide to postpone the consideration or provisional approval of the pending application.
- (b) Article 145 and other UNCLOS provisions related to the protection of the marine environment, article 150 regarding the policies relating to activities in the Area, as well as article 140<sup>4</sup> on the obligation to ensure that activities in the Area are carried out for the benefit of humankind as a whole, were identified to be particularly relevant and fundamental as part of the legal considerations related to the approval of any plan of work. Various delegations argued that there is currently a lack of scientific knowledge and understanding as to the negative impacts of deep seabed mining on the marine environment, and that it is not possible to ensure protection of the marine environment without robust

---

<sup>2</sup> Article 162(1) of UNCLOS states: *'The Council is the executive organ of the Authority. The Council shall have the power to establish, in conformity with this Convention and the general policies established by the Assembly, the specific policies to be pursued by the Authority on any question or matter within the competence of the Authority.'*

<sup>3</sup> Article 162(2)(a) of UNCLOS states: *'In addition, the Council shall... supervise and coordinate the implementation of the provisions of this Part on all questions and matters within the competence of the Authority and invite the attention of the Assembly to cases of non-compliance'.*

<sup>4</sup> Article 140 of UNCLOS states in relevant part: *'Activities in the Area shall, as specifically provided for in this Part, be carried out for the benefit of mankind as a whole... The Authority shall provide for the equitable sharing of financial and other economic benefits derived from activities in the Area through any appropriate mechanism, on a non-discriminatory basis, in accordance with article 160, paragraph 2(f)(i).'*

and effective RRP's relating to exploitation. Accordingly, the provisional approval of any plan of work in the current circumstances would be in breach of, *inter alia*, the UNCLOS obligations to prevent harm to the marine environment, the precautionary approach or principle, the due diligence obligation, as well as obligations and provisions under other international instruments.<sup>5</sup> Further, 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 be unfulfilled if a plan of work is provisionally approved without a clear mechanism in place for the sharing of economic benefits. It was therefore proposed that the Council could postpone the consideration and/or approval of a pending application for a plan of work under subparagraph (c) until the regulatory framework is in place and the RRP's are adopted, including an equitable benefit sharing arrangement, and/or there is comprehensive scientific understanding of deep-sea ecosystems and the impacts of deep-sea mining, which can produce sufficient and sound data to establish adequate environmental baselines, and guaranteed protection of the marine environment and marine biodiversity.<sup>6</sup>

- (c) Additionally, one delegation suggested that, since there is no consensus on what form a provisionally approved plan of work would take, the Council could take a decision to resolve the matter or refer the question to the International Tribunal for the Law of the Sea ('ITLOS'), in advance of having to consider a plan of work for exploitation. In other words, the Council could justify postponing the consideration and the provisional approval of a pending application for a plan of work by its referral of the question to ITLOS.

**9. On the other hand, several delegations took the position that there was no such legal basis for postponement:**

- (a) It was pointed out by a number of delegations, particularly during the 30 May Webinar, that the provisions of UNCLOS and the Part XI Agreement do not *expressly* provide for any postponement of the consideration or provisional approval of a pending application for a plan of work under subparagraph (c). In this regard, several delegations instead highlighted the timeline stipulated under Annex III, article 6(1) of UNCLOS<sup>7</sup>, which provides that the Authority shall take up for consideration proposed plans of work '*each fourth month*'.
- (b) A few delegations stated more definitively that there was no legal basis for such postponement under UNCLOS, the Part XI Agreement or international law. It was argued that subparagraph (c) does not permit the Council to postpone

---

<sup>5</sup> A delegation cited, in this regard, the Convention of Biological Diversity and the 'recently agreed Ocean Treaty' – *i.e.*, the Agreement under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity in areas beyond national jurisdiction.

<sup>6</sup> There was also a proposal for 'a pause or moratorium on commercial exploitation', as well as for postponement of the consideration and/or provisional approval of a pending application under subparagraph (c) until: '[t]he environmental, social and economic risks are comprehensively understood'; '[t]here is a framework in place to respect the free, prior and informed consent of Indigenous peoples and to ensure consent from potentially affected communities'; '[a]lternative sources for the responsible production and use of the metals also found in the deep sea have been fully explored and applied'; 'public consultation mechanisms have been established'; and 'Member States reform the structure and functioning of the ISA... to achieve the above'.

<sup>7</sup> Article 6(1) of Annex III to UNCLOS states: '*Six months after the entry into force of this Convention, and thereafter each fourth month, the Authority shall take up for consideration proposed plans of work.*'"

consideration and provisional approval of a plan of work. The text of subparagraph (c) does not refer to postponement. The use of the words '*shall*' and '*none the less*' in subparagraph (c) means that there is a mandatory obligation to consider and provisionally approve a pending application for a plan of work, even though the Council '*has not completed the elaboration of the rules, regulations and procedures relating to exploitation within the prescribed time*'. Postponing such consideration and provisional approval until the RRP's relating to exploitation are in place is, in their view, contradictory to the good faith interpretation of subparagraph (c) based on its ordinary meaning and context and in the light of the object and purpose of UNCLOS and the Part XI Agreement, which is to organize and control commercial exploitation of resources in the Area for the benefit of all humankind.<sup>8</sup> The rationale behind subparagraph (c) is to act as a 'circuit breaker' to ensure exploitation activities in the Area and the development of applicable regulations in the event of a Council deadlock. Moreover, applicant contractors and their sponsoring States have legitimate expectations that the Authority, Council and LTC will perform their obligations under section 1, paragraph 15 of the Annex to the Part XI Agreement in good faith.<sup>9</sup> Given the explicit roles of the Council, LTC and Authority, the Council cannot on its own accord amend the timelines and procedures detailed in UNCLOS and the Part XI Agreement and relied on by applicant contractors and sponsoring States. If the Authority and its member States elect to depart from that framework, they will have breached their treaty obligations and well-settled rules of customary international law.

- (c) It was further argued that other provisions of UNCLOS and the Part XI Agreement, or principles of international law, did not provide viable grounds for inferring the relevant authority to postpone. Postponing consideration and provisional approval of a plan of work on the basis of article 145 of UNCLOS<sup>10</sup> prejudices the merits of that plan of work, including as regards the protection of the marine environment, and infringes due process norms as well as the authority and expertise of the Council and LTC. In this regard, several delegations recalled that approval of a plan of work under subparagraph (c) is not automatic. Following its evaluation, the Council could still decide not to approve a plan of work which does not comply with the relevant provisions of UNCLOS and the Part XI Agreement, and the existing and applicable RRP's. One delegation argued that there is no legal basis to elevate article 145 above the rest of the provisions of UNCLOS and the Part XI Agreement, which aim to achieve a balance between protecting the marine environment and enabling

---

<sup>8</sup> Several delegations referred to article 31(1) of the Vienna Convention on the Law of Treaties, which states: '*A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.*'

<sup>9</sup> With regard to good faith, the said delegations cited articles 157(4) and 300 of UNCLOS.

<sup>10</sup> Article 145 of UNCLOS states: '*Necessary measures shall be taken in accordance with this Convention with respect to activities in the Area to ensure effective protection for the marine environment from harmful effects which may arise from such activities. To this end the Authority shall adopt appropriate rules, regulations and procedures for inter alia: (a) the prevention, reduction and control of pollution and other hazards to the marine environment, including the coastline, and of interference with the ecological balance of the marine environment, particular attention being paid to the need for protection from harmful effects of such activities as drilling, dredging, excavation, disposal of waste, construction and operation or maintenance of installations, pipelines and other devices related to such activities; (b) the protection and conservation of the natural resources of the Area and the prevention of damage to the flora and fauna of the marine environment.*'

commercial exploitation of deep seabed resources. As for the precautionary approach or principle, it was asserted that this has not been recognised as customary international law, and no references to these terms are found in UNCLOS and the Part XI Agreement (with only two, expressly-limited references in the Exploration Regulations). A delegation also noted that the consideration and provisional approval of a plan of work is governed by the specific strictures of subparagraph (c), and is not eligible for the procedure under section 3, paragraph 6 of the Annex to the Part XI Agreement.<sup>11</sup>

9. Despite this divergence of views, it is important to highlight that **many delegations cited section 3, paragraph (11)(a) of Annex to the Part XI Agreement, which points to some convergence in views with regard to the potential relevance and applicability of this provision vis-à-vis the procedure under subparagraph (c).** Section 3, paragraph 11(a) provides: *'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. If the Commission recommends the disapproval of a plan of work or does not make a recommendation, the Council may nevertheless approve the plan of work in accordance with its rules of procedure for decision-making on questions of substance.'*

10. However, it is important to note that several delegations stated that the 'extension' provision in section 3, paragraph 11(a) is only potentially relevant to the *approval or provisional approval* of a plan of work, but does not provide a legal basis to postpone the *consideration* of a plan of work. It was further pointed out by those delegations that section 3, paragraph 11(a) presupposes a situation where the LTC has already reviewed a plan of work and made a recommendation to the Council for approval or provisional approval, and only foresees the possibility for the Council to decide on extending the 60-day period to take a decision, not to consider such plan of work.

11. **There were also differing views on the scope of the Council's discretion to extend the prescribed period under section 3, paragraph 11(a):**

- (a) Some delegations considered that there was no limit on how much the prescribed period can be extended by, and section 3, paragraph 11(a) does not limit the reasons why the Council may wish to extend this period. As these details were not specified in section 3, paragraph 11(a), the Council appears to have full flexibility to decide on what circumstances may warrant an extension of the time period. A few delegations therefore took the position that the Council could extend the prescribed 60-day period until such time as the RRP's relating to exploitation are in place. Several delegations also referred to section 3, paragraph 6 of the Annex to the Part XI Agreement, pursuant to which the Council can defer the taking of a decision *'in order to facilitate further negotiation whenever it appears that all efforts at achieving consensus on a question have not been exhausted'*.
- (b) A number of other delegations expressed hesitation as to the Council possessing unlimited discretion under section 3, paragraph 11(a). It was

---

<sup>11</sup> Section 3, paragraph 6 of the Annex to the Part XI Agreement states: *'The Council may defer the taking of a decision in order to facilitate further negotiation whenever it appears that all efforts at achieving consensus on a question have not been exhausted.'*

argued that section 3, paragraph 11(a) did not give the Council postponement authority under subparagraph (c), but had been added because it was considered that some delay may be necessitated for technical reasons such as the inability of the Council to meet until the next regular session of the Authority for reasons of cost-effectiveness. In this regard, section 3(11)(a) is an exception to the general rule that the LTC's recommendation shall be deemed to have been approved after the 60-day period. One delegation stated that the Council shall consider or approve the application for a plan of work as soon as possible, but has a certain degree of discretion in the consideration period. Another suggested that in applying section 3, paragraph 11(a), the Council must act in good faith, and in accordance with the general policies established by the Assembly as well as the provisions of UNCLOS and the Part XI Agreement. It was also proposed that section 3, paragraph 11(a) does not imply that the approval shall be delayed indefinitely, as the rationale of the provision is to give the Council a reasonable time to make its decision on the LTC's recommendation.

12. Finally, a delegation also suggested that, in a scenario where it is not explicitly clear from section 3, paragraph 11(a), which of the two Council decision-making procedures, the normal or the special one, would apply,<sup>12</sup> there is strong legal basis for the Council to postpone the provisional approval of a pending application for a plan of work under subparagraph (c), should the Council require time to determine which decision-making procedure is applicable, or pursuant to a decision of the Council to seek clarity from ITLOS on which decision-making procedure is applicable.

**(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 First Briefing Note]***

13. **There is broad agreement among delegations that article 163(9) of UNCLOS is the relevant provision pertaining to the issuance of guidelines or directives by the Council to the LTC.** Article 163(9) of UNCLOS provides: *'Each Commission shall exercise its functions in accordance with such guidelines and directives as the Council may adopt.'*<sup>13</sup> **However, delegations had differing views on the nature and types of guidelines or directives which the Council may give to the LTC for the purpose of reviewing a plan of work under subparagraph (c).**

---

<sup>12</sup> In the view of the said delegation, these scenarios arise if: (a) the LTC 'submits appropriate recommendations to the Council which do not constitute a recommendation to approve or disapprove a plan of work'; (b) the LTC 'recommends the provisional approval of a plan of work to the Council (as distinct from 'final' approval)'; and (c) the LTC 'recommends the approval of a plan of work but the Council has not completed the [RRPs] for exploitation'.

The 'normal' procedure refers to the procedure for decision-making by the Council on questions of substance as set out in section 3, paragraph 5 of the Annex to the Part XI Agreement, which states: *'If all efforts to reach a decision by consensus have been exhausted, decisions by voting in the Council on questions of procedure shall be taken by a majority of members present and voting, and decisions on questions of substance, except where the Convention provides for decisions by consensus in the Council, shall be taken by a two-thirds majority of members present and voting, provided that such decisions are not opposed by a majority in any one of the chambers referred to in paragraph 9. In taking decisions the Council shall seek to promote the interests of all the members of the Authority.'* The 'special' procedure refers to the procedure for decision-making set out in section 3, paragraph 11(a).

<sup>13</sup> In the context of article 163(9) of UNCLOS, 'Commission' refers to the 'Economic Planning Commission' or the LTC, as the case may be.

14. **A key issue which divided delegations concerns whether the Council has the power to issue guidelines or directives to the LTC to refrain from making a specific recommendation for the approval or disapproval of a plan of work, or to refrain from making any recommendation at all, if the RRP's relating to exploitation have not been completed:**

- (a) On the one hand, a number of delegations argued that the Council did have such power. This was justified on the basis of the Council's power to establish the specific policies to be pursued by the Authority on any question or matter within the competence of the Authority (pursuant to article 162(1) of UNCLOS), as well as the Council's mandate to supervise and coordinate the implementation of the provisions of Part XI of UNCLOS on all questions and matters within the competence of the Authority (pursuant to article 162(2)(a)). Noting the lack of sufficient scientific knowledge on the risks of exploitation of the Area and its consequences on the marine environment, several delegations stated that it would not be possible or appropriate for the LTC to submit to the Council a recommendation for approval of a plan of work in the absence of RRP's that guarantee the protection of the marine environment, the equitable sharing of financial and other economic benefits derived from exploitation, as well as adequate inspection, compliance and enforcement mechanisms. Some delegations also noted that pursuant to article 165(2)(b)<sup>14</sup> and Annex III, article 6(3)<sup>15</sup> of UNCLOS, the LTC is to review plans of work based on the relevant provisions of UNCLOS, as well as *'the rules, regulations and procedures of the Authority, including those on operational requirements, financial contributions and the undertakings concerning the transfer of technology'*. Hence, in the absence of RRP's relating to exploitation, the LTC would be left without precise substantive criteria and conditions against which to assess a plan of work and cannot discharge its duty to review a plan of work in accordance with the grounds stated in Annex III to UNCLOS. A number of delegations thus proposed or supported the issuance by the Council of guidelines or directives to the LTC to the effect that, where an application for a plan of work is received when the RRP's are not in place, it would not be appropriate for the LTC to make a specific recommendation for approval or disapproval of such plan of work.<sup>16</sup> Alternatively, the LTC is to review such plan of work but not make a recommendation, or only make a recommendation once the RRP's are completed.
- (b) On the other hand, several delegations expressed the view that the Council cannot direct the LTC to make a specific recommendation (such as disapproval of a pending application for a plan of work), or to not issue a specific recommendation for approval or disapproval. Nor can the Council issue guidelines or directives that are intended to prevent or postpone the LTC's

---

<sup>14</sup> Article 165(2)(b) of UNCLOS states: *'The [LTC] shall... review formal written plans of work for activities in the Area in accordance with article 153, paragraph 3, and submit appropriate recommendations to the Council. The [LTC] shall base its recommendations solely on the grounds stated in Annex III and shall report fully thereon to the Council.'*

<sup>15</sup> Article 6(3) of Annex III to UNCLOS states in relevant part: *'The proposed plans of work shall comply with and be governed by the relevant provisions of this 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.'*

<sup>16</sup> Some delegations proposed that it would be appropriate instead for the LTC to give a comprehensive report or technical analysis on the proposed plan of work to the Council, including but not limited to the environmental implications and the financial viability of the proposed project for exploitation.

fulfilment of its obligations under UNCLOS and the Part XI Agreement. It was stated that the Council's guidelines and directives to the LTC must be consistent with the provisions of UNCLOS and the Part XI Agreement, as well as the decisions of the Assembly. Such guidelines and directives cannot undermine, circumvent or restrict the explicit role and mandate of the LTC, or derogate from or impede the LTC's exercise of its specific powers and functions concerning the review of plans of work and the submission of appropriate recommendations.<sup>17</sup> This would be *ultra vires* UNCLOS and the Part XI Agreement, and undermine the clear separation of powers of the organs and subsidiary organs of the Authority. The LTC plays an independent and critical role as the technical subsidiary body of the Council, and is the only organ with the necessary expertise to adequately review a plan of work and issue appropriate recommendations. The Council's guidelines or directives to the LTC therefore cannot prejudice or influence the LTC's decisions. One delegation therefore argued that while such guidelines or directives should clarify the context within which the LTC is requested to operate in making its independent evaluation, they are not to replace the LTC's fundamental role or undermine the LTC's independent work.

15. **Nevertheless, there appears to be some scope for common ground insofar as several (although not all) delegations proposed or expressed openness to the possibility of the Council issuing guidelines and directives to the LTC for the purpose of clarifying the criteria which the LTC should take into account, and/or the procedure to be followed, when reviewing a plan of work, if the RRP's relating to exploitation are not yet in place.** One delegation proposed that the directives issued by the Council should be aimed at clarifying the provisions of UNCLOS and any RRP's that the Council may have adopted provisionally, or the norms contained in UNCLOS and the terms and principles contained in the Part XI Agreement, as referred to in subparagraph (c), which the Council considers necessary for the LTC to take into account to ensure the protection of the marine environment. Another delegation recommended that the Council adopt a decision that the LTC shall review the plan of work based on the draft RRP's available at that time. If the relevant requirements under the draft RRP's are satisfied, the LTC shall recommend the provisional approval of the plan of work to the Council.

16. However, there were also some delegations that considered that it was not necessary or desirable, at the present juncture, for the Council to issue guidelines or directives concerning the criteria to be considered by the LTC should a plan of work be submitted pursuant to subparagraph (c), as the relevant criteria are already clearly outlined in subparagraph (c). It was also premature to do so when there is presently no plan of work before the LTC. If a plan of work is submitted, and the LTC is unable to interpret the criteria contained in subparagraph, then at that juncture, and at the request of the LTC, it might be appropriate for the Council to issue guidelines or directives expanding on the subparagraph (c) criteria to assist the LTC to fulfil its mandate.

17. **As many delegations included, in their written submissions, proposals for the types of guidelines or directives that the Council may give to the LTC for the purpose of reviewing**

---

<sup>17</sup> One delegation cited article 158(4) of UNCLOS, which states in relevant part: *'In exercising such powers and functions each organ shall avoid taking any action which may derogate from or impede the exercise of specific powers and functions conferred upon another organ.'* Another delegation however pointed out that article 158 only refers to the organs of the Authority, which are, according to article 158(1) and (2) of UNCLOS, the Assembly, the Council, the Secretariat and the Enterprise. The LTC is an organ of the Council to which Article 163 of UNCLOS applies.

**a plan of work under subparagraph (c), a list of these proposals is set out in the Annex to this Second Briefing Note.** This list is a compilation of the views expressed during the intersessional dialogue, and should by no means be considered exhaustive.

### Conclusion

18. **There remains a divergence in views on the question of whether there is a legal basis under UNCLOS and the Part XI Agreement for the Council to postpone the consideration and/or provisional approval of a pending application for a plan of work under subparagraph (c).** Delegations are broadly divided between:

- (a) Those who support the existence of such a legal basis for postponement, in the light of the Council's power to adopt specific policies and decisions to ensure compliance with the obligations under UNCLOS (in particular, articles 140 and 145). In this regard, given the current circumstances, the Council could decide to postpone the consideration or provisional approval of a plan of work under subparagraph (c) until there is sufficient scientific understanding on the impacts of deep seabed mining on the marine environment, and/or the relevant RRPs are in place to ensure protection of the marine environment and to provide for the equitable sharing of financial and other economic benefits.
- (b) Those who take the view that no such legal basis exists under UNCLOS and the Part XI Agreement, in particular subparagraph (c), and that such postponement would contradict the legitimate expectations of applicant contractors and sponsoring States, prejudice the merits of a plan of work (including as regards the protection of the marine environment), and infringe due process norms.

19. **There appears to be some convergence in views that section 3, paragraph 11(a) could have potential relevance and applicability vis-à-vis the procedure under subparagraph (c).** That said, several delegations pointed out that the 'extension' provision in section 3, paragraph 11(a) is only potentially relevant to the approval or provisional approval of a plan of work, but did not provide a legal basis to postpone the *consideration* of a plan of work. **There were also differing views on the scope of the Council's discretion to extend the prescribed period under section 3, paragraph 11(a),** particularly as regards whether the Council had full and unlimited flexibility, including to extend the prescribed period until such time as the RRPs relating to exploitation are in place. **The suggestion was also made that the Council could take a decision to resolve this and other matters through referral to ITLOS, in advance of having to consider and/or provisionally approve a plan of work for exploitation.**

20. **There is broad agreement that article 163(9) of UNCLOS is the relevant provision pertaining to the issuance of guidelines or directives by the Council to the LTC.** That being said:

- (a) **Delegations remain divided on the question of whether the Council has the power to issue guidelines or directives to the LTC to refrain from making a specific recommendation for the approval or disapproval of a plan of work, or to refrain from making any recommendation at all, in the event that the RRPs relating to exploitation have not been completed.** A key point of contention is whether guidelines or directives of such a nature would undermine the LTC's role and independence in reviewing a plan of work and submitting appropriate recommendations.

- (b) **However, there appears to be some scope for common ground insofar as several (although not all) delegations proposed or expressed openness to the possibility of the Council issuing guidelines and directives to the LTC for the purpose of clarifying the criteria which the LTC should take into account, and/or the procedure to be followed, when reviewing a plan of work, if the RRP's relating to exploitation are not yet in place.** That said, some delegations considered such guidelines or directives to be unnecessary and premature, as subparagraph (c) is clear in setting out the relevant criteria to be taken into account and given that there is no pending application for a plan of work at the present juncture.

21. **The Council may wish to further discuss and/or take decisions on some or all of the above-mentioned issues in paragraphs 18-20, as appropriate.**

---

7 July 2023

**Delegations' proposals on guidelines or directives that the Council may give to the LTC for the purpose of reviewing a plan of work under subparagraph (c)**

***Proposed guidelines or directives that pertain to the specific recommendation, or the nature or types of recommendation, to be provided by the LTC***

- (i) "... the Council could provide substantial guidelines and directives on the nature of the appropriate recommendations it expects from the LTC following its review of a formal application for a plan of work, pursuant to article 165 (2) (b) of UNCLOS ... other functions of the LTC listed in article 165 could be solicited by the Council when the LTC is reviewing a formal application for a plan of work in the absence of rules, regulations and procedures relating to exploitation, in particular, the Council could ask the LTC to:
  - a) make recommendations to the Council on the protection of the marine environment, taking into account the views of recognized experts in that field; 165(2)(e) - (e.g. how a specific recommendation of the LTC would be consistent with the precautionary approach or article 145 of UNCLOS on the protection of the marine environment);
  - b) make recommendations to the Council regarding the establishment of a monitoring programme to observe, measure, evaluate and analyse, by recognized scientific methods, on a regular basis, the risks or effects of pollution of the marine environment resulting from activities in the Area, ensure that existing regulations are adequate and are complied with and coordinate the implementation of the monitoring programme approved by the Council; 165 (2) (h);
  - c) recommend to the Council that proceedings be instituted on behalf of the Authority before the Seabed Disputes Chamber, in accordance with this Part and the relevant Annexes taking into account particularly article 187; 165(2)(i) – (e.g. recommend specific questions for an advisory opinion, which could include the various aspects of the consideration and provisional approval process at the Council, following a recommendation of the LTC);
  - d) make recommendations to the Council to disapprove areas for exploitation by contractors or the Enterprise in cases where substantial evidence indicates the risk of serious harm to the marine environment; 165(2)(l)"
- (ii) "... 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"
- (iii) "This could include a directive to the LTC not to issue a recommendation at all, and a directive on the type of recommendation that may be issued... In addition to a directive not to issue a formal recommendation, Council could specify the nature of the input

sought for the LTC. For example, the Council could request the LTC to report back to the Council with its considerations on the application for the plan of work in accordance with the precautionary principle, obligations under Article 145 and international commitments to halt and reverse biodiversity loss and to maintain, restore or enhance ecosystem health and ocean resilience.”

- (iv) “It is therefore submitted that the Council may give the LTC the following guidelines or directives:  
In the event a plan of work for exploitation is submitted before the elaboration and adoption of the necessary rules, regulations and procedures relating to exploitation:  
1. (a) it would not be appropriate to give a recommendation for approval of such a plan of work; and  
2. (b) it would be appropriate to instead give a comprehensive report on the proposed plan of work for exploitation to the Council, including but not limited to the environmental implications and the financial viability of the proposed project for exploitation.”
- (v) “... the Council could direct the LTC to review such a plan of work but not make a recommendation, or to review and only make a recommendation once regulations have been concluded”
- (vi) “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”
- (vii) “... in support of the Council issuing a directive to the LTC *not* to issue a formal recommendation for approval of a plan of work”

***Proposed guidelines or directives that pertain to the criteria to be considered, and/or the procedure to be followed, by the LTC in reviewing a plan of work under subparagraph (c)***

- (viii) “... the Council may provide guidelines and directives for the LTC on matters such as the basis or method for considering the application for a plan of work”
- (ix) “... the Council could request the LTC itself to propose a rule of procedure for the LTC on how it will deal with an application for exploitation received in the absence of RRP, and the Council can verify in advance that it approves of such procedure”
- (x) “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.... 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.”

- (xi) "... the Council may provide the LTC with guidance on what it should refer to when reviewing a plan of work (i.e. specific provisions of UNCLOS, provisionally adopted exploitation regulations, relevant parts of exploration regulations and environmental guidelines, etc.) within the grounds stated in ANNEX III."
- (xii) "If a Plan of Work is submitted pursuant to Paragraph 15, and the Commission is unable to interpret the criteria contained in Paragraph 15, at that juncture, and at the request of the Commission, it might be appropriate for the Council to issue guidelines or directives expanding on the criteria in Paragraph 15 to assist the Commission in understanding the procedure for its consideration of the Plan of Work and to fulfil its mandate."
- (xiii) "We recommend that the Council adopts a decision that incorporates the following contents: "if a plan of work for exploitation is submitted before adoption of the Regulations on Exploitation, the LTC shall review the plan of work based on the draft Regulations available at that time. If the relevant requirements under the draft Regulations are satisfied, it shall recommend the provisional approval of the plan of work to the Council."
- (xiv) "... the Council could request that due to the lack of knowledge, the considerations of a plan of work should be made in accordance with the precautionary principle and the obligations under UNCLOS Article 145 and other international commitments such as the Global Biodiversity Framework where States have committed to effective protection of the marine environment, halt and reverse biodiversity loss and enhance ocean resilience."