

**Co-Facilitators' Briefing Note to the Council on the
informal intersessional dialogue established by
Council decision ISBA/27/C/45**

Introduction and background

1. During the November 2022 meeting of its 27th session, 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(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') 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' (see ISBA/27/C/45). The Council further decided that the dialogue shall be convened using virtual means and be open to all members of the Authority, observers and their designated experts.

2. Of particular relevance is a provision known as the '**two-year rule**', which can be found in section 1(15) of the annex to the Part XI Agreement. This provision allows any member State of the Authority whose national intends to apply for approval of a plan of work for exploitation to request that the Council complete the adoption of the rules, regulations and procedures ('RRPs') relating to exploitation within two years of the request. Subparagraph (c) of the above-mentioned 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***'.

3. On 25 June 2021, the Republic of Nauru invoked section 1(15) of the annex to 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 'two-year' timeline under the above-mentioned provision will expire on 9 July 2023.**

4. In accordance with the modalities of the dialogue as set out in the above-mentioned decision of the Council and with the logistical support of the Secretariat, 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. Prior to the Webinar, the Co-Facilitators prepared an introductory note to provide background information pertinent to the dialogue, as well as three sets of questions to guide the discussions.

5. During the Webinar, which was attended by more than 170 participants, an important number of oral interventions were made, including introductory remarks by the Secretary-General. Additionally, all members of the Authority, observers and their designated experts were invited to send written responses on the questions in the Co-Facilitator's introductory Note by a deadline of Tuesday, 14 March 2023. Written responses were received from Argentina, Australia, Canada, Chile, People's Republic of China, Germany and the Netherlands (jointly), Italy, Japan, Republic of Korea, Mexico, Nauru, Norway, Russian Federation, Singapore, Advisory Committee on Protection of the Sea (ACOPS), Deep-Ocean Stewardship Initiative (DOSI), Deep Sea Conservation Coalition (DSCC), International Union for Conservation of Nature (IUCN), Research Institute for Sustainability, Pew Charitable Trusts and The Ocean Foundation. All written responses submitted, along with the Co-Facilitators'

introductory note, can be found on the webpage created for the dialogue: <https://isa.org.im/event/informal-intersessional-dialogue>.

Objectives of this Briefing Note

6. In accordance with the decision of the Council in ISBA/27/C/45, the Co-Facilitators have prepared this Briefing Note to be presented to the Council for further consideration during the March 2023 meeting of its 28th session. The present Briefing Note seeks to summarise and objectively reflect the views expressed by all delegations and participants through the oral interventions made at the Webinar and the written responses to the Co-Facilitators' questions. **In line with the Co-Facilitators' mandate, the Briefing Note further identifies (i) areas of commonality and consensus based on the views expressed, as well as (ii) key issues and questions on which there remain divergences in views and which may accordingly form the focus of further discussions and/or decisions by the Council, as appropriate.**

7. In preparing this Briefing Note, the Co-Facilitators are guided by the fact that the Council is working diligently to elaborate and adopt the RRP's relating to exploitation. At the same time, and without pre-judging the Council's work in this regard, it is vital to examine and understand the legal consequences and implications if the Council does not complete 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.** Without intending to be exhaustive or prescriptive, but in the interests of focusing discussions on the legal issues that appear to be the most pressing, the Co-Facilitators had set out three sets of questions which were discussed in sequence during the Webinar. In the interests of clarity, this Briefing Note adopts the same structure and approach.

Discussions and views expressed on the Co-Facilitators' questions

(1) What is the meaning of the phrase 'consider and provisionally approve' in subparagraph (c)? Can the Council disapprove a plan of work after having considered it? Can the consideration of a pending application be postponed until certain conditions are met? Does the use of the word 'elaboration' in subparagraph (c) carry any legal significance?

8. As a preliminary issue, a few delegations considered that the 'two-year rule' imposes a 'best endeavours' obligation (or an obligation of 'conduct' and not 'result'), in the sense that the Council is required to do its best in good faith to complete the RRP's relating to exploitation before the prescribed deadline (i.e., 9 July 2023), but is entitled to continue negotiating the RRP's after such date if these are not in place by then.

9. Based on the views expressed, **there is broad agreement that subparagraph (c) does not impose an obligation on the Council to automatically approve a pending application for a plan of work. Accordingly, the Council can decide to disapprove a plan of work after having considered it.** Delegations noted that subparagraph (c) provides for a decision-making process and that the use of the word 'consider' means that the Council is required to 'evaluate' or 'assess' an application to determine whether it should be approved or disapproved. A number of delegations pointed out, however, that a decision to disapprove must be made in 'good faith' and on the basis that the plan of work does not meet the criteria under the legal sources set out in subparagraph (c).

10. However, there is a divergence in views on whether there is a legal basis for the Council to postpone the consideration of a pending application for a plan of work until certain conditions are met:

- (a) On the one hand, several delegations took the position that subparagraph (c) imposes an obligation on the Council to consider a pending application for a plan of work if the RRP's have not been completed by the prescribed deadline. In this regard, some were of the view that the Council cannot postpone such consideration, citing the lack of a legal basis for postponement under UNCLOS and the Part XI Agreement. It was further noted that article 6(1) of Annex III to UNCLOS provides that the Authority shall take up for consideration proposed plans of work 'each fourth month'. One delegation further expressed the view that postponing or preventing the consideration of a plan of work for exploitation 'circumvents the explicit rights of applicant contractors and sponsoring States' in subparagraph (c) and is 'clearly *ultra vires*' the UNCLOS and the Part XI Agreement. That said, another delegation opined that while the legal provisions do not mention the possibility of postponement, this issue may be 'regulated by a specific decision of the Authority'.
- (b) On the other hand, some delegations stated that the Council could extend the prescribed period of time to consider a plan of work (based on section 3(11)(a)¹ of the annex to the Part XI Agreement) and that the Council can also 'defer' taking a decision on a plan of work under subparagraph (c) until the RRP's relating to exploitation are in place (based on section 3(6)²). The consideration process may commence but the Council could decide to defer the decision on whether to approve or disapprove the application until certain criteria are set. A few delegations further took the view that considering and provisionally approving a plan of work at the present juncture may be inconsistent with UNCLOS (in particular, article 145) and the precautionary approach/principle. These delegations cited, *inter alia*, the lack of adequate and robust scientific knowledge and environmental baselines and criteria to assess the impacts of deep seabed exploitation, the gaps in the regulatory regime (including with regard to financial arrangements and equitable benefit-sharing) and limited institutional capacity with regard to assessing plans of work, inspecting activities and enforcing compliance. The view was also expressed that, given this context, the Council would be 'bound to disapprove' an application for a plan of work.

11. There were also differing views on the legal significance of the word 'elaboration' in subparagraph (c), especially when contrasted with the term 'adoption'. The view was expressed that 'elaborate' and 'adopt' are used interchangeably in paragraph 15, and that a good faith interpretation of subparagraph (c) based on its ordinary meaning indicated that the word 'elaboration' in that provision does not have legal significance. However, other delegations took the position that the use of the word 'elaboration' is deliberate and represented a distinct process to 'adoption' of the RRP's. A few delegations further argued that, having completed the elaboration of the RRP's, the Council may decide to postpone their adoption until, for instance, the necessary standards and guidelines are in place. On this view, the Council would not be obligated to consider a plan of work since subparagraph (c) would

¹ Section 3(11)(a), of the annex to the Part XI Agreement states in relevant part: '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.'

²Section 3(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.'

not be triggered once the Council has completed the elaboration of the RRP, even without adopting them.

- (2) **What is the procedure and what are the criteria to be applied in the consideration and provisional approval of a pending application under subparagraph (c), in the light of, amongst others, article 145 of UNCLOS? In this regard, what roles do the Council and the Legal and Technical Commission (LTC) respectively play?**

Procedure for consideration and provisional approval of a pending application and roles of the Council and LTC

12. Knowing the exact roles of the Council and the LTC in the process for consideration and provisional approval of a plan of work under subparagraph (c) is important because the voting rules for the Council depend on whether or not the LTC submits a recommendation to the Council, as well as on the nature of such recommendation. If the LTC recommends the approval of a plan of work, the Council can only disapprove such a plan 'by a two-thirds majority of its members present and voting, including a majority of members present and voting in each of the chambers of the Council' (section 3(11)(a) of the annex to the Part XI Agreement).

13. Based on the views expressed, **there is broad agreement that, in addition to the Council, there is a role for the LTC as its subsidiary body when a pending application needs to be considered under subparagraph (c).** Delegations noted that the work of the LTC is fundamental within the process of analysis of a plan of work, since it is the technical subsidiary body of the Council which provides the Council with the necessary expertise to allow it to make informed decisions, while respecting confidentiality requirements. The LTC's expertise, including with regard to the environmental implications of the submitted plan of work, will be beneficial to the Council's decision-making process, particularly in the absence of fully elaborated and adopted RRP relating to exploitation.

14. **There are, however, divergent views concerning the question of whether the specific procedure described in article 165(2)(b) of UNCLOS³ applies to the process of consideration and provisional approval of a plan of work under subparagraph (c).** Delegations are generally divided between two broad interpretations:

- (a) According to the first interpretation, when confronted with a plan of work for exploitation in the scenario that the RRP relating to exploitation are not in place upon the expiry of the 9 July 2023 deadline, it would not be possible for the LTC to fulfil its legal obligation under article 165(2)(b) of UNCLOS 'to base its recommendations solely on the grounds stated in Annex III and... report fully thereon to the Council'. This is because the proposed plans of work can never 'comply with and be governed by the relevant provisions of [UNCLOS] and the rules, regulations and procedures of the Authority', as required by article 6(3) of Annex III to UNCLOS⁴, since those 'rules, regulations and procedures' do not yet exist. Furthermore, section 1(15) of the Annex to the Part XI Agreement does not extend the powers of the LTC as set out in UNCLOS, since the LTC is not even mentioned in section 1(15). The LTC would therefore – on the basis

³ 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.'

⁴ 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."

of UNCLOS and/or the Part XI Agreement – not lawfully be able to make a recommendation on a plan of work for exploitation without the RRP's relating to exploitation regulations. In the light of this, it was proposed that the LTC only give a comprehensive report on the proposed plan of work to the Council, but not a recommendation. The view was also expressed that it was for the Council to determine the applicable process and role of the LTC under subparagraph (c).

- (b) According to the second interpretation, the LTC's review of a plan of work followed by its submission of appropriate recommendations to the Council remains, pursuant to article 165(2)(b) of UNCLOS, a mandatory step in the process of consideration and provisional approval of a plan of work by the Council under subparagraph (c). Delegations that took this view also cited articles 153(3)⁵ of UNCLOS and section 3(11)(a) of the annex to the Part XI Agreement as provisions applicable to the decision-making procedure under subparagraph (c). In other words, even in the absence of RRP's relating to exploitation, the LTC and the Council shall fulfill their respective duties in accordance with their respective functions, and the explicit role and function of the LTC under UNCLOS and the Part XI Agreement cannot be derogated from. The LTC has to review the plan of work based on the criteria contained in subparagraph (c) and submit recommendations to the Council. The object and purpose of this two-tiered system is to ensure that the Council bases its decisions on a prior scientific assessment by its designated expert organ, while also ensuring that confidentiality requirements are complied with.

15. Whether or not article 165(2)(b) of UNCLOS applies to the decision-making process under subparagraph (c), **there seems to be scope for some common ground between the first and second interpretations, as there appears to be broad agreement that neither UNCLOS nor the Part XI Agreement explicitly requires the LTC to make a specific recommendation to approve or disapprove a plan of work.** Indeed, several delegations pointed out that article 165(2)(b) of UNCLOS only requires the LTC to submit 'appropriate recommendations' to the Council, but does not oblige it to recommend the approval or disapproval of plan of work. Only a recommendation of the LTC to approve a plan of work would trigger the above-mentioned voting mechanism in section 3(11)(a) of the annex to the Part XI Agreement. Furthermore, section 3(11)(a) explicitly recognises the possibility that the LTC 'does not make a recommendation'.

16. A number of delegations stated that in the scenario contemplated under subparagraph (c), the Council could issue guidelines or directives to the LTC, including instructions to not provide any recommendation to approve or disapprove a plan of work if certain conditions, such as the completion of the RRP's relating to exploitation, are not met. Alternatively, the Council could ask the LTC to limit its intervention to highlighting the relevant factors for the Council to consider when reviewing an application for a plan of work, or to giving a comprehensive report on the proposed plan of work to the Council. In this regard, while the LTC could be expected to refrain from recommending the approval of a plan of work without adopted RRP's relating to exploitation, prior guidance by the Council to the LTC as its subsidiary body could be welcome. A Council decision during the March meeting of its 28th session – the last Council meeting before the expiration of the 'two-year' deadline – could guide the LTC in case a plan of work is received before the RRP's relating to exploitation are

⁵ Article 153(3) of UNCLOS states in relevant part: '*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.*'

finalised. Indeed, on the basis of article 163(9) of UNCLOS, the LTC '*shall exercise its functions in accordance with such guidelines and directives as the Council may adopt*'.

Criteria to be applied in the consideration and provisional approval of a pending application

17. Subparagraph (c) stipulates that the Council shall consider and provisionally approve a 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 (the) Annex (to the Agreement) as well as the principle of non-discrimination amongst contractors*'.

18. **It was stressed by delegations and commonly agreed that the provisions of UNCLOS, including but not limited to article 145⁶ and other articles concerning the protection and preservation of the marine environment, form part of the legal sources based on which the Council shall consider the application for approval for a plan of work under subparagraph (c).** One delegation also noted that the applicable provisions in the Part XI Agreement include, but are not limited to, those governing the qualifications of applicants (article 4); requirements for the approval of plans of work (article 6); reference and priority among applicants (article 10); financial terms of a contract (article 13); (vi) exclusivity (article 16); (vii) revisions (article 19); and (viii) the transfer of rights (article 20). Others argued for a 'science-based approach' in the Authority's decision-making, while references were also made to the precautionary approach/principle and ecosystem approach.

19. Several delegations took the view that prior adoption of the RRP's relating to exploitation is necessary for ensuring the protection of the marine environment. On this view, considering and provisionally approving any plan of work before such environmental criteria in the RRP's are in place may therefore be inconsistent with the obligation under article 145, as well as with the precautionary approach/principle. While there is no obligation under UNCLOS and the Part XI Agreement for the ISA to automatically approve a plan of work, there is a clear obligation in article 145 to prevent damage to marine flora and fauna and ensure effective protection of the marine environment from harmful effects of activities in the Area. Some delegations considered that it would accordingly be impossible for the Council to guarantee this when considering and provisionally approving a plan of work without the applicable regulations and standards.

20. For some delegations, a possible option could be for the Council to provisionally adopt RRP's relating to exploitation, or parts of the RRP's (even if it has yet to complete the elaboration of the RRP's in their entirety), as mentioned in subparagraph (c). Another delegation suggested that in the absence of the provisional adoption of RRP's relating to exploitation, the LTC may take into account, as guidance, the LTC's draft RRP's, including draft standards and guidelines. One delegation also expressed the view that it would not be in contravention of UNCLOS and the Part XI Agreement if the Council were to adopt a decision that, should a plan of work for exploitation be submitted before the adoption of the RRP's relating to exploitation, the LTC shall consider the plan of work based on the draft RRP's available at that time and, if appropriate, recommend provisional approval of the plan of work to the Council.

⁶ 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.*'

(3) What are the consequences of the Council provisionally approving a plan of work under subparagraph (c)? Does provisional approval of a plan of work equate to the conclusion of an exploitation contract?

21. Based on the views expressed, **there is broad agreement that provisional approval of a plan of work under subparagraph (c) is not the same as, and does not amount to, final approval.** A number of delegations characterised provisional approval as being 'temporary', 'transitory', 'interim', 'tentative' and/or 'conditional' in nature, and that the Council can impose conditions when deciding to provisionally approve a plan of work.

22. **Flowing from this, there is also a convergence in views that a provisionally approved plan of work does not equate to a contract for exploitation.** Several delegations expressed that only a contract would establish contractual rights, obligations and liabilities and grant the contractor security of tenure. Compared to a plan of work that has been provisionally approved, an exploitation contract could include further details and conditions reflecting, for instance, environmental obligations. It was also suggested that provisional approval does not 'authorise' or 'confer the right' to the contractor to immediately commence mining.

23. **There remain, however, divergent views regarding the consequences and procedures that follow the provisional approval of a plan of work under subparagraph (c):**

- (a) One delegation expressed the view that if a plan of work is provisionally approved under subparagraph (c), the Council is required to instruct the Secretary-General to issue the provisionally approved plan of work in the form of a provisional contract, citing article 153(3) of UNCLOS (which requires that *'the plan of work shall, in accordance with Annex III, article 3, be in the form of a contract'*). Otherwise, an applicant contractor would be left in a 'regulatory vacuum' and section 1(15) of the annex to the Part XI Agreement would be devoid of meaning, resulting in a 'manifestly absurd and unreasonable interpretation' for contractors and sponsoring States. A delegation suggested that the conclusion of a contract would 'follow' from approval of a plan of work, without the need for a separate decision by the Council. Another stated that the 'logical consequence' of provisional approval is to enter into negotiations for a contract. It was pointed out that the 'exclusive right' to exploit the area covered by the plan of work shall be 'provisionally guaranteed' upon the provisional approval of the plan of work for exploitation, on the basis of article 16 of Annex III to UNCLOS.⁷ The view was also expressed that the Council must act in 'good faith' regarding any next steps towards the conclusion of an exploitation contract.
- (b) Several other delegations, however, identified considerations and issues that potentially affect whether a provisionally approved plan of work would ultimately result in an exploitation contract. One delegation stated that provisional approval does not mean that an exploitation contract would be concluded, while another described the negotiations on a contract as a 'separate procedure' to provisional approval. A number of delegations noted that the provisional approval of a plan of work could be revised, or made subject to appropriate conditions, on the basis of, *inter alia*, ensuring compliance with RRP's relating to exploitation if these are subsequently adopted; the precautionary

⁷ Article 16 of Annex III to UNCLOS states: *'The Authority shall, pursuant to Part XI and its rules, regulations and procedures, accord the operator the exclusive right to explore and exploit the area covered by the plan of work in respect of a specified category of resources and shall ensure that no other entity operates in the same area for a different category of resources in a manner which might interfere with the operations of the operator. The operator shall have security of tenure in accordance with article 153, paragraph 6.'*

approach/principle; 'adaptive management principles'; and new facts and evidence which materially alter the Council's assessment. One delegation suggested that if the RRP's relating to exploitation are subsequently adopted, a provisionally approved plan of work would have to be 'resubmitted' to the Council for approval, to give effect to the principle of non-discrimination among contractors.

- (c) There were also some delegations who took the view that pending the adoption of the RRP's relating to exploitation, the Council cannot give final approval to a plan of work and/or direct the Secretary-General to negotiate or issue an exploitation contract. One delegation argued that article 3(5) of Annex III to UNCLOS, which states that '*upon its approval by the Authority, every plan of work... shall be in the form of a contract concluded between the Authority and the applicant or applicants*', does not apply in the case of a provisionally approved plan of work. Some delegations referred to the prior practice of the Authority concerning the pioneer investors in the exploration context, as a precedent supporting the proposition that contracts for exploration/exploitation are to be concluded only after the RRP's are in place. However, another delegation considered that there was no 'legal basis or requirement' under UNCLOS or the Part XI Agreement for the Authority to have taken such an approach in the exploration context. One delegation suggested that further study is needed on whether an exploitation contract can be concluded under a provisionally approved plan of work.

Conclusion

24. There is emerging consensus on the following issues pertinent to the legal interpretation and application of the 'two-year rule' and subparagraph (c):

- (a) Subparagraph (c) does not impose an obligation on the Council to automatically approve a pending application for a plan of work. The Council can decide to disapprove a plan of work after having considered it.
- (b) There is a role for both the Council and the LTC as its subsidiary body in the consideration of a pending application for a plan of work under subparagraph (c). Article 145 and other provisions of UNCLOS form part of the legal sources and criteria, mentioned in subparagraph (c), based on which the Council shall consider and provisionally approve a plan of work.
- (c) Provisional approval of a plan of work under subparagraph (c) is not the same as, and does not amount to, final approval. A provisionally approved plan of work does not equate to a contract for exploitation.

25. Divergences in views remain in relation to the following key issues and questions:

- (a) Is there a legal basis for the Council to postpone (i) the consideration and/or (ii) the provisional approval of a pending application for a plan of work under subparagraph (c), and if so, under what circumstances?
- (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)?

- (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)?
- (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?

26. The Council may wish to further discuss and/or take decisions on some or all of the above-mentioned issues and questions in paragraph 25, as appropriate.

23 March 2023