Press release

Two-year Countdown for Deep Seabed Mining

The clock is ticking down fast but is there a need to rush? In 2021, the island nation of Nauru triggered a treaty provision known as the "two-year rule" that obliges the International Seabed Authority (ISA) to finalize and adopt regulations for deep seabed mining within 24 months. That deadline expires in July 2023. Researcher Pradeep Singh of the Institute for Advanced Sustainability Studies (IASS) examines the legal implications of this provision.

The Pacific island nation of Nauru notified the International Seabed Authority (ISA) on 25 June 2021 of its intention to invoke Section 1(15) of the 1994 Implementing Agreement *(see excerpt below)*, with operative effect from 9 July 2021, on the basis that mining company under their sponsorship, Nauru Ocean Resources Inc. (NORI) intends to apply for the approval of a plan of work for exploitation under the United Nations Convention on the Law of the Sea (UNCLOS). The ISA is an autonomous intergovernmental body tasked with regulating mining activities in international waters.

Nauru is a small island nation in the Pacific Ocean, located northeast of Australia. With a surface area of just 21 km^2, it is the third smallest state on Earth. There are roughly 11,500 people living on Nauru. NORI, which is incorporated and registered in Nauru, is a wholly owned subsidiary of Canada-based mining start-up The Metals Company (formerly known as DeepGreen).

Two-year rule triggered

The invocation of the "two-year rule" gives the ISA Council two years – in this case, until July 9, 2023 – to finalize a set of regulations governing the exploitation of minerals on the international seabed, under which mining revenues and other benefits are to be equitably shared among states. If the Council fails to adopt the regulations within this time and an exploitation application is submitted, the Council would still have to 'consider' and 'provisionally approve' it.

To date, the ISA has established a regulatory regime for exploration activities relating to three different types of mineral: for polymetallic nodules in 2000, for polymetallic sulfides in 2010, and for cobalt-rich ferromanganese crusts in 2012. As of 1 January 2022, the ISA has awarded 31 exploration contracts, but no applications or contracts for mining have been considered or awarded yet. One primary reason for this, the study's author Pradeep Singh writes, is that "the development of regulations to facilitate exploitation activities have not been finalised."

The many unknowns in the deep sea

One argument against deep seabed mining is the existence of previously unknown species in the deep sea, including the recently discovered pom-pom-like Biremis spaghetti worm and the delightfully weird rubber squirrel. These discoveries illustrate the lack of available data on deep sea habitats that could be used to assess the baseline environmental conditions in targeted areas. Our understanding of deep sea habitats and ecosystem functions (including its role in regulating the climate and supporting the food web) and how mining activities could adversely affect them is still far from comprehensive. Despite the fact that scientific knowledge remains scarce, scientists are already able to predict that the environmental impacts that could potentially arise from the extraction of minerals from the seafloor would be significant and largely irreversible. Consequently, a group of over six hundred

marine scientists and experts have called for a pause on the ISA's transition from exploration to exploitation until critical knowledge gaps are closed. And it is against this backdrop that the ISA member states are now required to negotiate and define an "acceptable" level of environmental damage from deep seabed mining. However, until recently, the impacts of the Covid-19 pandemic have prevented the Council from meeting in person to progress negotiations. Since the pandemic, the Council has only been able to carry out in person negotiations on the regulations for a total of four weeks and is scheduled to meet again later this year for another two weeks.

At the same time, the task of establishing a threshold for environmental damage also raises issues of legal liability, explains legal scholar Pradeep Singh, a Fellow at the IASS. "We can only hope that the ISA will try to provide clearer guidance by issuing standards and guidelines as to what is 'acceptable harm' and what is not 'acceptable harm'. And what criteria we should use to assess environmental damage," says Singh. "These things need to be agreed upon so that actors who exceed the limits set by the ISA can be held liable for their actions. Unfortunately, the issue of legal liability has been largely neglected in discussions to date," explains Singh.

Mining must benefit all humankind

A primary concern of those drafting the mining regulations (collectively known as the Mining Code) is that deep seabed mining on the international seabed must be carried out for the benefit of all humankind. Since the adoption of the regulations would pave the path for commercial mining to commence, it is essential for member states to feel confident that the regime they end up endorsing is actually one that serves the best interest of everyone, and not just a handful of actors.

In the study, Pradeep Singh concludes that the so-called deadline is not an absolute one and missing it could largely prove to be inconsequential from a legal perspective. In fact, blindly rushing to meet the deadline without ensuring that the regime is first "fit for purpose" could instead have far greater consequences, including exposing the ISA to legal action and reputational harm. He accordingly urges ISA member states to allow themselves all the time needed to develop a robust and precautionary regime and advises that: "ISA should not feel too pressured to finalise the regulations, particularly if this means that substandard, incoherent or incomplete requirements will be put in place in order to meet the perceived deadline."

At the same time, if the deadline is missed and an application for exploitation is submitted, the approval of a plan of work is not automatic or guaranteed. Indeed, the ISA Council could reject any such application if there were concerns about the protection of the marine environment from the harmful effects of mining activities pursuant to the plan, or about the adequacy of environmental information and measures such as impact assessments or monitoring. "The clock is fast ticking down with the deadline looming, but there is no real need to rush", he adds.

Background material:

Section 1(15) of the Annex to the 1994 Agreement on Implementation of the Seabed Provisions of the Convention on the Law of the Sea

The [ISA] shall elaborate and adopt, in accordance with article 162, paragraph 2(o)(ii), of the Convention, rules, regulations and procedures based on the principles contained in sections 2, 5, 6, 7 and 8 of this Annex, as well as any additional rules, regulations and procedures necessary to facilitate the approval of plans of work for exploration or exploitation, in accordance with the following subparagraphs:

(a) The Council may undertake such elaboration any time it deems that all or any of such rules, regulations or procedures are required for the conduct of activities in the Area, or when it determines that commercial exploitation is imminent, or at the request of a State whose national intends to apply for approval of a plan of work for exploitation;

(b) If a request is made by a State referred to in subparagraph (a) the Council shall, in accordance with article 162, paragraph 2(o), of the Convention, complete the adoption of such rules, regulations and procedures within two years of the request;

(c) 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.

Publication:

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The Institute for Advanced Sustainability Studies (IASS) conducts research with the goal of identifying, advancing, and guiding transformation processes towards sustainable societies in Germany and abroad. Its research practice is transdisciplinary, transformative, and co-creative. The institute cooperates with partners in academia, political institutions, administrations, civil society, and the business community to understand sustainability challenges and generate potential solutions. A strong network of national and international partners supports the work of the institute. Among its central research topics are the energy transition, emerging technologies, climate change, air quality, systemic risks, governance and participation, and cultures of transformation. The IASS is funded by the research ministries of the Federal Government of Germany and the State of Brandenburg.


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