Deep-Sea Minerals Exploitation: The 2-Year Rule Deadline is Running Out, What Happens Next?

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Matter commented on: ISA draft exploitation regulations and the 2-Year rule

1 Introduction

Nauru invoked the 'two-year rule' enshrined in section 1(15)(b) of the Annex to the 1994 Agreement relating to the implementation of Part XI of UNCLOS (Part XI Agreement) on 25 June 2021 and announced the intentions of Nauru Ocean Resources Inc (NORI) to apply for the approval of a plan of work for exploitation. This effectively put the International Seabed Authority (ISA) under the clock to complete the adoption of rules, regulations and procedures (RRPs) for exploitation activities by 9 July 2023. When the Council of the ISA fails to complete and adopt the RRPs within this deadline, and if application for approval of a plan of work is pending, then, in accordance with section 1(15)(c) of Part XI Agreement, the Council "shall none the less consider and provisionally approve such plan of work based on the provisions of the Convention [UNCLOS] and any [RRPs] 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 [to the Part XI Agreement] as well as the principle of non-discrimination among contractors".

This provision raises several interpretation challenges, such as: what does it mean to 'consider and provisionally approve'? Does it entail an automatic approval of a plan of work? Can the Council disapprove a plan of work after having considered it? How long can the Council take to consider and decide in this matter? Can the Council postpone its decision? What does a provisional approval of a plan of work entail? For how long does such provisional approval last? Can any exploitation-related activities take place with just provisional approval? Under what conditions will such provisional approval become definite? Given that seabed mining activities can pose significant risk to the marine environment and could inclusively cause irreversible harm, the mere suggestion that exploitation activities could be approved before the necessary RRPs are in place, is enough to trigger serious concerns. With the deadline looming, the calls for a ban, moratorium, or precautionary pause have also intensified resulting in further discussions as to whether there is a legal basis that can support an eventual moratorium.

This blog post aims to contribute towards the ongoing discussions concerning the interpretation and application of section 1(15) of the Annex to Part XI Agreement and on the legal basis for a moratorium. Section 2 provides a brief overview of the intersessional work being done at the ISA on the interpretation of section 1(15). Section 3 provides the author's own views on section 1(15), followed by section 4 that provides the author's views on a legal basis for a moratorium on deep sea mining activities. Finally, section 5 offers concluding reflections.

2 Intersessional dialogue on the interpretation and application of section 1(15)

Notwithstanding the efforts of the Council towards the conclusion and adoption of the necessary RRPs, with the pace of negotiations signaling that this process will not be concluded by 9 July 2023, it becomes paramount to clarify the legal interpretation and potential application of section 1(15). Mindful of the potential legal consequences of failing to meet the two-year deadline, the Council established, during the November 2022 meeting of its 27th Session (see ISBA/27/C/45), an informal intersessional dialogue to facilitate discussions on the potential scenarios foreseen in section 1(15) of

the Part XI Agreement and on other legal considerations relevant in this context. Another important aim of the intersessional dialogue was to ascertain the different positions of the different participants given the need to reach a consensus on these matters.

The intersessional dialogue convened a webinar on 8 March 2023 where more than 170 participants, including member states, and observers attended. In their written submissions the participants focused on the three sets of 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?

(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 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?

(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?"

The written comments of the different participants as well as the co-facilitators' briefing notes (available here) showed a broad agreement on a number of matters. In particular, it seems to be generally accepted that section 1(15)(c) does not oblige the Council to automatically approve a pending application for a plan of work and can in fact disapprove it if it does not meet the criteria set out in the legal sources referred to in this provision. There is also broad agreement that the LTC, albeit not mentioned expressly in section 1(15)(c), will play a fundamental role in reviewing a pending plan of work. Finally, there is also emerging consensus that a provisionally approved plan of work does not amount to a final approval or a contract for exploitation.

At the same time, there are still diverging views on several key aspects. Notably, there is divergence on whether there is a legal basis for the Council to postpone the consideration and/or the decision to provisionally approve the plan of work. There is also divergence on the extent to which the Council can give directives to the LTC in relation to a review of a plan of work in this context. Finally, there are also varying views on what happens following a provisional approval of a plan.

Given this existence of diverging views on such essential matter, the Council decided on 31 March 2023 (ISBA/28/C/9) to continue the informal intersessional dialogue with a view to continue progress in building consensus. For this, the co-facilitators convened a follow up webinar on 30 May 2023 and invited written submissions of States Members of the ISA, observers and their experts (available here). The focus of these submissions was primarily on two set of 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?

(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)?"

The co-facilitators are now preparing their briefing note which they will present by 30 June 2023 to the Council for further consideration during the July meeting of its 28th session. A canvas of written submissions indicates that consensus seems hard to reach on these critical aspects. For example, given the polarized positions of States and observers in the broader discussion of seabed mining, it is not surprising to see Nauru, Japan, and Korea affirming that there is no legal basis for the Council to postpone the consideration of a plan of work. Conversely, it is also not surprising to see New Zealand, Portugal, Germany, the Netherlands, or organizations like WWF and the Deep Sea Conservation Coalition, argue the exact opposite.

3 Reflections on the interpretation and application of section 1(15)(c)

Since there is already general agreement on some of the issues triggered by the interpretation of this provision, the subsections hereunder offer first some general observations on the obligations it imposes to the Council, and then focus on selected issues that are still the object of dissent.

3.1 General observation on section 1(15)(c)

Given the ordinary meaning of terms in section 1(15)(c) and the context, object, and purpose of the 1994 Implementing Agreement and the UNCLOS, it is clear that section 1(15)(c) obliges the Council to scrutinize a submitted plan of work and to make a decision on it. However, section 1(15)(c) does not give contractors automatic or irreversible approval of their plan of work. It also does not allow contractors to immediately commence exploitation activities until they obtain the final approval in the form of a signed contract. The Council is only obliged to provisionally approve a submitted plan if the latter is in line with the requirements laid out in the provisions of UNCLOS, the terms and principles contained in the Annex to the Part XI Agreement, any eventually any RRPs that the Council may have adopted provisionally. This means that the Council does not have to approve a plan of work (even provisionally) that is inadequate as this would be contrary to Article 145 of the LOSC, the 1994 Implementing Agreement's spirit which reiterates the importance of the LOSC for the protection and preservation of the marine environment, and the precautionary principle which binds the ISA. While it is true that Section 1(15)(c) was intended to address a potential deadlock situation, it is hard to conceive that it allows a 'back door' automatic approval of plans of work that do not meet environmental protection requirements.

3.2 Is there a legal basis for postponing the consideration and/or the provisional approval?

As mentioned above, the inclusion of section 1(15)(c) in the Annex of Part XI Agreement was done to address a potential deadlock situation in the negotiation of RRPs and to force the Council to consider and decide on a pending plan of work even in the absence of applicable exploitation RRPs. So, it seems challenging to argue that section 1(15)(c) opens for the possibility of an indefinite postponement. At the same time, there is currently no deadlock at the Council with the parties actively negotiating the RRPs, and section 1(15)(c) does not offer any guidance on procedural matters, including on any specific deadline for the Council to consider and decide on the approval or disapproval of a plan of work. Section 3(11) of the Annex to the Part XI Agreement, containing the rules of procedure for decision-making, prescribes that the Council shall normally decide within 60 days unless the Council decides to provide for a longer period. The provision does not put a time limit on this extension beyond the normal 60 days. However, given the spirit of Part XI Agreement, it seems that such extension also cannot be indefinite but should rather be limited to a reasonable period that allows the Council to address whatever issues prevented it from deciding within the normal 60 days period. Given the lack of clarity on which procedure, especially the voting procedure, the Council will have to follow, it is reasonable to argue that the Council should request the Seabed Disputes Chamber of ITLOS for an advisory opinion and that this would imply an acceptable extension to the normal 60 days period.

Arguably, delaying a decision until at least the LTC has obtained more scientific knowledge enabling the establishment of binding environmental thresholds as instructed by Council decision ISBA/27/C/42, would also be legitimate.

3.3 What does a provisional approval entail? Circumventing the difficulties with the legal basis for postponing an approval

The problem of the legal basis for postponing a decision to approve an application of a plan of work can also be circumvented by a pragmatic approach. That is an approach relating to the conditions that can be ascribed to the conclusion of a contract following a provisional approval of a plan of work. Provisional approval of a plan of work does not amount to a final contract, nor does it enable an applicant to immediately commence exploitation. The ISA has a two-step process for an applicant to be able to commence activities. First, the Council must approve the plan of work, second, the Secretary-General negotiates and signs, at the indication of the Council, the exploitation contract. There is already a precedent at the ISA (pioneer investors) where the Council approved the plans of work for exploration on 27 August 1997, but the negotiation and conclusion of the contracts by the Secretary-General were postponed until after the exploration regulations for polymetallic nodules were concluded on 13 July 2000 (Report of the Secretary-General of the Authority under Article 166(4) of UNCLOS, ISBA/6/A/9). The same could be done in relation to provisional approval of plans of work submitted under section 1(15)(c) – provisionally approve them but postpone the conclusion of the contract until after the exploitation RRPs have been concluded by the Council and Approved by the Assembly. Another reason for postponing the conclusion of the contracts until after the exploitation RRPs have been approved relates to the fact that the Secretary-General cannot really negotiate elements of the contract that are dependent on those RRPs, particularly the financial terms.

3.4 What guidelines, directive, or criteria can the Council establish for the LTC?

As a technical body established to advise the Council, the LTC plays a crucial role in ensuring that decisions on plans of work are science-based, objective, and impartial, rather than being based on purely commercial or political interests. The LTC issues its recommendations solely on the grounds provided in Annex III to the UNCLOS, i.e. grounds relating to procedure matters, the qualification of applicants (financial and technical), and to the compliance with the relevant provisions of UNCLOS and RRPs adopted by the ISA, which include an assessment as to whether the environmental impact of the proposed activity is acceptable.

The problem at hand in the context of a submission under section 1(15) of the Annex to the Part XI Agreement is that, in the absence of concluded or provisionally adopted RRPs on exploitation, it may be difficult for the LTC to ascertain if the plan of work complies with all the relevant provisions of the Convention. It will also be difficult if not impossible for the LTC to objectively determine if the level of harm of proposed activities is acceptable until the LTC has managed to obtain more scientific knowledge enabling the establishment of binding environmental thresholds as instructed by Council decision ISBA/27/C/42 . This also means that the LTC may not be in the condition to provide the Council an appropriate recommendation.

The LTC exercises its functions in accordance with guidelines and directives that the Council may adopt (Article 163(9) of UNCLOS). It is, therefore, clear and accepted that the Council can establish guidelines and directives for the LTC, and that the latter, as an organ of the Council must abide by such guidelines and directives. The point of dissent is rather on the substance of said guidelines and directives, and the extent to which the Council may direct the LTC not to issue a formal recommendation of approval/disapproval. The ordinary meaning of the word 'directive' – an official or authoritative instruction on how to proceed or act – seen in tandem with the fact that the LTC is a subsidiary organ of the Council seems to give the latter a leeway to direct the way in which the LTC must discharge its functions. While this means that the Council can in fact provide substantial guidelines and directives,

it must still observe the limitations imposed by Article 158(4) of UNCLOS. That is, the Council must avoid taking any action, including via its guidelines or directives, which may derogate from or impede the LTC from exercising specific powers and functions conferred upon it. The LTC must be free to decide whether it recommends the approval/disapproval of a plan of work, or whether it even submits a formal recommendation at all since it is also generally accepted that the LTC is not obliged to do so as per Article 165(2)(b) of UNCLOS and section 3(11)(a) of the Annex to Part XI Agreement.

What the Council can do, is provide closer guidance to the LTC on what aspects the LTC needs to take into consideration to form an 'appropriate' recommendation. The Council may also request that the LTC makes additional recommendations to the Council on the matters foreseen in Article 165(2)(e)(h)(i) and (l) of UNCLOS. Rather than outright directing the LTC not to issue any recommendation, the Council can adopt a softer approach and recommend that the LTC refrain from issuing a formal recommendation if it finds that it cannot provide an 'appropriate' one.

4 The legal basis for a moratorium

A full moratorium/permanent ban on seabed mining is contrary to the object and purpose of the UNCLOS, (specifically Part XI and Annex III) and the Part XI Agreement, which are premised on the idea that mining operations will be conducted in the Area. UNCLOS and Part XI Agreement clearly outline that States and Authority need to cooperate towards the development of the resources of the Area for the benefit of mankind. This does not mean, however, that if States so wish, the provisions of these instruments cannot be changed to accommodate a full moratorium/permanent ban. However, since it would require amending UNCLOS and Part XI Agreement, it is highly unlikely. it is also hard to conceive of States adopting such an approach, even in the face of growing momentum in the moratorium movement.

While States should focus and employ their best efforts to conclude the RRPs, a temporary pause / precautionary pause is possible under the UNCLOS and the Part XI Agreement and desirable, particularly with exploitation RRPs not being concluded by 9 July 2023. That is, exploitation activities should not be allowed to commence until:

- the exploitation regulations, standards and guidelines are concluded and are adequate to ensure exploitation activities do not cause serious harm to the marine environment, and to ensure that proper inspection and enforcement can take place;

- the LTC has obtained more scientific knowledge enabling the establishment of binding environmental thresholds (in line with ISBA/27/C/42 Decision of the Council).

The UNCLOS and the Part XI Agreement are designed to facilitate mining activities, but they also include a relevant constraint, specifically the obligation to ensure the effective protection of the marine environment from harmful effects. Part XI Agreement acknowledges the importance of the protection and preservation of the marine environment and the growing concern for the global environment, and states in section 1(5)(g) of the Annex that the ISA was to concentrate on the adoption of RRPs before the approval of the first plan of work for exploitation. This reinforces the idea that the ISA should not approve a plan of work before the exploitation regulations are in place. Moreover, the Area and its resources are the common heritage of mankind which also vests in the ISA an obligation to manage the Area and its resources for the benefit of future generations. Allowing exploitation activities without adequate understanding of impacts of mining activities and of acceptable thresholds can be seen as going against ISA's wider management obligations including ensuring the effective protection and preservation of the marine environment. The ISA has also been operating on the basis of the precautionary approach incorporated into its Strategic Plan and Exploration Regulations. The Advisory Opinion also confirmed that the ISA is under an obligation to apply the precautionary approach to activities in the Area (Responsibilities and obligations of States with respect to activities in the Area, 1 February 2011, ITLOS Reports 2011, para. 131). To allow exploitation activities without enough

scientific evidence attesting that exploitation activities will not constitute a risk of serious harm to the marine environment would be at odds with the precautionary approach. While the polarization of the deep seabed mining debate also raises certain doubts on the veracity/correctness of certain claims on scientific knowledge, it is difficult to dismiss increasing calls from scientists pointing to significant knowledge gaps and to the risk of serious and even irreversible harm to the marine environment.

A longer period to reflect on/adjust ISA's institutional capacity and the need and functioning of subsidiary bodies is also recommended and would be in line with Section 1(3) of the Annex to the Part XI Agreement which calls for an evolutionary approach in these matters so that ISA can effectively discharge its responsibilities. The ISA has been facing significant and increasing criticism regarding transparency, legitimacy, capacity, objectivity, and lack of adequate science-based decision-making. While not all criticism is warranted, there are indeed issues that must be addressed. A period to make necessary adjustments ahead of exploitation activities would also allow for addressing some misconceptions/ problem areas.

5 Conclusions

Clarity in relation to the legal consequences of failing to meet the two-year deadline is indeed necessary. The second part of the ISA's 28th Session (10-21 July 2023) will be decisive in this, and the Council must strive to find agreement on the yet outstanding interpretation issues concerning section 1(15)(c). Consensus seems to be, however, difficult to achieve and recourse to the Seabed Disputes Chamber of ITLOS seems also very likely. At this session the Assembly, as the supreme organ of the ISA, will also be considering and adopting the strategic plan of the Authority for the five-year period 2024–2028. This will be a good opportunity to set high environmental goals that can guide the Council on how to proceed.

The interpretation of section 1(15)(c) is challenging with compelling arguments being made from both camps – in favor and against commencing activities before exploitation RRPs are in place. Nonetheless, this author sustains that there is some latitude to postpone a decision on approval of an application of plan of work. In effect, there is precedent at the ISA allowing for the postponement of the conclusion of a contract until the RRPs have been concluded. Furthermore, this author also sustains that while the Council cannot dictate a particular outcome in the LTC's recommendations it can nonetheless provide some direction as to what can be deemed as an 'appropriate' recommendation. At the same time, it must also be underlined that clarifying the effects of section 1(15)(c), while important, cannot distract from the primary focus of negotiations which is to complete sound and enforceable RRPs that can ensure the effective protection of the marine environment and that the Area resources are managed to the benefit of humankind.

As for a moratorium, this author sustains that while a complete ban/indefinite moratorium would be contrary to the UNCLOS and Part XI Agreement, there is some latitude, albeit limited, for a precautionary pause. Such a pause until the RRPs are concluded is the most responsible course of action given the potential of deep seabed mining to cause serious damage to the marine environment.

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