DEEP-SEA MINING: WHY NOW AND HOW? PART 2

23 FEBRUARY 2022 • ARTICLE

PART 2 – THE LEGAL AND REGULATORY FRAMEWORK AND ESG RISKS

As discussed in Part 1 of this series of articles, deep-sea mining has become a hot topic in recent months. Whilst Part 1 focussed on the practicalities of deep-sea mining and the numerous complex challenges that this presents, Part 2 examines the international legal and regulatory framework and the significant environmental, social and governance ("ESG") risks that deep-sea mining has the potential to create if not properly addressed through robust baseline and environmental impact assessment, regulation and enforcement.

> "It appears that the current international regulatory framework is not sufficiently sophisticated to regulate deep-sea mining and ensure that exploration and exploitation is being carried out in an environmentally sound way."

LEGAL CHALLENGES

Whilst there will undoubtedly be a host of legal challenges to be overcome in the context of, for example, structuring and taking security of these sorts of projects in different countries around the world with different legal systems, the purpose of this article is to focus on international regulatory framework around ESG matters.

It appears that the current international regulatory framework is not sufficiently sophisticated to regulate deep-sea mining and ensure that exploration and exploitation is being carried out in an environmentally sound way. Given the complexities of agreeing the UN Convention on the Law of the Sea ("UNCLOS") and that the United States has not ratified it (although recognising it as a statement of principle,) getting such international agreement when rare (and extremely valuable) resources are being discussed is already proving to be a challenge.

DRAFT EXPLOITATION REGULATIONS

The ISA, created by UNCLOS and charged with overseeing and administering a system for deep-sea mining, is responsible for regulating and granting contracts (also referred to as licences) to explore for and exploit deep sea mineral resources. Draft Exploitation Regulations ("DER") on exploitation of mineral resources in the Area (ISBA/25/C/WP.1) were published by the ISA's Legal and Technical Commission in 2019. As mentioned in Part 1 of our article, ISA is working to finalise the DER by 2023 which is perceived by many to be too rushed and premature. Draft standards and guidelines to complement the DER are still being developed.

The DER incorporate various key elements one would expect from an environmental protection perspective, such as provisions aimed at preserving the precautionary principle and the polluter pays principle as well as provisions for operators (also referred to as "contractors") to draw up a Plan of Work and a feasibility study before a licence can be granted. A Plan of Work must cover and append to a schedule of any Contract the Mining Workplan, Financing Plan, Emergency Response and Contingency Plan, Training Plan, Environmental Management and Monitoring Plan, Closure Plan, Health and Safety Plan and Maritime Security Plan amongst others.

The DER also contain provisions in relation to an "Environmental Performance Guarantee" and an "Environmental Compensation Fund" for the administering authority to tap into in order to fund any environmental remediation that cannot be met by the contractor in the event of "serious harm" (i.e. significant adverse change in the marine environment) resulting from exploitation activities.

An UNCLOS Article 145 obligation to "*ensure effective protection for the marine environment from harmful effects which may arise from such activities*" is enshrined in Regulation 2 of the DER. However, given the various regulatory and practical challenges involved in deep-sea mining and the scarcity of scientific knowledge about the degree of irreversible harm it can cause, we are likely to witness a surge in legal challenges being brought specifically for failures to meet Article 145. Furthermore, given the concerns of the wider scientific community as to the effects of deep-sea mining (and with electric vehicle manufacturers supporting a moratorium on such activities), ensuring there is no breach of the UNCLOS provisions in respect of the environment will continue to prove problematic. Whilst operators are obliged to produce an Environmental Impact Assessment ("EIA") before any works can commence, the baseline assessment which forms part of this is practically unattainable given the scarcity of baseline evidence currently available regarding deep-sea mining. This has been identified as a key weakness of the proposed DER regime. Any EIA produced by operators under the DER will likely fail to meet the EIA test.

Cases regarding deep-sea mining are already starting to emerge. During 2021, the New Zealand Supreme Court ruled in *Trans-Tasman Resources Ltd v Taranaki Whanganui Conservation Board* [2021] NZSC 127 that a marine consent for seabed mining cannot be granted if the decision-maker is not satisfied that material harm will be avoided, remedied or mitigated so that overall the harm is not material. Furthermore, it is also known that an EIA by seabed mining contractor Nauru Offshore Resources, Inc. for its proposed collector test does not include the required environmental baseline, underlining that the scientific knowledge does not yet exist. There is strong argument therefore that absence of an environmental baseline makes it impossible to predict, avoid or monitor impacts to the environment from the activity.

ENFORCEMENT AND PENALTIES

"Whilst operators are obliged to produce an Environmental Impact Assessment ("EIA") before any works can commence, the baseline assessment which forms part of this is practically unattainable given the scarcity of baseline evidence currently available regarding deep-sea mining."

Section 3 of the DER lays down some basic provisions for enforcement and penalties to provide for instances when the conditions of an exploitation contract may be breached by contractors. In the event of breach, the authority has the power to issue a "Compliance Notice" requiring the contractor to take such action as may be specified in the "Compliance Notice". If the contractor fails to comply with the "Compliance Notice" then the Council (executive arm of ISA) has the power to either suspend or terminate the exploitation contract or to impose upon a contractor a monetary penalty "proportionate to the seriousness of the violation". No starting point or range is provided in the DER for the likely levels of penalties. The penalties will likely be determined on a case by case basis. Importantly, the DER do not make it a criminal offence for the contractor or the individuals in the position of power charged with overseeing the mining process to cause irreversible harm to marine environment and biodiversity. The compliance bar, therefore, is set rather low for an activity that has the potential to cause significant and irreversible harm to the seabed and its surrounding marine life.

SO, WHAT'S NEXT?

The ISA is intent on adopting regulations that would allow the undersea mining of cobalt, nickel and other metals to go ahead by July 2023 on the basis that the Pacific Island nation of Nauru in 2021 triggered a so-called 'two year rule' under UNCLOS which requires the ISA do so. This is notwithstanding protests from a number of countries and the fact that at least 622 scientists along with government ministries and agencies from 37 IUCN member countries are calling for a moratorium on deep-sea mining. Leading companies including Volkswagen, BMW Group, Volvo Group, Google, Samsung SDI, Scania, Philips, Patagonia and banks such as Triodos Bank, have also all called for a moratorium on deep-sea mining and pledged to keep deep-sea minerals from their supply chains until the risks to biodiversity are better understood. Fishing industry associations across Europe have also called for a moratorium.

WHO WILL FINANCE THIS?

Finding a solution to these questions, and then committing the capital to build the assets, will also be a challenge. Given the various concerns over the environment, will investors and debt financiers be willing to make the required equity investments and loans, or for that matter will insurers be prepared to insure such ventures?

It may prove difficult or even impossible to justify investing in deep-sea mining given investors and financiers own increasingly stringent internal climate and biodiversity commitments, ESG KPIs, obligations under the Equator Principles risk management frameworks and the more recent EU Taxonomy which categorically prohibit investments in and financing of projects which have the potential to cause irreversible environmental damage and biodiversity loss. Conversely, there is much to be said for investors and lenders who are committed to those principles being involved, rather than let others pursue these projects with a minimal compliance mindset.

Only time will tell whether seabed mining solutions should be put to bed once and for all or whether more studies into the feasibility of underwater mining will eventually make the process safe enough for the marine world to be exploited in the future. As noted in Part 1, there may also be a balance to be met in future between the environmental impact of potentially higher grade deep-sea mining projects and that of lower grade surface or underground mines, particularly when pursuing an overall trend towards greener energy. There is one thing we can be certain of and that is that the debate on whether or not deep-sea minerals are essential to meeting the decarbonisation challenge is far from over.

KEY CONTACTS

JAN MELLMANN
PARTNER • LONDON

T: +44 20 7814 8060

jmellmann@wfw.com

TOBY ROYAL
PARTNER • LONDON

T: +44 20 7814 8014

troyal@wfw.com

DAISY EAST
PARTNER • LONDON

T: +44 20 7863 8990

deast@wfw.com

NICK WALKER
PARTNER • LONDON

T: +44 20 3036 9822

nwalker@wfw.com

VALENTINA KEYS
COUNSEL • LONDON

T: +44 20 3314 6957

vkeys@wfw.com