DEEP SEABED MINING INSIGHTS: POTENTIAL PITFALLS WITH A "PRECAUTIONARY PAUSE" TO DEEP SEABED MINING

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"The United Nations Convention on the Law of the Sea is a single package that was finely balanced to enable its widespread acceptance."

This article forms part of WFW's Deep Seabed Mining Insight Series, which draws on the firm's unparalleled experience and expertise in deep seabed mining matters to provide insightful, timely and commercially relevant updates on deep seabed mining legal and regulatory issues. Upcoming topics include the role and rights of States sponsoring deep seabed mining contractors, the obligations and rights of deep seabed mining contractors, and deep seabed mining dispute settlement options. Previous topics include a preview of the International Seabed Authority's July 2023 session and an overview of the International Seabed Authority and its regulatory processes.

INTRODUCTION

As the International Seabed Authority (the "Authority") concluded Part II of its 28th Session, a small number of member States continue to call for a "precautionary pause" or "moratorium" on moving to the exploitation phase of deep seabed mining activities. This article examines what proponents of a "pause" are suggesting, examines the legality of such proposals, and sets out potential remedies for other member States, including Sponsoring States and contractors that may suffer loss or damage if such a proposal is adopted.

BACKGROUND

The United Nations Convention on the Law of the Sea ("UNCLOS" or the "Convention") is a single package that was finely balanced to enable its widespread acceptance. Part XI of the Convention, read together with the 1994 Agreement on the Implementation of Part XI (the "1994 Agreement"), regulates deep seabed mining in the area beyond the limits of national jurisdictions (the "Area").

Under these provisions, exploration and exploitation activities in the Area can only be done pursuant to an approved plan of work in the form of a contract with the Authority. The Authority is also required to issue further rules, regulations and procedures ("RRPs") to govern the various activities that can take place in the Area.

The Authority adopted RRPs for exploration over a decade ago. Contractors have since undertaken and invested in substantial exploration activities pursuant to those RRPs with the expectation of moving to the exploitation phase of deep seabed mining. However, despite lengthy discussion of detailed drafts, the Authority is yet to adopt RRPs for exploitation.

THE REQUIREMENT TO ADOPT RRPS FOR EXPLOITATION AND TO CONSIDER AND PROVISIONALLY APPROVE PLANS OF WORK FOR EXPLOITATION

"However, in the absence of RRPs for exploitation, the 1994 Agreement still permits contractors to submit applications for plans of work for exploitation and requires the Authority to consider and provisionally approve such applications."

As explained in our previous article, following the Republic of Nauru's notification in 2021 that a contractor sponsored by Nauru intended to apply for a plan of work for exploitation, the 1994 Agreement legally required the Authority to adopt all necessary RRPs for exploitation by 9 July 2023.

The Authority and its member States failed to meet this deadline and as a result are in breach of their legal obligations under the 1994 Agreement. However, in the absence of RRPs for exploitation, the 1994 Agreement still permits contractors to submit applications for plans of work for exploitation and requires the Authority to consider and provisionally approve such applications based on UNCLOS (including the norms it contains), terms and conditions contained in the Annex to the 1994 Agreement, any provisionally adopted RRPs, and the principle of non-discrimination among contractors.

WHAT IS BEING SUGGESTED – "BAN", "MORATORIUM", "PAUSE"?

Notwithstanding the clear legal obligations referred to above, there are three proposals aimed at preventing exploitation activities in the Area:

- first, an open-ended and outright ban on deep seabed mining and ceasing development of associated regulatory work to enable such an industry;[1]
- second, a moratorium on deep seabed mining, the adoption of relevant RRPs, and the granting of contracts for exploitation until certain conditions are met, such as that the "*environmental, social and economic risks are comprehensively understood*", "[a]*lternative sources for the responsible production and use of the metals also found in the deep sea have been fully explored and applied*", "*there is broad and informed public support for deep seabed mining*", and the Authority is reformed;[2] and
- third, a conditional moratorium or "precautionary pause" until certain regulations for deep seabed mining exploitation activities are completed, or "*defer*[ring] *commencement of deep-sea mining until it can be carried out without risking significant harm to the marine environment*".[3]

"To interpret the Convention's environmental protection provisions as prohibiting exploitation activities contradicts the clear and explicit language of other parts of the Convention and the 1994 Agreement."

ARE THESE PROPOSALS JUSTIFIED UNDER UNCLOS?

UNCLOS does not contain any express exception that enables member States or the Authority to: (i) fail to adopt RRPs for exploitation by the 9 July 2023 deadline; or (ii) refuse to consider and provisionally approve an application for a plan of work for exploitation based on the criteria contained in the 1994 Agreement.

Instead, proponents have made two related arguments to justify pausing or deferring consideration of applications for plans of work for exploitation:

- first, that Article 145 and Part XII of the Convention mandate the protection of the marine environment and that this requires the deferral of exploitation until member States can be certain the environment is appropriately protected; and
- second, that there is a broader requirement under customary international law requiring States to apply the "precautionary principle" or "precautionary approach", as contained in the Rio Declaration, when implementing the requirements in the Convention. This principle/approach is said to apply where "*there are threats of serious or irreversible damage*" and specifies that "*a lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation*".[4]

"If the Authority and its member States were to adopt a "precautionary pause" or "moratorium" on the consideration of applications for exploitation, this will have serious ramifications for contractors and their Sponsoring States and would amount to a breach of their rights under the Convention regime."

These arguments are both legally and factually contentious.

Legal issues with arguments for a precautionary pause

Legally, the Convention contains a range of obligations upon member States to protect and preserve the marine environment, most notable in Article 145 and Part XII. These have been key to guiding the Authority's development of the regulatory regime for deep seabed mining.

The Convention also contains explicit obligations regarding exploration and exploitation activities in the Area (as noted above). These clearly contemplate the scenarios within which such activities are to take place and the regulations that will apply to them.

Importantly, the Convention does not require the provisional adoption and approval of RRPs for exploitation before applications for exploitation can be considered and approved. Indeed, the 1994 Agreement explicitly enables, requires and empowers the Authority's consideration and approval of applications for plans of work for exploitation even where the RRPs for exploitation activities have not been adopted.

As such, to interpret the Convention's environmental protection provisions as prohibiting exploitation activities contradicts the clear and explicit language of other parts of the Convention and the 1994 Agreement. This would be contrary to the general principles of treaty interpretation, particularly where it is possible and appropriate to read the provisions harmoniously (i.e., that Article 145, Part XII and other provisions, guide the application and implementation of Part XI to ensure that there is effective protection of the marine environment in the conduct of activities in the Area).

It should also be noted that applications for exploitation will be assessed based on (among other things) UNCLOS, including its environmental protection provisions and their underlying norms. As such, UNCLOS's assessment process for applications already ensures proper and adequate consideration of the protection and preservation of the marine environment in relation to each contractor's proposal.

There is also no consensus regarding the status of the "precautionary principle" or "approach" as a rule of customary international law. Current jurisprudence and commentary consistently note that it is not a binding rule of international law, and there remain several States that object to the existence of such a rule. As such, it cannot be used to interpret or override the clear terms of the Convention and the 1994 Agreement.

Factual issues with arguments for a precautionary pause

Factually, contractors and other States have pointed to the significant and lengthy scientific research that has been done as part of the exploration of the Area. This includes testing of mining methods; investigation of their impact on the marine environment, deep sea species and ecosystems; and the development of management plans to reduce the impact of mining activities.

Thus, the validity of assertions regarding the state of scientific knowledge regarding the impact of exploitation on the marine environment – and the ability for that environment to be protected and preserved – is also highly contested.

"The Convention contains a range of compulsory and binding dispute settlement procedures available to Sponsoring States and contractors to enforce their rights and seek remedies."

POTENTIAL LEGAL RAMIFICATIONS OF A "PRECAUTIONARY PAUSE" OR "MORATORIUM"

If the Authority and its member States were to adopt a "precautionary pause" or "moratorium" on the consideration of applications for exploitation, this will have serious ramifications for contractors and their Sponsoring States and would amount to a breach of their rights under the Convention regime.

Sponsoring States enjoy a range of rights under the Convention as full member States. Key among these is to be able to share equitably in the benefits to be derived from activities in the Area and to see these benefits realised in accordance with the Convention. Similarly, contractors are guaranteed rights under the Convention, customary international law, and also their specific contracts with the Authority. This includes rights against unlawful expropriation and fair and equitable treatment ("FET") by the Authority.

If the Authority refused to consider applications for plans of work for exploitation until certain RRPs are adopted or at all, this would explicitly breach the rights of Sponsoring States to have the Authority assess and provisionally approve such applications.

It also likely amounts to an unlawful expropriation or a breach of FET in relation to contractors, who have legitimately relied upon their well-founded expectations that member States and the Authority would act in accordance with their Convention obligations. By refusing to consider applications for exploitation, the Authority may in effect be expropriating the value of contractors' current investments in the Area under exploration contracts without proper compensation. The adoption of any such decision is also likely to be considered arbitrary, unfair and in bad faith, given the clear terms of the 1994 Agreement.

REMEDIES FOR SPONSORING STATES AND CONTRACTORS

The Convention contains a range of compulsory and binding dispute settlement procedures available to Sponsoring States and contractors to enforce their rights and seek remedies.

> "If the Authority and its member States were to put in place an unjustified "precautionary pause" to the implementation of Part XI, this would have serious implications for the unity of the UNCLOS package as a whole and could expose the Authority and its member States to the risk of dispute settlement proceedings."

If the Authority and its member States continue to breach the Convention, Sponsoring States (or indeed any member State) would be able to seek redress for that breach against the Authority or specific member States through:

- proceedings before the Seabed Dispute Chambers, or a special chamber of the International Tribunal on the Law of the Sea ("ITLOS") in accordance with Section 5 of Part XI of the Convention;
- non-binding conciliation in accordance with Article 284 and Annex V of the Convention;
- ad hoc international arbitration in accordance with Section 2 of Part XV and Annex VII of the Convention; and
- subject to certain jurisdictional requirements, proceedings before the International Court of Justice or ITLOS in accordance with Section 2 of Part XV of the Convention.

Contractors may also be able to enforce their rights as against the Authority via a dispute before the Seabed Disputes Chamber, pursuant to Article 187 of the Convention, regarding:

- their contractual rights vis-à-vis the Authority;
- any acts or omissions of the Authority directed towards the contractor;
- a refusal to grant a contract or legal issue in the negotiation of a contract; and

- the Authority's liability for damages caused by its wrongful acts.

Contractors are also able to make use of commercial arbitration under the UNCITRAL Arbitration Rules to pursue disputes regarding their contractual rights.

The key remedies available upon the finding of a breach would be:

- an order for specific performance that the Authority, and its member States, must comply with their obligations under the Convention, including to consider and provisionally approve any submitted applications for exploitation; and
- compensation for damages suffered, including material and moral damages.

CONCLUSION

UNCLOS is a finely balanced package that contains numerous protections for environmental matters. This includes:

- obliging the Authority to develop and adopt regulations on environmental protection; and
- the detailed process for consideration and approval for applications for plans of work for exploitation, during which member States can ensure proposed activities meet the requirements of the Convention and the 1994 Agreement.

However, the Convention and the 1994 Agreement do not contain any general, overriding exception enabling member States to nullify its clear and express provisions regarding the establishment of an exploitation phase for deep seabed mining.

Some proponents of pausing the development of deep seabed mining agree that "a permanent ban on deep sea mining would currently be inconsistent with States' obligations under UNCLOS and the mandate of the ISA". However, even a temporary "deferral" or "precautionary pause" would give rise to many of the same legal issues as a permanent ban given the difficulty in finding a legal basis for it in UNCLOS.

Instead, UNCLOS envisages the use of regulations, consideration of specific applications, and on-going regulatory oversight, as the means to ensure effective protection of the marine environment. If the Authority and its member States were to put in place an unjustified "precautionary pause" to the implementation of Part XI, this would have serious implications for the unity of the UNCLOS package as a whole and could expose the Authority and its member States to the risk of dispute settlement proceedings.

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Sydney Partner Nathan Eastwood is an authority on public international law and one of only a handful of internationally recognised experts on deep seabed mining and the Law of the Sea. He currently acts for and advises contractors, sponsoring States, investors and applicant contractors concerning their activities in the Area. Sydney Special Counsel Devon Whittle has deep experience and expertise advising on complex and high-profile international negotiations and public international law issues, including relating to deep seabed mining. Sydney Senior Associate Iuliia Samsonova advises private entities and States on international disputes and public international law matters, including on deep seabed mining. Bangkok Associate Aaron Murphy regularly advises clients on public international law matters, including rights under investment treaties and issues related to deep seabed mining and the Law of the Sea.

FOOTNOTES

[1] "Press Release: France Calls for Ban on Deep-Sea Mining at COP27", Deep Sea Conservation Coalition, 7 November 2022, available at: https://savethehighseas.org/isa-tracker/2022/11/07/press-release-france-calls-for-ban-on-deep-sea-mining-at-cop27/.

[2] "DSCC Position Statement on Deep Seabed Mining", Deep Sea Conservation Coalition, July 2019, available at: https://savethehighseas.org/wp-content/uploads/2019/08/DSCC-Position-Statement-on-Deep-Seabed-Mining_July2019.pdf.

[3] Prof. Zachary Douglas KC, et al, "Opinion: In the Matter of a Proposed Moratorium or Precautionary Pause on Deep-sea Mining Beyond National Jurisdiction", 10 February 2023, available at: https://www.pewtrusts.org/-/media/assets/2023/03/deep-sea-mining-moratorium.pdf, para. 13.

[4] Rio Declaration on Environment and Development, A/CONF.151/26 (Vol. I), 12 August 1994, available at: https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_CONF.151_26_Vol.I_Declaration.pdf, Principle 15.

[5] Prof. Zachary Douglas KC, et al, "Opinion: In the Matter of a Proposed Moratorium or Precautionary Pause on Deep-sea Mining Beyond National Jurisdiction", 10 February 2023, available at: https://www.pewtrusts.org/-/media/assets/2023/03/deep-sea-mining-moratorium.pdf, para. 109.

KEY CONTACTS

NATHAN EASTWOOD
PARTNER • SYDNEY

T: +61 2 9276 7613

NEastwood@wfw.com

DEVON WHITTLE
SPECIAL COUNSEL • SYDNEY

T: +61 2 9276 7624

dwhittle@wfw.com

IULIIA SAMSONOVA
SENIOR ASSOCIATE • SYDNEY

T: +61 2 9276 7625

isamsonova@wfw.com

AARON MURPHY
ASSOCIATE • BANGKOK

T: +66 2 665 7812

amurphy@wfw.com

JAN MELLMANN
PARTNER • LONDON

T: +44 20 7814 8060

jmellmann@wfw.com

SUMEET MALHOTRA
PARTNER • SINGAPORE

T: +65 65519133

smalhotra@wfw.com

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