THE REPUBLIC OF NAURU OFFICIALLY REQUESTS COMPLETION OF DEEP SEABED EXPLOITATION REGULATIONS

The deep seabed mining (DSM) industry is growing rapidly, expanding beyond national jurisdictions and onto the high seas. However, the legal framework facilitating exploitation is yet to be finalised. The Republic of Nauru is no longer willing to wait, and has formally requested that the exploitation framework be finalised within two years.

Key issues

- Deep seabed mining is a rapidly growing sub-sector of the resources industry and involves complex rules of both public international law and domestic regimes.
- The exploitation regulations governing DSM activities are yet to be finalised.
- The Republic of Nauru has formally requested under the relevant international treaty that the executive arm of the International Seabed Authority finalise the exploitation regulations within two years.
- There is no word yet whether this will be achieved. If it is not, debate will ensue as to whether the relevant treaty requires provisional assessment of applications for plans of work to carry out exploitation.

The regulator of DSM in extra-territorial waters – the International Seabed Authority (Authority) – is yet to promulgate final exploitation regulations. These critical regulations, along with accompanying standards and guidelines, are collectively known as the (Mining Code). The timing for finalising the exploitation regulations has now reached a critical juncture. The relevant international treaties are the United Nations Convention on the Law of the Sea (UNCLOS) and the Agreement Relating to the Implementation of Part XI of the Convention (1994 Agreement). On 25 June 2021, the Republic of Nauru (Nauru), formally requested under Section 1, Paragraph 15 of the 1994 Agreement that the executive arm of the Authority, the Council, complete the adoption of the exploitation regulations (Section 1 Request). The Section 1 Request has significant implications for all DSM participants. Following the Section 1 Request, the Council now has two years to finalise the exploitation regulations (and any other relevant parts of the Mining Code that are not yet finalised). If the Council does not finalise the exploitation regulations after two years, prospective exploitation contractors and the Authority will enter unchartered waters: the 1994 Agreement contemplates 'provisional' approval of the prospective exploitation contractor's application for a 'plan of work'. The question many DSM participants will be asking is – will the Council finalise the exploitation regulations in two years and, if not, what happens next?

WHY NAURU?

Before turning to the potential effect of the Section 1 Request, Nauru's involvement bears some attention. Nauru is an island located in the South Pacific and is one of the world's smallest countries, with a population of just over 12,000 people. Nauru's participation in DSM can be traced back to 2011, when Nauru Ocean Resources Inc (**NORI**), a Nauruvian company under the effective control of Nauru, signed an exploration contract with the Authority. This contract gave NORI exploration rights to search for polymetallic nodules in four blocks covering 74,830 square km in the Clarion-Clipperton Fracture Zone. Fast

forward to today, NORI is now a subsidiary of The Metals Company (formerly DeepGreen). Nauru retains involvement in NORI's DSM activities by virtue of the innovative DSM system under UNCLOS, which requires that prospective contractors that wish to explore, or exploit resources obtain a certificate of sponsorship from a State party and remain under their effective control. In the case of NORI, Nauru is the sponsoring State.

WHAT HAPPENS NEXT?

The first question many DSM participants will be asking is – will the Council complete the elaboration of the rules, regulations and procedures relating to exploitation within the prescribed period i.e. two years? The answer to this is not clear. On 29 June 2021, a press release issued by the Authority announced the Section 1 Request and reiterated that draft exploitation regulations were prepared by the Legal and Technical Commission of the Authority following broad public consultations and were submitted to the Council for its consideration in July 2019. The Authority also stated that it is anticipated that the Council will resume its work on the draft exploitation regulations before the end of 2021. Thus, it remains to be seen if the Council will or can commit to completing the elaboration of the exploitation regulations within two years.

If the exploitation regulations are not finalised within two years, all eyes will be on Section 1(15)(c) of the 1994 Agreement, which provides:

> *The Authority shall elaborate and adopt* […] *rules, regulations and procedures* […] *to facilitate the approval of plans of work for exploration or exploitation, in accordance with the following subparagraphs:*
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> *(c) If the Council has not completed the elaboration of the rules, regulations and procedures relating to exploitation within* [two years] *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* [UNCLOS] *and any rules, regulations and procedures that the Council may have adopted provisionally, or on the basis of the norms contained in* [UNCLOS] *and the terms and principles contained in* [the 1994 Agreement] *as well as the principle of non-discrimination among contractors.*'

While prospective exploitation contractors may be optimistic that Section 1(15)(c) provides a fast-track route to exploitation, a number of issues remain. The first and perhaps more important issue is that Section 1(15)(c) contemplates the provisional approval of a 'plan of work' for exploitation. Generally speaking, under UNCLOS and the 1994 Agreement, a 'plan of work' is distinct to the exploitation contract itself. Specifically, under the current draft exploitation regulations, the 'plan of work' contains information regarding the applicant's proposed exploitation activities. The purpose of a plan of work is for the applicant contractor to demonstrate that its proposed exploitation activities will comply with UNCLOS and the Mining Code, allowing the Authority to enter negotiations with the applicant contractor for a contract for exploitation. DSM participants will be keen to equate provisional approval of a 'plan of work' with the provisional award of an exploitation contract, but this may not be the case. As a result, a provisionally approved 'plan of work' may not lead to an exploitation contract under Section 1(15)(c). The second issue is that the 'provisional' approval of a 'plan of work' may take many years: the Authority's secretary-general Michael Lodge recently stated in an interview with BBC News that "[e]*ven under the current draft regulations* […] *any application for exploitation is likely to be a lengthy process that has multiple checks and*

balances."[1] This also begs the question: what principles under UNCLOS and the 1994 Agreement are applicable, and how does the Council 'provisionally' approve the draft exploitation regulations such that they can be applied under Section 1(15)(c)?

COMMENT

Presently, 31 prospecting and exploration permits have been issued to contractors for DSM of polymetallic sulphides, polymetallic nodules and cobalt-rich crusts in waters outside national jurisdiction. While to date the regulatory architecture for exploitation has been a work in progress, Nauru's Section 1 Request has the potential to trigger the commencement of the exploitation phase of DSM in the next two years. The Section 1 Request comes at a time when the DSM market is attracting increasing levels of investment from private parties, and predictions show that the shift toward low-carbon technology will cause shortfalls in supply of land based strategic metals needed for the 'green transition' such as copper, cobalt and nickel bringing the vast resources of the seabed into sharp commercial focus. All these factors strengthen the case that DSM finally coming of age may be in the not too distant future. For those who are opposed to DSM, Nauru's Section 1 Request will be of concern as it has the potential to accelerate the activation of the DSM system in circumstances where there is ongoing debate about its environmental impact and merits.

[1] David Shukman, ' Deep sea mining may be step closer to reality' (BBC News, 2 July 2021), Accessed 5 July 2021 at: https://www.bbc.com/news/science-environment-57687129

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