CLIMATE CHANGE LAW.
CURRENT PERSPECTIVES.

Deep seabed mining:
The critical juncture that we should all be talking about

Authors
Amy Sander
Sean Aughey
Deep seabed mining:  
The critical juncture that we should all be talking about

The potential mining of minerals from our ocean seabed looms. Whilst some urge to press forward to unlock these ‘batteries in a rock’ as an alternative to terrestrial mining (e.g. here), a growing chorus warns of “driving blindly” into an environmental catastrophe (e.g. here).

The International Seabed Authority (‘the Authority’) is the authority mandated under the United Nations Convention on the Law of the Sea (‘UNCLOS’ or ‘the Convention’) to organize and control activities in the seabed beyond the limits of national jurisdiction. Currently, pursuant to regulations it has issued, it has approved 31 exploration contracts. But with respect to exploitation, no regulations have been issued and, accordingly, no contracts approved. The drafting of those regulations is raising a whole host of thorny issues and their finalisation seems a long way off. So why the hullabaloo this summer? Because on 9 July 2021 Nauru triggered a ‘two-year rule’ which provides that if the exploitation regulations are not issued by 9 July 2023, the Authority “shall none the less consider and provisionally approve” a plan for exploitation work. With this fork in the road, there are reports of one company aiming to start production by the end of next year (see here), whilst a plethora of other voices are calling for a deferral to any commencement of exploitation activity (e.g. here, here, here and here).

This post provides an update on the latest from the Authority’s latest session, which concluded late last month, with respect to exploitation, reflecting on the fundamental issues that must now be grappled with. Before turning to that update, an overview of the relevant legal framework is instructive.
The legal framework

The legal framework is set out in Part XI of UNCLOS, Annex 3 of UNCLOS, and the 1994 Agreement relating to the Implementation of Part XI of UNCLOS ("the 1994 Agreement") (noting the Annex to the 1994 Agreement (comprising various sections) forms an integral part of that Agreement: 1994 Agreement, Art. 2). The seabed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction, are defined in UNCLOS as ‘the Area’ (Art. 1(1)). The mineral resources in the Area at or beneath the seabed include polymetallic nodules, polymetallic sulphides and cobalt-rich ferromanganese, and are referred to as “minerals” when recovered from the Area (UNCLOS, Art 133(a)-(b)). Significantly, the Area and its resources are the “common heritage of mankind” (UNCLOS, Art. 136), with the Area’s minerals only to be “alienated” in accordance with Part XI of UNCLOS and the “rules, regulations and procedures of the Authority” (UNCLOS, Art 137(2)-(3); Annex 3, Art. 3).

UNCLOS Article 156 established the Authority, of which all States Parties are ipso facto members (Art. 156(2)). The Authority comprises a Secretariat, Assembly, Council and also a Legal and Technical Commission ("LTC") (that “shall exercise its functions in accordance with such guidelines and directives as the Council may adopt”: UNCLOS, Art. 163(9)). As indicated above, the Authority is “the organization through which States Parties shall, in accordance with this Part, organize and control activities in the Area” (UNCLOS, Art. 157(1), see also Arts. 150(a) and 153(1)), noting “activities in the area” is defined as “all activities of exploration for, and exploitation of, the resources of the Area” (UNCLOS, Art. 1(3)). The Authority is expressly mandated to inter alia provide for “the equitable sharing of financial and other economic benefits derived from activities in the Area” (UNCLOS, Art. 140(2)), and promote, encourage and carry out marine scientific research in the Area “for the benefit of mankind as a whole” (UNCLOS, Art. 143(1)-(2)).

Accordingly, the Authority is mandated to issue rules, regulations and procedures (‘RRPs’) with respect to exploration and exploitation of resources. The RRP’s are first formulated by the LTC (UNCLOS, Art. 165(2)(f)), then adopted with provisional application by the Council (Art. 162(2)(o)) with final approval by the Assembly (Art. 160(2)(f)).

Activities in the area must be carried out in accordance with a formal work plan approved by the Council, acting on the recommendation of the LTC (if given) (UNCLOS, Arts. 153(3), 165(2)(b); 1994 Agreement s. 3(11)(a); Council March 2023 Decision, paras. 2-3), with a two thirds majority required for the Council to disapprove a recommendation (1994 Agreement s. 11(a)). The work plan must be in conformity with UNCLOS and relevant RRP’s (Annex 3, Arts. 3(4)) and (6(3)). If it does so conform the Authority “shall approve” it (except in limited circumstances) (Annex 3, Art. 6(3); 1994 Agreement s 3(11)) and accord the operator the exclusive right to exploit the area covered by the plan (Annex 3, Art. 16).

The general conduct of States in relation to the Area “shall be” in accordance with Part IX of UNCLOS as well as the principles embodied in rules of international law in the interests of maintaining peace and security and promoting international cooperation and mutual understanding (UNCLOS, Art. 138). States Parties also owe an obligation to protect and preserve the “marine environment” (defined in Art. 1(3)) (see UNCLOS Part XII, in particular Arts. 192-194 on the core substantive obligations and Arts. 204-206 on the obligations to undertake environmental assessments of planned activities and to monitor ongoing activities), and this is expressly provided for with respect to the conduct of the Authority including as regards the adoption of RRP’s and approval process and operations (UNCLOS Arts. 145, 165(2)(f), 162(2)(w) and 162(2)(x); Annex 3, Art. 17(1) (b)(xii) and (f); 1994 Agreement, s. 1(5)(g) and (k); the Authority’s position before ITLOS here, paras. 33 and 57).

The current position

As indicated above, the Authority has adopted three sets of exploration regulations covering the prospecting and exploration for: polymetallic nodules (2000 and revised in 2013); polymetallic sulphides (2010); and cobalt-rich ferromanganese crusts (2012) (see here), pursuant to which some 31 exploration contracts were subsequently agreed with 22 contractors. Notably, those regulations expressly adopt the precautionary principle as one of the “fundamental policies and principles” and provide that “prospecting shall not be undertaken if substantial evidence indicates the risk of serious harm to the marine environment” (Regulation 2). The Authority...
has interpreted the requirement under the Convention to ensure protection for the marine environment from “harmful effects” as a protection against “serious harm”, which it has defined as “any effect from activities ... which represents a significant adverse change in the marine environment determined according to the rules, regulations and procedures adopted by the Authority on the basis of internationally recognized standards and practices” (UNCLOS, Art. 145; Regulation 1(3)(f), 31(1)-(2); here, para. 31; cf. UNCLOS, Art. 162(2)(x) establishing a specific threshold of “serious harm”). The exploration regulations state that they may be supplemented by further rules, regulations and procedures, in particular on the protection and preservation of the marine environment (Regulation 1(5)).

In exercise of its powers under UNCLOS, the Authority has also adopted one Regional Environmental Management Plan (REMP) (for the Clarion-Clipperton Zone (“CCZ”)), characterising this as “one of the measures appropriate and necessary to ensure effective protection of the marine environment of that part of the Area” (ie, under UNCLOS, Part XII), and other REMPs are in development (UNCLOS, Arts. 145 and 162(1); 2012 Council Decision adopting the REMP for the CCZ). Although it is unclear whether the REMP falls within the definition of RRPs, the requirement for a work plan to conform with the Convention arguably includes conformity with measures adopted by the Authority which it considers are necessary to comply with Convention obligations (Annex 3, Arts. 3(4), 6(3)).

With respect to exploitation, the picture is much more up in the air, but the pressure is on following the triggering of the ‘two-year rule’. That rule is somewhat buried in the 1994 Implementation Agreement, at section 1(15)(c). Section 1(15) states that if a request is made by a State (whose national intends to apply for approval of a plan of work for exploitation) for the Council to elaborate and adopt RRPs, including with respect to exploitation, the Council “shall” complete the adoption of such RRPs “within two years of the request” and that:

“c. [if the Council has not completed the elaboration of the [RRPs] relating to exploitation within the prescribed time and an application for approval of a plan of work for exploitation is pending, it shall not 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.”

Nauru made the relevant request pursuant to section 1(15)(c) on 25 June 2021 (effective date 9 July 2021), with the two years having therefore expired on 9 July 2023. Draft exploitation regulations (as well as supporting standards and guidelines) have been on the Authority’s table since 2016 (see here), but they continue to be under consideration by the Council, with various working groups established to focus on specific (difficult and unresolved) aspects. One working group is addressing the hugely significant issue of the protection and preservation of the environment. Whilst the working group has recently stressed the importance of “setting high standards” (see here at Annex para. 10), the current paucity of scientific knowledge with respect to deep-sea species and ecosystems (see e.g. here and here) raises serious questions about how, inter alia, adequate environmental baselines and/or thresholds can be set at this stage. In a ‘Briefing Paper’ dated 29 June 2023, the Council’s President outlined that at its July 2023 session the Council would avoid “a paragraph-by-paragraph reading” of the draft regulations but instead “attempt to identify the conceptual elements that need to be resolved section by section”, with “delegations to retain the maximum flexibility in terms of working methodologies and in finding creative ways to resolve outstanding matters”.

In short, the draft regulations are far from being “completed” for the purposes of section 1(15)(c). As to how section 1(15)(c) is to be interpreted and applied in these circumstances, the Council’s March 2023 session identified certain points on which there was an “emerging consensus” (see the Council Decision of 31 March 2023 (‘the March Council Decision’) at para. 7, and para. 24 of the Briefing Note referred to therein). Those points, which provide genuinely helpful and significant clarification, are as follows.

First, that section 1(15)(c) “does not impose an obligation on the Council to automatically approve a pending
application for a plan of work"; the Council has the obligation to consider a plan of work but has the capacity to decide whether or not to provisionally approve it. The March Decision also expressly noted that the LTC had “no obligation” to make a recommendation with respect to a work plan (at para. 3); perhaps a veiled indication to the LTC to refrain from making any such recommendation at this fraught stage, although the question of whether the Council has the power to direct the LTC to act in this way is a key issue dividing States Parties (see here, para. 14).

Second, that “Article 145 and other provisions of UNCLOS form part of the legal sources and criteria, mentioned in [section 1(15)] subparagraph (c), based on which the Council shall consider and provisionally approve a plan of work”. This is clear marker that the obligations to protect and preserve the environment are of central importance.

Third, that “[p]rovisional approval of a plan of work under subparagraph (c) is not the same as, and does not amount to, final approval. A provisionally approved plan of work does not equate to a contract for exploitation”. However, there was divergence in views on a whole raft of key issues, including (as set out at para. 7 of the Council March Decision): whether there is “a legal basis for the Council to postpone (i) the consideration and/or (ii) the provisional approval of a pending application for a plan of work under subparagraph (c), and if so, under what circumstances” and “what guidelines or directive 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 Outstanding Issues”).

Subsequently, “informal intersessional dialogue” has been held with a view to “continuing making progress in the areas of divergence”, with Council sessions in July 2023 devoted to discussing the outcome of that dialogue and a Briefing Note dated 7 July 2023 summarising the different views on the Outstanding Issues.

The Authority’s latest session ended on 28 July without the elaboration and adoption of the exploitation regulations and without the calls for a deferral of exploitation activity being heeded. On 21 July, the Council adopted a pair of modest decisions. The first decision provides a timeline for the adoption of the regulations, which is now planned for 2025 (21 July 2023 Council Decision on timeline, para. 1). The second decision, reiterates that commercial exploitation “should not be carried out in the absence of” regulations but decides only “to consider further actions that the Council may take if an application for a plan of work for exploitation were to be submitted” before that time and that, if this does come to pass, the Council shall as a matter of priority seek to reach a “common understanding” on the effects of the two-year rule and reach a decision “including the possible issuing of guidelines or directives, without prejudice to the [LTC’s] mandate” (July 2023 Council Decision on the two-year rule).

The absence of any decision on the effects of the two-year rule indicates disagreement within the Authority. Notably, a proposal to include on the Assembly’s agenda the supplementary item of a general policy on the protection of the marine environment, including in consideration of the effects of the two-year rule, was reportedly defeated (see here and here; Assembly Rules of Procedure, rules 11-12).

What next?

The Authority’s decision to kick the can a little further comes with a growing risk that it might run out of road. While there appears to be agreement that the exploitation regulations should not be rushed and that greater scientific knowledge on the impacts of deep sea mining is needed, there also appears to be nothing in the legal framework to stop a mining company from submitting an application, thereby forcing a decision on the interpretation of the two-year rule and its application in a given case, if not a more general decision on whether a deferral of all exploitation activity is required.

There have been suggestions (no doubt inspired by the earlier advisory opinion on Activities in the Area, as well as the current advisory proceedings on climate change) that the Council could ask the Seabed Disputes Chamber of the ITLOS to provide guidance on the legal effect of the two-year rule (see eg 7 July Briefing Note, para. 8(c); UNCLOS, Art. 191). It is unclear whether there would be the necessary consensus (ie, absence of any formal objection) on the desirability of this and on the specific question (Activities in the Area advisory opinion, paras. 34-36). It is also unclear whether, in practice, the need for
consensus could be circumvented by seeking a request from the Assembly in relation to a proposal before it (see UNCLOS, Art. 159(10); Assembly Rules of Procedure, rules 61 and 65). The Council’s latest decision to seek to decide on the issue as a matter of priority could be read as weighing against drawn out advisory proceedings other than as a last resort.

States Parties will need to continue considering carefully the extent and implementation of their obligations (acting both collectively through the Authority and individually) to protect and preserve the marine environment in light of developing scientific knowledge. While some delegations reportedly underscored the need for alignment with the recently concluded BBNJ Agreement which contains more detailed provisions on environmental assessment, including “strategic environmental assessments” (see here: BBNJ, Art. 41 ter), this question would assume greater practical relevance if UNCLOS States Parties were to accept the provisional application of the BBNJ pending its entry into force (BBNJ, Art. 62).

No doubt, sponsoring States will also be alive to the risk that adopting a position that is adverse to the sponsored company could lead to costly proceedings under the applicable sponsorship agreement and/or applicable investment treaties.

* * *

The authors recently advised a State on issues related to deep-sea mining. They are instructed in the ongoing advisory proceedings on climate change before the ITLOS and the ICJ (Sam Wordsworth KC, Ben Juratowitch KC and Naomi Hart are also instructed in those proceedings). Amy Sander is a co-author of the fourth edition of Law of the Sea (Churchill, Lowe and Sander, 2022).
Deep seabed mining:
The critical juncture that we should all be talking about

AUTHORS

Amy Sander

Sean Aughey

This note is provided free of charge as a matter of information only. It is not intended to constitute, nor should it be relied upon as constituting, legal advice, and no responsibility is assumed in relation to the accuracy of the contents of the same as regards anyone choosing to rely upon it.