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Navigating Legal Remedies: Investment Protection before the International Tribunal for the Law of the Sea in case of Inaction by the International Seabed Authority

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With the increasing scarcity of resources on Earth, in particular the increasing demand for the raw materials that are needed for technologies to combat climate change, legal issues relating to the exploitation of the raw materials of the deep seabed are gaining importance. Even though the United Nations Convention on the Law of the Sea ("UNCLOS") has provided a legal regime for the prospection, exploration and exploitation of the deep seabed and respective arbitration and other dispute settlement since 1982, it has only recently gained practical significance. For some years now, it has been realistic to pursue deep-sea mining profitably; however, this raises questions regarding the framework conditions and consequences, especially when it comes to protection of the environment. At the same time, deep-sea mining will undoubtedly be an area of potential dispute resolution – arbitration and court proceedings – in international law (see, e.g., *Harrison/Pecoraro*; *Sun*; *Lodge*). More recently, attention has been paid to the question whether companies investing in deep-sea mining can invoke legitimate expectations in terms of the investment protection standard of fair and equitable treatment if the elaboration of the legal details of deep-sea mining is unduly delayed by the work of the International Seabed Authority ("ISA"). In January 2025, an official letter to the ISA from a number of companies that are contractors for the exploration of potential mining areas has come to light, in which the companies at least hint at pursuing claims for damages.

However, little attention has been paid to the question of what arbitration and/or court proceedings are available to a company if it submits an exploitation application today, without the finalized regulations for deep-sea mining in place, under the assumption that such an application will not be processed by the ISA within a reasonable period of time (if at all). This scenario is extremely realistic –Nauru Ocean Resources, Inc. ("NORI") has held an exploration license for manganese nodules in the Clarion Clipperton Zone, the area with the highest deposits, since 2011. NORI has announced that it will submit an application to exploit these manganese nodules on June 27, 2025. However, the necessary detailed regulations for deep-sea mining will not be in place by this date; the adoption of the relevant rules by the ISA has been delayed since July 2023. Thus, the question arises as to whether a company such as NORI has a claim to the granting of a license, how far such a claim would extend, and whether NORI could activate arbitration and/or international court proceedings in order to obtain a license to exploit the relevant raw materials.

The Unfinished Mining Code

The legal basis for mining activities on the deep seabed, which are defined in a legal relationship between contractors and the ISA, is essentially established by means of the Mining Code. This code contains regulations for each of the three main processes of deep-sea mining: prospection, exploration, and exploitation. However, so far only regulations on prospection and exploration have been introduced. Final regulations on exploitation have not yet been made. However, Annex Section 1 No. 15(c) of the Agreement to the Implementation of Part XI of UNCLOS ("IA") applies here:

> "15. The [International Seabed] Authority shall elaborate and adopt, in accordance with article 162, paragraph 2(o)(ii), of the Convention, rules, regulations and procedures based on the principles contained in sections 2, 5, 6, 7 and 8 of this Annex, as well as any additional rules, regulations and procedures necessary to facilitate the approval of plans of work for exploration or exploitation, in accordance with the following subparagraphs: (…)
>
> (c) If the Council has not completed the elaboration of the rules, regulations and procedures relating to exploitation within the prescribed time 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 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."

On the basis of this provision, contractors who have already been granted exploration contracts with the ISA can submit an application for approval of a work plan for the extraction of raw materials on the deep seabed. Based on the wording "shall […] consider", the Council of the ISA (see Art. 161 et seq. UNCLOS) ("Council") is obliged to examine the application. Failure to process the application would be incompatible with the purpose of the standard. The Council must apply "norms contained in [UNCLOS] and the terms and principles contained in this Annex as well as the principle of non-discrimination among contractors" and is therefore not reliant on detailed rules in the Mining Code – which do not yet exist. The draft "consolidated text" of the Exploitation Rules is not applicable, as it is not yet complete and not in force.

Discretion of Council and Standard of Review

However, the duty of the Council to decide on a request for confirmation of a work plan is limited. As is seen in the wording of Annex Section 1 No. 15(c) IA ("consider"), there is only a duty to exercise proper discretion. In other words, the Council has a margin of discretion that cannot be reviewed unless it is arbitrary. Ultimately, the contractors are entitled to a decision free of discretionary errors. The basic conditions for the confirmation of a work plan are set out in Annex III, Art. 6 II of UNCLOS, and the applicant must fulfill the requirements and procedures set out in Annex III, Art. 4 of UNCLOS. These requirements are identical to those of the Exploration Regulations for polymetallic nodules ("Exploration Regulations-PMN"). If a company already has

a confirmed work plan for exploration, this should not present any difficulties. Conflicting principles of UNCLOS and the IA are not apparent. According to Annex III, Art. 10 of UNCLOS, and Regulation 24 No. 2 of the Exploration Regulations-PMN, a company that already has an area reserved for exploration takes priority over other applicants in that area. However, this right only applies if the company has complied with the work plan. Compliance can be assumed as long as the Council has not taken action against the company under Regulation 24 No. 2 of the Exploration Regulations-PMN. NORI attracted attention in 2022 when an overflow of sediment water happened during an exploration test. But the case was assessed by the Compliance Assurance and Regulatory Management Unit of the ISA Secretariat, which did not identify any non-compliances.

Moreover, it remains questionable whether the Council is subject to a decision deadline. While a deadline is not explicitly provided for, previous experience with the work plans on exploration shows that the Council examines applications in the Annual Sessions. Accordingly, it makes sense for an application to be submitted in June of this year, as the Council's Annual Session Part II is scheduled to take place in July 2025.

Proceedings before the Seabed Disputes Chamber ("SDC") of the International Tribunal for the Law of the Sea ("ITLOS")

A company could raise a claim for a decision on a submitted work plan for exploitation before the SDC of ITLOS in accordance with Art. 187(d) of UNCLOS. However, per the wording of the provision, it only covers the rejection of a contract or a legal issue arising during the negotiation of the contract with a future contractual partner. Since the other conditions set out in Art. 187(d) of UNCLOS must be assumed to be met, it is only a question of whether the failure to deal with an application corresponds to one of these alternatives set out in Art 187(d) of UNCLOS. In the event of a rejection of a work plan, legal protection under Art. 187(d) of UNCLOS would apply. If no legal protection under Art. 187(d) of UNCLOS were granted in the event of inaction (i.e. neither rejection nor approval), the Council could thus undermine the legal protection of NORI or any other company at its own discretion. This cannot be the purpose of the rule, nor of the legal protection system of UNCLOS. Therefore, there is much to suggest that Art. 187(d) of UNCLOS is applicable and offers legal protection for companies wishing to engage in exploitation in case of inaction of the Council of ISA.

Limited Jurisdiction of SDC

Finally, it is not yet clear what influence Art. 189 of UNCLOS has on the possibility of legal protection under Art. 187(d) of UNCLOS. This provision constitutes a restrictive regulation with regard to the jurisdiction of the SDC. Among other issues, the SDC's jurisdiction does not cover the exercise of discretion by the ISA, meaning that it may not substitute its discretion for that of the ISA. At the same time, this restriction of jurisdiction is not comprehensive; rather, it is relaxed by three exceptions in the third sentence of Art. 189 of UNCLOS. The purpose of the provision is to strike a balance between the ISA's interest in protecting its prerogative of assessment and the contractors' interest in being subject to adequate legal protection.

In this case, the second exception, which addresses "excess of jurisdiction or misuse of power" by the ISA, could be relevant. A failure to act by the ISA could be one of these alternatives. The ISA

here has jurisdiction over the processing of the application. If the ISA simply decides not to do so, the result would constitute an undercutting of jurisdiction, i.e. exceeding in the negative sense. In addition, the ISA has the power to organize activities in the mining area. If the ISA remains inactive, this power is deliberately not exercised, which can be regarded as an abuse.

If, on the other hand, non-processing is not covered by this exception, Art. 189 of UNCLOS would still not preclude the competence of the SDC. The reason for this is that the SDC, by finding a lack of discretion on the part of the ISA despite a claim under Annex Section 1 No. 15(c) of the IA, does not override the decision-making prerogative. Rather, such a judgment would only be a finding that the ISA had simply not acted, i.e. a call for action.

Conclusion

The SDC is therefore competent to decide on the issue of failure to exercise discretion in reasonable time regarding an application of approval of a work plan for exploitation. Accordingly, it very well may be that we see the first-ever case before the SDC on the failure to act by the Council in the near future.

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This entry was posted on Tuesday, March 25th, 2025 at 8:53 am and is filed under Deep Sea Mining, Dispute Resolution, Dispute Settlement, International arbitration, International tribunals, Investment

protection, ITLOS, UNCLOS
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