Current Legal Developments

International Seabed Authority

What Are the Next Steps for the International Seabed Authority after the Invocation of the ‘Two-year Rule’?

Pradeep A Singh | ORCID: 0000-0002-2944-8541
Research Centre for European Environmental Law, Faculty of Law, University of Bremen, Germany
pradeep@uni-bremen.de

Abstract

In late June 2021, the Republic of Nauru invoked a legal provision known as the ‘two-year rule’ at the International Seabed Authority (ISA), which effectively obliges the Council of the ISA to complete the elaboration of the mineral exploitation regulations within the prescribed time of two years, that is, by 9 July 2023. This article provides an update on recent developments at the ISA since the invocation of the two-year rule, outlining six options that appear to be available to the ISA Council in response to the invocation of the rule.

Keywords

Introduction

The invocation of a legal provision known as the ‘two-year rule’ at the International Seabed Authority (ISA) in late June 2021 attracted considerable attention as it signified that the commercial exploitation of the mineral resources of the deep seabed could soon become a reality despite the many uncertainties and debates surrounding the conduct of this nascent activity.\(^1\) In an earlier issue of this journal, Willaert explained the circumstances in which the Republic of Nauru invoked Section 1(15) of the Annex to the 1994 Agreement Relating to the Implementation of Part XI of the UN Convention on the Law of the Sea\(^2\) (hereinafter ‘Section 1(15)’) on the ground that its national sponsored entity, Nauru Ocean Resources Inc. (NORI), intends to submit an exploitation application to the ISA.\(^3\) In effect, Section 1(15) obliges the ISA Council to complete the elaboration and adoption of mining exploitation regulations within two years from when a request is made by a member State whose national intends to submit an exploitation application, failing which, the Council would nonetheless have to consider any such pending applications despite the absence of regulations.\(^4\) This article will discuss recent developments that have occurred since the invocation of Section 1(15), followed by a brief examination of six options or pathways that appear to be available to the ISA Council as it moves forward in light of the invocation of Section 1(15).

\(^1\) The open access publication of this article was made possible, thanks to financial support from the J.M. Kaplan Fund. The author would like to thank Dr Aline Jaeckel and Hannah Lily for their helpful comments on an earlier draft of this article. See, e.g., the following: H Reid, ‘Pacific island of Nauru sets two-year deadline for U.N. deep-sea mining rules’ Reuters, 29 June 2021; available at https://www.reuters.com/business/environment/pacific-island-nauru-sets-two-year-deadline-deep-sea-mining-rules-2021-06-29/; accessed 5 October 2021; K Lyons, ‘Deep-sea mining could start in two years after Pacific nation of Nauru gives UN ultimatum: The International Seabed Authority has two years to finalise regulations governing the controversial industry’ The Guardian, 30 June 2021; available at https://www.theguardian.com/world/2021/jun/30/deep-sea-mining-could-start-in-two-years-after-pacific-nation-of-nauru-gives-un-ultimatum; accessed 5 October 2021; D Shukman, ‘Deep sea mining may be step closer to reality’ BBC News, 1 July 2021; available at https://www.bbc.com/news/science-environment-57687129; accessed 5 October 2021.


Background

Established under Part XI of the UN Convention on the Law of the Sea 1982 (LOSC) and comprising 167 member States and the European Union, the ISA is responsible for organising and controlling mineral exploration and exploitation activities in seabed areas beyond the limits of national jurisdiction, otherwise known as ‘the Area’. While mineral exploration has been ongoing for some two decades, commercial exploitation activities are yet to begin. The ISA has been working on developing regulations that would facilitate exploitation activities since 2014 (which would collectively comprise the ‘Mining Code’). Formal negotiations premised on an advanced draft commenced at the Council in 2019. At its meeting in February 2020, the Council agreed to establish three informal, thematic working groups to facilitate further negotiations that would convene at the next meeting of the Council. However, the Council’s efforts to progress discussions on the draft regulations came to an abrupt halt due to the global spread of the COVID-19 pandemic. In late June 2021, after some 15 months of inactivity concerning the exploration regulations, the Republic of Nauru invoked Section 1(15).

Recent Developments since the Invocation of the ‘Two-year Rule’

On 13 July 2021, the members of the Council that belong to the African Group delivered a written submission to the ISA stating their concerns about the invocation of Section 1(15). The submission unequivocally states that the African Group considers certain issues, including the financial terms of exploitation contracts, an appropriate mechanism for the equitable sharing of benefits and the operationalisation of the ISA’s own mining arm (known as ‘the Enterprise’), as priority matters that it expects to be resolved alongside the negotiations of the exploitation regulations within the prescribed time.
In late August 2021, the ISA Secretary-General issued a report on the status of the draft exploitation regulations with a proposed roadmap. The report noted as follows: ‘In order to meet this timeline and to ensure that a robust and holistic regulatory framework is adopted by the Council on or before 9 July 2023, it is clearly necessary for the Council to commit more time and financial resources to accelerate work on the draft regulations.’ The proposed roadmap suggests that the Council meets for three weeks in February and March 2022 (instead of the usual one week), another three weeks in July 2022 (instead of the usual one week), and with the possibility to add an additional part for the Council to meet for a further two weeks in late 2022. In late September 2021, the ISA Secretariat announced that the Council and the Assembly will meet in person (with certain restrictions, for example, member State delegations limited to two representatives and ISA observer delegations limited to one representative) to resume the 26th session from 6–10 December and 13–15 December 2021 respectively. A subsequent press release from the ISA Secretariat in early October 2021 clarified that the proposed Council meeting in December 2021 ‘will not allow for the resumption of negotiations on the text of the [draft exploitation regulations], whereby the Council will instead ‘focus its attention on taking decisions on pending items of its agenda which require action before the end of the 26th session [including the] consideration of a proposed roadmap and schedule of meetings of the Council in 2022 and 2023.’ Thus, from the ISA Secretariat’s point of view, it is clear that the Council should exert all means necessary to adopt the exploitation regulations within the prescribed time, namely, by 9 July 2023.

---

12 ISBA/26/C/44.
13 Ibid., para 13.
14 Ibid., para 14 and Annex III.
15 ISA Press Release, ‘Dates of 26th Session of International Seabed Authority Council and Assembly Announced’ (20 September 2021) available at https://www.isa.org.jm/index.php/news/dates-26th-session-international-seabed-authority-council-and-assembly-announced; accessed 5 October 2021. However, as communicated via a recent announcement from the ISA Secretariat in late November and owing to renewed concerns over the COVID-19 pandemic, the said meetings will now take place as a hybrid format, with delegations having the option to attend in-person, participate virtually, or even both.
However, it seems unrealistic to expect that the Council will be able to meet, negotiate and achieve consensus on the exploitation regulations and all other related matters that remain outstanding within the confines of the prescribed time.\textsuperscript{17} The multilateral negotiation of legal texts typically requires physical meetings to ensure dynamic exchanges and informal consultations. Given the travel uncertainties and health implications that currently persist across the globe due to the COVID-19 pandemic, physical meetings might not be possible, at least in the near future. Indeed, on 13 October 2021, ten member States belonging to the Latin American and Caribbean Group of the ISA delivered a written submission to the ISA in response to the invocation of Section 1(15),\textsuperscript{18} expressing their view that ‘because of the importance and technicality of the legal framework for exploitation activities, the Council must negotiate, agree and adopt it at in-person meetings, and not virtually’.\textsuperscript{19} According to them, ‘it is paramount that an adequate and effective regulatory framework be completed before the commencement of exploitation activities; and consequently, ‘consideration must be given to the reality that the Council might not be able to conclude the development and adoption of the required rules, regulations and procedures within the two-year period’\textsuperscript{20} In these circumstances, it would seem to be both prudent and necessary to consider what other options might actually be available to the member States of the ISA going forward.

**Options for the ISA**

In the author’s view, there appears to be six potential options at the disposal of the ISA member States, particularly through the Council, as the ISA moves forward in the light of the invocation of Section 1(15).\textsuperscript{21} While some of these pathways may overlap with each other to a limited extent and could be considered in combination, they each have distinct, stand-alone characteristics.

\textsuperscript{17} P Singh, ‘The two-year deadline to complete the International Seabed Authority’s Mining Code: Key outstanding matters that still need to be resolved’ (2021) 134:104804 *Marine Policy* 1–10.
\textsuperscript{18} ISBA/26/C/47.
\textsuperscript{19} Ibid., para 6.
\textsuperscript{20} Ibid., paras 9, 10.
\textsuperscript{21} These options form the viewpoint of the author and are listed in no particular order. It is conceded that some options may be viewed less favourably than others. Yet, all options should be debated nonetheless.
**Option 1: Proceed to Meet the Prescribed Time**

As anticipated in the Secretary-General’s report, one option would be for the Council to proceed in its work to complete the elaboration of the draft exploitation regulations within the prescribed time. As noted above, accomplishing this would appear to be a rather insurmountable task even under ordinary circumstances, let alone under the COVID-19 pandemic conditions (which continues to prevent the Council from meeting in person to proceed with negotiations). Moreover, although the draft exploitation regulations are at the forefront of the matter at hand, other critical matters also need to be resolved simultaneously.

While rushing the regulatory process to meet the two-year deadline could lead to a weakened set of regulations, it is also entirely plausible for the Council to develop more stringent environmental or procedural requirements that would apply at least to the initial phase of exploitation activities. For example, the Council could consider embracing the proposal by Germany that some degree of test mining should be made compulsory during the exploration stage and that the approval of an application of a plan of work for exploitation should be made contingent upon the outcomes of such test mining projects. It also seems possible for the Council to design a framework that imposes a staged (require activities to start small-scale before being allowed to up-scale) or staggered (only allowing a handful exploitation contracts that are spatially and temporally distanced from each other to commence at the same time at first) approach to exploitation activities. Likewise, this may entail the introduction of a transitional phase between exploration and exploitation (i.e., provisional exploitation contract phase), whereby an additional approval process is anticipated before such provisional contracts can be converted into...
tenured ones. Alternatively, stringent requirements could be imposed on contractors within the exploitation phase itself, that is, subjecting them to another layer of mandatory environmental appraisals and approval processes from the ISA before being allowed to commence commercial production.

**Option 2: Proceed Notwithstanding the Deadline by Taking as Much Time as Needed**

Under the second scenario, the Council could simply reaffirm its pre-existing approach and decide that the Council must be allowed as much time as necessary to design a full-proof system for exploitation notwithstanding the invocation of Section 1(15). In other words, all issues and concerns relating to the system for exploitation must be fully ventilated as a package, that is, that the building block approach to regulatory development is respected and ‘nothing is agreed until everything is agreed’, with ample opportunity given to all stakeholders to contribute to the regulatory process.

Apart from that, it is important to note that just because Section 1(15) has been invoked, this does not necessarily mean that an exploitation application will be submitted in the second half of 2023 (which the Council would be required to consider). In fact, there is no compulsion under international law for NORI to submit such an application or for the Republic of Nauru to agree to sponsor them despite having invoked Section 1(15). Reluctance to submit an application may occur if, for instance, there is a subsequent change in circumstances within the NORI set-up or business arrangements, the relevant technical or environmental requirements (e.g., equipment or mining systems, logistics or preparation of environmental impact assessments) may not be satisfied, or commercial exploitation may be considered unjustified due to market conditions. In the circumstances, it is quite possible that the Council will


30 That said, apart from NORI, any other operator might also decide to submit an application of its own, which the Council would have to consider in the absence of exploitation regulations after the expiry of the deadline.
have more time at its disposal to complete the Mining Code than the invocation of the two-year rule suggests.

On the one hand, it may be called into question whether the Council, legally speaking, can justify ignoring or disregarding the two-year deadline to complete the elaboration and adoption of the exploitation regulations. In this respect, Section 1(15)(b) explicitly provides that the Council shall ‘complete the adoption of such rules, regulations and procedures within two years of the request’. On the other hand, the ISA bears the responsibility to act on behalf of and oversee that mining activities are conducted for the benefit of humankind as a whole (Articles 137(2) and 140(1) of the LOSC), to ensure the effective protection of the marine environment from the harmful effects of mining activities (Article 145 of the LOSC), to exercise such necessary control over mining activities in the Area (Article 153(3) of the LOSC), and to adopt rules, regulations and procedures that give effect to the exercise of its functions under Part XI of the LOSC (Article 17 of Annex III to the LOSC). If the Council is not able to definitively ensure all of the above within the prescribed time, it is arguable that adopting an incomplete, less effective or weak set of regulations simply to meet the two-year deadline would be a dereliction of duty. Moreover, Section 1(15)(c) does recognise the very possibility that the Council may not be able to meet the deadline, thereby suggesting that the Council could indeed proceed to take the necessary amount of time needed to develop the exploitation regulations despite the invocation (albeit with the caveat that any exploitation applications submitted after the prescribed time would still have to be considered by the Council despite the absence of the said regulations).

In practical terms, however, it may be possible for Council members to informally negotiate with current sponsoring States (including Nauru) in order to reach an understanding whereby none of them would submit or sponsor an exploitation application until and unless the regulations and other critical outstanding matters have been agreed upon. Simply put, if no exploitation applications are submitted pending the adoption of the exploitation regulations, the implications under Section 1(15)(c) would not arise and the pressure on the Council to meet the deadline would be alleviated. Such an understanding seems possible to achieve (at least in the short term), given the lingering COVID-19 pandemic and the inability of the Council to meet in person, as well as the probability that existing exploration contractors may not actually be ready to submit exploitation applications over the next two years. The prospect of this option becoming a reality seems promising, especially if the Council is

31 For a broad overview of the key outstanding matters that still need to be resolved, see Singh (n 17).

THE INTERNATIONAL JOURNAL OF MARINE AND COASTAL LAW 37 (2022) 152–165

Downloaded from Brill.com 04/11/2024 09:30:26PM
via Open Access. This is an open access article distributed under the terms of the CC BY 4.0 license.
https://creativecommons.org/licenses/by/4.0/
prepared to commit to act with a renewed sense of urgency to progress with the regulations once the pandemic situation improves.

**Option 3: Adopt a Provisional (Temporary) Set of Regulations for the Time Being and Continue to Work on Developing a System for Exploitation**

Under the third pathway, the Council may decide to adopt a provisional set of regulations that would apply on a temporary or interim basis. This option becomes particularly relevant if the prescribed time is running out for the Council, and the Council is made aware or speculates that an exploitation application will soon be submitted. Adopting a provisional or interim set of regulations would allow such applications to still be subjected to certain additional requirements (apart from those listed under the LOSC and the 1994 Implementing Agreement). In this respect, Section 1(15)(c) provides that in considering pending applications, reliance shall also be placed on rules, regulations and procedures ‘that the Council may have adopted provisionally’.

Therefore, the Council may wish to develop a provisional set of regulations specifically for the purpose of entertaining applications that come under Section 1(15)(c), especially if it appears that the Council is not able to agree on the full set of regulations. This would allow for the incorporation of key matters (such as requirements relating to the assessment of applications, environmental responsibilities, standard terms and obligations, as well as any other matter that the Council could achieve consensus on) to feed into the assessment and decision-making processes at the Council during this interim period. More importantly, in accordance with the precautionary approach, the Council could choose to incorporate stricter environmental or procedural requirements for this interim period while the development of a more comprehensive and robust system for exploitation that is capable of withstanding the test of time continues.

**Option 4: Complete Elaboration of the Regulations within the Prescribed Time but Not Adopt Them Yet, or Adopt Them with Conditions Precedent in Relation to Their Subsequent Entry into Force or Application**

The fourth option carves out the scenario in which the Council completes the elaboration of the exploitation regulations within the prescribed time, but decides to postpone the adoption process to a later date or to adopt them with conditions that would delay its application or entry into force. In this regard, it is noted that Section 1(15)(c) begins with the words ‘if the Council has not completed the elaboration of the rules, regulations and procedures relating
to exploitation within the prescribed time ...’. Such wording suggests that the rest of sub-paragraph (c) would not come into operation if the Council has successfully completed the elaboration of the exploitation regulations within the prescribed time but delays or postpones its adoption, or subjects its entry into force to certain conditions precedent. While the main paragraph and sub-paragraph (b) of Section 1(15) requires the Council to complete both the elaboration and adoption of the said regulations within the prescribed time, the consequences for failing to meet the deadline (as stipulated under sub-paragraph (c)) appear to only apply to the inability to complete the elaboration, and not the adoption, of the same.

Indeed, this pathway would certainly give effect to the explicit decision of the Council that all necessary standards and guidelines should be completed before the exploitation regulations are adopted. Since such standards and guidelines are essential to give effect to the exploitation regulations, it is critical for these to also be agreed upon alongside the regulations as part of a ‘package’. Similarly, other crucial matters, such as the establishment of an appropriate mechanism for the equitable sharing of benefits, could be introduced as conditions precedent to the entry into force of the exploitation regulations.

**Option 5: Adopt a ‘Precautionary Pause’ or Moratorium on Exploitation Activities**

Considering that the adoption of the exploitation regulations would pave the path for commercial-scale mining activities to commence, this option entails the postponement of further deliberations on the exploitation regulations or impeding the commencement of exploitation activities for the time being through the adoption of a ‘precautionary pause’ or moratorium. It would appear that while a precautionary pause could be pursued by more informal means at the Council, that is, akin to the ‘building blocks’ and ‘nothing is agreed until everything is agreed’ understanding already in place, the imposition of a moratorium would necessarily invoke formal decision-making processes at the ISA. In terms of the latter, depending on its nature and resemblance to an indefinite or permanent ban, this may even require an amendment to the LOSC (as opposed to agreeing on a precautionary pause in order to close current knowledge gaps and safeguard that the environmental responsibilities of the ISA are met, which should not raise any issues of nonconformity with the LOSC). While the political will to impose a formal moratorium on exploitation

---

32 ISBA/25/C/37, para 5.
33 Ibid. See also, Singh (n 17).
activities at the ISA appears to be lacking as things currently stand, the invocation of the ‘two-year rule’ may breathe some life into efforts to embrace a pause at the ISA and slow the transition to exploitation.

The legal basis for introducing a precautionary pause or moratorium can be drawn from the ISA’s responsibility to ensure the effective protection of the marine environment from the harmful effects of mining activities (Article 145 of the LOSC) as well as derived from the application of the precautionary approach.34 Given the significant lack of scientific knowledge and prevailing environmental uncertainties, it is arguable that exploitation activities should not be allowed to commence until existing gaps in scientific knowledge and prevailing environmental uncertainties are drastically and systematically reduced, effective management measures and enforcement mechanisms are put in place, and the effective protection of the marine environment from the harmful effects of mining activities can be truly guaranteed.35 As underscored by the ISA Secretary-General in 2018, ‘[e]nvironmental protection is front and centre of the [ISA’s] responsibilities under [the LOSC]. Seabed mineral exploitation cannot be permitted to proceed unless the [ISA] is satisfied that rigorous environmental safeguards are in place through globally applicable regulations that are binding upon member States’.36 Not surprisingly, in an immediate reaction to the invocation of Section 1(15), the Deep Ocean Stewardship Initiative, an accredited observer at the ISA, cautioned that ‘the two-year rule will not allow much of the relevant scientific research currently underway to be completed, communicated, and taken into account, preventing critical scientifically informed decision making. Two years is not a sufficient period for acquisition of the necessary scientific research to inform best environmental practices’.37

34 With respect to the application of the precautionary approach in relation to the work of the ISA, it is now trite that the ISA is ‘under an obligation to apply the precautionary approach in respect of activities in the Area’, which ‘applies in situations where scientific evidence concerning the scope and potential negative impact of the activity in question is insufficient but where there are plausible indications of potential risks’. See Responsibilities and Obligations of States with respect to Activities in the Area, Advisory Opinion, 1 February 2011, ITLOS Reports 2011, p. 10, at paras 125–135, especially para 131. On this, see Section 1(5) of the Annex to the 1994 Agreement (n 2), in particular, paragraphs (g), (h), (i) and (k).

There have been external calls in recent times demanding the imposition of a moratorium on mineral exploitation at the ISA. This includes a call by the European Parliament and, most recently, a call by the International Union for Conservation of Nature’s World Conservation Congress. Meanwhile, earlier this year, a large group of leading marine scientists and policy experts called for an immediate pause to the transition from exploration to exploitation at the ISA ‘until sufficient and robust scientific information has been obtained to make informed decisions’. It should be stressed, however, that as of yet, no member State of the ISA has proposed or advocated for the imposition of any form of a ban, moratorium or precautionary pause on exploitation activities at the ISA to date, although the positioning of member States on this matter may obviously change with the passage of time.

**Option 6: Explore the Available Judicial Avenues**

Finally, the Council or ISA member States may wish to explore the judicial avenues that may be available in terms of the interpretation or application of Section 1(15). This option involves submitting a request for an advisory opinion from the Seabed Disputes Chamber of the International Tribunal for the Law of the Sea (SDC-ITLOS) in accordance with Article 191 of the LOSC, or to commence contentious proceedings to challenge the invocation of Section 1(15) under Article 187 of the LOSC. The first avenue could possibly be appealing to some Council members, and there has already been one precedent of a request for an advisory opinion in 2010–2011. While advisory opinions issued by the SDC-ITLOS are non-binding, they are extremely useful in providing legal clarity. Such a request, which can also be submitted by the Assembly, could seek clarification on the interpretation of Section 1(15) and shed light on the legal implications of its application. That said, even if such a request is deemed

---


42 ISBA/16/C/13.

feasible, another matter to consider at the Council is the timing of when to make such a request. In this respect, it may be wise not to seek immediate clarifications on the legal consequences of the Council not being able to meet the prescribed timeline, especially bearing in mind the real possibility for the Council members to first exercise some political diplomacy and pragmatically explore the potentialities of the pathways explored above.

The second avenue, that is, commencing contentious proceedings to challenge the very invocation of Section 1(15) with the intention to set aside the operation of the prescribed time of two years, seems to be a much less palatable option. Although there appears to be some legal grounds to challenge the invocation of Section 1(15), which has been discussed elsewhere, pursuing this option could create a divide between ISA member States while the chances of achieving some form of success seem low in any case. Conversely, the ISA may find itself being the subject of contentious legal proceedings, for example, brought against it by the Republic of Nauru (or NORI), if it elects to ignore the invocation of Section 1(15) and abstains from advancing the regulations within the prescribed time, or if the Council declines to consider (or decides to disapprove) an exploitation application subsequently submitted thereunder.

Conclusion

Negotiating and reaching consensus at the Council on the exploitation regulations and other aspects that are intrinsically related to the system for exploitation activities in the Area by July 2023 would seem to be an extremely challenging task, particularly in the light of the ongoing COVID-19 pandemic. It remains to be seen how the Council will respond to the invocation of Section 1(15) and design a system of exploitation that works for the benefit of humankind and fully conforms to the environmental and other normative requirements under the LOSC and the 1994 Implementing Agreement. While it is not expected that the Council itself will impose a moratorium (option 5) or commence contentious proceedings to challenge the invocation of section 1(15) (option 6) in the near future, it also seems unlikely that the Council will be able to proceed to finalise the exploitation regulations and the necessary standards and guidelines to accompany them, as well as resolve all other

---

intrinsically related issues, within the prescribed time (option 1). Therefore, it would appear that the more likely pathways moving forward involve attempting to broker an understanding or political compromise among ISA member States to defer the sponsorship or submission of exploitation applications to allow sufficient time for negotiations and achieving consensus on the regulations at the Council (option 2), adopting a provisional set of regulations to specifically deal with pending applications under section 1(15)(c) while continuing to negotiate the exploitation regulations at the Council (option 3), or adopting the regulations with certain conditions precedent in relation to their entry into force (option 4). As the ISA moves forward in the light of the invocation of Section 1(15) amidst the ongoing COVID-19 pandemic, it is sincerely hoped that the range of options highlighted above will be thoroughly considered. Finally, irrespective of whichever option or combinations thereof that the ISA chooses to pursue, the ISA should also consider opportunities to make progress on advancing the regulations through virtual and intersessional means with full and inclusive participation, which would then serve to better facilitate in-person negotiations when physical meetings resume.