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Deep seabed mining in international waters

by

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The seabed floor is increasingly becoming commercialized in response to global demand for battery components. However, regulations concerning mining the deep seabed have not kept up with the increased interest. Accordingly, MNEs do not currently have clear guidance on how to structure potential deep sea FDI.

The deep sea minerals located outside national jurisdictions are subject to the rules of the 1982 UN Convention on the Law of the Sea, which subsequently created the International Seabed Authority (ISA) to govern the international seabed (waters outside the territorial bounds of states , the focus of this *Perspective*). In practical terms, the ISA governs more than half of the oceans.

The ISA's framework differs for explorative or exploitative investments. Exploration covers searching for resources; exploitation, the process of collecting and refining minerals.

The ISA adopted regulations in 2013 that cover exploration projects. They spell out who, where and how investors can explore. As a result, exploration contracts have now been granted to over 30 contractors, comprising many MNEs from varied sponsor states. But, ultimately, this is only half the equation. The ISA has not yet developed the framework on how to exploit the seabed minerals located by ISA-approved exploration projects.

Despite significant pressure from MNEs to conclude a definitive Mining Code, the ISA is yet to clearly address the terms of exploitative investments. In 2021, Nauru—a small island nation in Micronesia—triggered a provision in the ISA Implementation Agreement that gave the ISA two years to finalize a Code before provisional contracts could be awarded. Nauru is interested in mining the Clarion-Clipperton Zone (a resource rich area between Hawai`i and Mexico). Despite this pressure, the ISA concluded its July 2023 meetings without finalizing a Code.

The consequences of not finalizing the Code are not yet clear. Under current law, the ISA must provisionally consider mining applications based on provisional rules, regulations, procedures, and norms. However, provisional rules are provisional for a reason, and many aspects of the provisional rules are hotly contested.

The framework has massive implications because of the value of deep seabed resources, in particular nickel (in nodules) and cobalt and magnesium (in crusts). These resources are increasingly important as the lithium-ion battery market is projected to rise to US$129 billion by 2027—more than tripling since 2019. Investors surely will continue to push for access to seabed resources. It will be up to the ISA to determine which projects will be allowed.

Agreement on the Code must address an important question: how can developing countries ensure that they get the best deal out of the arrangements and/or contracts they conclude with investing MNEs?

And, as of now, it is not entirely clear how developing countries can do so. Without a defined Code, it is unclear exactly what role states will play, as opposed to private parties. In the interim, there are still a few important considerations:

- Partnering with established contractors with experience in deep sea mining and with the ISA, because contracts will ultimately be concluded involving the ISA, the contractor and the sponsor state.

- Exploring options for projects involving multiple sponsor states, leveraging resources of partnering developed countries while retaining control over the project.

- Ensuring that the goals of any partnering MNE align with those of the sponsor state(s).

Interestingly, the ISA has a duty to ensure that access is shared among all states, even less developed countries not currently equipped to conduct large-scale seabed mining operations. (Potential gains by developing countries can be subverted in practice, particularly by MNEs utilizing developing countries as sponsor states with little actual input in the project.) In fact, one of the ISA's central responsibilities is to ensure that the deep seabed remains a shared resource. Here, the equitable path forward is to ensure that developing countries are not precluded by virtue of many of them having less negotiating power and experience, as a general matter, when entering into contracts with MNEs. Developing countries, and MNEs looking to partner with them, should work to hold the ISA to its mandate on this issue.

Thus, applications for contracts by developing countries should be framed in a way to highlight the equitable benefits of supporting those applications over those from developed countries. Such clauses should expressly reference the ISA's duty to ensure equitable sharing.

Developing countries, and MNE-partners, could also seek to build upon the work done by others. This work would include observing the rationale given by the ISA when rejecting or approving prior applications. As the ISA continues to review applications, precedent will naturally develop regarding how the ISA views certain aspects of potential projects. This precedent will serve as a useful guide for later applications.

The ISA's deep seabed mining regulations present a unique opportunity for developing countries to gain equal footing with developed countries in the extraction of deep seabed resources. Whether or not the ISA finalizes these regulations will have significant ramifications for foreign investment and economic growth globally.

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