Introduction

On 25th June 2021, the Republic of Nauru, a Commonwealth Pacific Island country, requested the Council of the International Seabed Authority (ISA) to “complete the adoption of the rules, regulations and procedures necessary to facilitate the approval of plans of work for exploitation in the Area within two years.” This is the first time that the two-year trigger’ (henceforth, simply ‘the trigger’) has been invoked, pursuant to Section 1, paragraph 15 of the 1994 Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea (UNCLOS)\(^1\).

Nauru’s invocation of the trigger will provide Commonwealth countries with both considerable opportunities and challenges in negotiating the Exploitation Regulations through the next two years, not least concerning further consultation on, and implementation of the payment regime, the Standards and Guidelines, the Enterprise and the Economic Planning Commission.

This discussion paper considers scenarios which may result from the trigger, and details options that Commonwealth countries may wish to consider when participating in the next two years of critical ISA work.

Rationale Provided

Nauru’s letter to the President of the Council of the ISA\(^2\) noted that its sponsored entity Nauru Ocean Resources Inc. (NORI) intends to apply for a Plan of Work for exploitation of polymetallic nodules within its contract area in the Clarion-Clipperton Zone in the central Pacific Ocean. In this letter, Nauru observes that the negotiation of the Exploitation Regulations has been going on for more than seven years and that “there is urgency of concluding [the negotiations] in order to provide the legal certainty required for the [seabed mining] industry to move forward.” Nauru considers that having made significant investments to advance its seabed mining project in the Area, with the objective of applying for a Plan of Work for exploitation, it stands to lose from further...
delay in finalising the ISA Exploitation Regulations. The development of the seabed mining industry “offers a rare opportunity” for Nauru’s socio-economic development and, from a climate change perspective, for the production of minerals needed for low-carbon technologies.

The letter also emphasises “regulatory certainty” as necessitating the urgent finalisation of the Exploitation Regulations, and that all stakeholders stand to benefit from it. The “step change in communications technology” necessitated by the COVID-19 pandemic has, according to Nauru, made it easier for States Parties to meet remotely and frequently, thus providing an even greater opportunity for all ISA States Parties to work together to finalise the regulations. The request to finalise the Exploitation Regulations within two years was not considered to be a rush because the negotiation process has been ongoing for more than seven years and is “nearly complete”.

The two-year trigger period was requested to commence on 30 June 2021, and the ISA has now confirmed that it plans for the regulations to be finalised and adopted by 9 July 2023.

**Ramifications**

Although the trigger mechanism is within the articles of UNCLOS, its ramifications, including financial and environmental, were not fully explored during the UNCLOS III negotiations, and have not since been discussed within the ISA or considered in detail among States Parties, seabed mining stakeholders, or by interested members of the public.

Within this two-year timeline, there remain several critical issues yet to be resolved in the draft Exploitation Regulations, particularly the payment regime and the completion of the Standards and Guidelines, including those necessary for protection of the environment. The operationalisation of the Enterprise, an issue of particular concern to many developing countries, also remains outstanding.

While it is understood that the ISA, its organs and members will make all efforts to meet the two-year deadline, it is nonetheless prudent to consider what might occur if the deadline is missed. If the final Exploitation Regulations, Standards and Guidelines cannot be agreed by then, exploitation contracts could be awarded under three possible scenarios:

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**Box 1: Section 1, paragraph 15 of the 1994 Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea**

The 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:

a. The Council may undertake such elaboration any time it deems that all or any of such rules, regulations or procedures are required for the conduct of activities in the Area, or when it determines that commercial exploitation is imminent, or at the request of a State whose national intends to apply for approval of a plan of work for exploitation;

b. If a request is made by a State referred to in subparagraph (a) the Council shall, in accordance with article 162, paragraph 2(o), of the Convention, complete the adoption of such rules, regulations and procedures within two years of the request;

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.
1. terms for each contract (payment regime, environmental requirements, etc.) are negotiated separately, leading to each contract potentially containing different terms;
2. contract terms could be based initially on provisional Regulations, and when final Regulations are adopted, terms would be transitioned to those;
3. contract terms could be based on provisional Regulations and remain based on those throughout the 30-year life of the contract.

Commonwealth members may wish to seek clarification from the Council on which of these scenarios (or combination thereof) will be followed should the deadline not be met.

Practicalities of meetings

To expedite completion of the Exploitation Regulations, the ISA has put forward an adjusted schedule of meetings in 2021 and 2022, as well as announcing the operationalisation of three informal working groups:

a. the protection and preservation of the marine Environment (chaired by Dr Raijeli Taga (Fiji));
b. inspection, compliance and enforcement (chaired by Ms Janet Omoleegho Olisa (Nigeria));
c. institutional matters (including the role and responsibilities of the various organs of the Authority, timelines, recourse to independent expertise and stakeholder participation) (to be chaired by a nominee of the Latin American and Caribbean Group);

As well as the previously implemented open-ended working group on:

d. financial terms of a contract.

In-person meetings, suspended during the coronavirus pandemic, are now resuming. The Council will be held from 6-10 December 2021, followed by the Assembly on 13-15 December. An indicative programme of work has recently been provided.

The 2022 schedule comprises:

**February / March 2022**

- Council session of 3 weeks, including the Financial working group, Environmental working group and Inspection, compliance and enforcement working group.
- Legal and Technical Commission (LTC) session of 1 week working on Standards and Guidelines.

**July 2022**

- Council session of 3 weeks, including time for working groups (as required).
- Assembly of 1 week.

**tbc later in 2022**

- Council session of 2 weeks, including time for working groups (as required) and review of working group output.

With limited opportunity remaining to influence the drafting of the Exploitation Regulations, States Parties may see fit to prioritise attendance in Kingston (in the past, Assembly has struggled to achieve quorum).

The increased workload and travel schedule may disadvantage States with fewer resources for attending meetings, particularly during economic hardships associated with the COVID-19 pandemic. The ISA have noted the attendance issue and suggested that an estimated additional US$130,000 for the voluntary trust fund could ameliorate travel costs, though for some smaller governments, human capacity issues could remain. Developed Commonwealth countries may wish to consider supporting this voluntary trust fund. The Commonwealth Secretariat also has some limited funding available to support developing Commonwealth Member attendance. Please contact us to enquire.

While virtual communication has indeed increased during the pandemic, the ISA and other UN bodies have shown few signs of taking major decisions online. The productivity of the 26th Session has been lower given ongoing pandemic issues. The second part of the 26th ISA Annual Session (Council and Assembly), originally scheduled for July 2020, was twice postponed and will now take place later in 2021. It remains unclear as to if, or how, Members will be able to participate virtually over the next two years in the context of the ongoing (albeit hopefully lessening) pandemic.
Decision-making procedures

While the proposed meeting schedule provides the ISA Council and Assembly with more time than the usual annual meeting schedule, it will still be very challenging to adequately discuss the recommendations of each of the four working groups in the allotted time. In the absence of ready consensus, some matters may be forced to a vote, thereby departing from the tradition established during the negotiation of UNCLOS when all efforts were made to reach a decision by consensus, as reflected in the Rules of Procedure for both the Council and Assembly. Thus, the pressures of the trigger may call for a modification of ISA procedures, no longer exhausting “all efforts to reach a decision by consensus”. Any change to ISA procedures, however, will need to be agreed upon in advance. Given the heightened possibility of changed procedures and of voting, countries in payment arrears may wish to address this matter promptly in order to fully participate.

Council membership

Council membership changes each year, with some States Parties sharing seats based on geographic representation or interests within seabed mining. For these States, there will be fewer opportunities to contribute during the next two years of work, and that some States, some of which are also Sponsoring States, will not have the opportunity to participate/vote in the final Council sessions before the end of the trigger, or in 2024’s sessions where a Plan of Work is likely to be considered.

Regulatory Uncertainty

Although all efforts should be made to reach consensus and finalise the Exploitation Regulations by the 9 July 2023, should this not occur, UNCLOS provides for contractors to submit a Plan of Work for provisional approval. In the absence of adopted regulations it will be important for the Council to be clear on what criteria and principles these Plans of Work will be evaluated against so they can consider the Plan of Work and decide if they are able to approve it based on the current framework.

In particular, there is a lack of clarity between sub-paragraphs (b) and (c) of Section 1, Paragraph 15 of the 1994 Agreement regarding when the Council may consider and provisionally approve a Plan of Work.

Sub-paragraph (b) states that if a request is made by a State, “the Council shall … complete the adoption of such rules, regulations and procedures within two years of the request”.

Sub-paragraph (c) uses the language “If the Council has not completed the elaboration of the rules…”, it shall consider and provisionally approve a Plan of Work based on the Convention and provisionally adopted rules, regulations and procedures.

This lack of consistency in language creates a lack of clarity. The term “adoption” is more precise and easily understood than the term “elaboration”. Therefore, within the procedure of developing rules, regulations and procedures, it needs to be clarified at what point the elaboration of the rules, regulations and procedures will be considered complete.

UNCLOS provides, in the absence of adopted Exploitation Regulations, for Plans of Work submitted to be approved against provisional regulations; however, it is silent on the process through which any provisional regulations would be negotiated and adopted. If there were differences large enough among ISA members to impede approval of the final regulations, then these differences may equally hamper agreement of provisional regulations. Therefore, a process by which to achieve agreement on provisional regulations will need to be considered in advance of any such impasse, and may, for example, need to rely more heavily on voting and less upon achieving consensus (as discussed above).

The latest drafts of the Exploitation Regulations, Standards and Guidelines might appear as a reasonable basis upon which to develop provisional regulations. However, the question of how to handle unresolved issues still remains. Provisional regulations could contain gaps or loopholes on critical issues that would need to be resolved via another mechanism such as bilateral negotiations of contracts, or the courts. In the event that neither the final nor provisional Exploitation Regulations are adopted, then UNCLOS allows for the Council to consider plans of work for approval on the basis of the norms, principles and terms of UNCLOS.
and the 1994 Agreement. This would arguably be problematic to operationalise as the treaty language of these is not intended to, and does not contain sufficient detail to, establish critical benchmarks, such as the financial or environmental terms of a plan of work. Indeed, it is for this very reason that the development of Exploitation Regulations is necessary.

The absence of provisional and final Exploitation Regulations may also lead to a situation whereby the Council could negotiate individual terms of provisional plans of work with contractors. Should this occur, it may become problematic as different contracts could, theoretically, agree to different terms, which might well be seen as contradicting the non-discrimination principle embedded in UNCLOS.

Should provisional rules and regulations be required, ISA members may wish to consider agreeing to take an explicitly precautionary approach in their development. Such an approach would have two clear advantages: 1) better assurance of favourable financial terms for the common heritage of humankind resource, as well as improved likelihood of environmental health; and 2) its terms could encourage early contractors to voluntarily transition to the final regulations when adopted.

**Contractual Uncertainty**

Should any Plan of Work be approved on the basis of provisionally adopted rules, regulations and procedures, it is currently unclear whether those would be binding throughout the 30-year duration of the contract (or life of the mine, if less) or only provisionally until the final Exploitation Regulations are adopted.

UNCLOS does not recognise this potential issue, nor does it provide any guidance, which suggests that the ISA will need to come to agreement on this question based on current norms and best practices found elsewhere in international law. While UNCLOS does recognise the importance of stability of contracts, it does not provide any guidance about how to reconcile changes of regulations from provisional to final.

The two possibilities are:

1. That the contractor is bound by the terms of its provisional plan of work throughout the term of the contract, even if the Exploitation Regulations are subsequently adopted.
   
   This would provide certainty to contractors and allow them to make investment decisions concerning seabed mining secure in the knowledge that the financial and environmental terms of the provisional workplan are not subject to change. It would, however, contravene the non-discrimination tenets of UNCLOS as different contractors would in effect be bound by different terms. Provisional terms that are more favourable to the contractor than finalised ones may also conflict with the ISA’s overarching obligation to protect the marine environment and develop seabed minerals for the benefit of humankind as a whole, including the equitable sharing of financial and other economic benefits derived from activities in the Area. In this light, a provisional payment regime should err on the side of stringency; i.e. favouring the common heritage of humankind rather than the contractors.

2. That the plan of work is superseded by the Exploitation Regulations when they are adopted, with all contractors transitioning to the new terms under the Exploitation Regulations.
   
   This approach would be non-discriminatory, and it could also be argued the time and effort that the ISA devoted to final Exploitation Regulations may mean that they have more comprehensive financial and environmental terms as compared to any provisional plans of work negotiated under the time constraints of the trigger. This approach would, however, lead to some uncertainty for first-mover contractors, and may also lead to liability issues if decisions which are difficult or costly to reverse were made under the Plan of Work but are not supported by the Exploitation Regulations. For example, technology that is compliant under the provisional environmental regulations may not fulfil more comprehensive requirements of the final regulations. Again, this would argue for erring on the side of precaution in the adoption of any provisional environmental regulations.
There needs to be clarity prior to any Plan of Work being approved concerning whether its terms will, or will not, be superseded by the Exploitation Regulations when they are adopted. One solution that warrants serious consideration, as it would provide a degree of certainty to contractors and would not be discriminatory, would be to include transition clauses in all provisionally approved plans of work. These clauses would mandate how contractors would transition to the payment regime included in the adopted Exploitation Regulations.

In the absence of a final or provisional agreed payment regime, when considering any plan of work, the LTC and Council would need to agree on if, or how, its contents could be assessed, and how the resultant terms of a contract would be determined, whilst conforming to the principles provided by UNCLOS and the Implementing Agreement.

Environmental regime, Standards and Guidelines

The Secretary-General has recently indicated that the LTC is already considered to have finished its work on nine of the Phase 1 Standards and Guidelines11, indicating they are considered complete and are awaiting the Council’s approval. However, considering the long-ranging impacts of these documents, it is concerning to have reached this conclusion having only had one round of written submissions12, with no indication regarding how revisions have been made, including whether external comments were incorporated or dismissed, and the rationale as to why. Without such information, it is difficult to imagine the Council being able to come to an informed decision on whether to adopt them or send them back to the LTC for further consideration. Given the pressing timeline of the trigger, such decisions will likely hinge on explicit interventions and requests from States Parties.

Additionally, within the trigger period, it is not only Phase 1 Standards and Guidelines that will need to be adopted and operationalised, but also Phase 2 – those necessary to be in place prior to the receipt of the first application for a Plan of Work. Very little information has been provided by the LTC on plans for development of Phase 2, and as can be seen in Table 1, only one of the original Phase 2 Standards and Guidelines has been developed and consulted upon in writing thus far.

Similar to the payment regime, discussed above, when drafting the Standards and Guidelines, the precautionary approach would dictate erring on the side of caution if agreement cannot be reached by the deadline; i.e., to agree to interim conditions which may be more stringent than those eventually finalised.

Aspects of the Standards and Guidelines that would benefit from further refinement before being implemented include, inter alia:

a. Baseline environmental data

Draft Guidelines on the expected scope and standard of baseline data collection were drafted by an informal working group led by the LTC and consulted upon in early 2021. The baseline underpins not only understanding mining-related environmental impacts and ‘serious harm’, but also adaptive management and scientific monitoring protocols. It will inform the development of Environmental Impact Assessments and implementation of Environmental Management and Monitoring Plans.

Collection of appropriate baseline data takes many years and involves considerable academic and industry resources. Before submitting a Plan of Work, contractors will need to clearly understand what is required of them regarding developing an environmental baseline and monitoring protocols. Any extra uncertainty introduced by provisional requirements under the trigger needs to lead to greater scientific rigour, per the precautionary approach, which will also better ensure that future requirements, when finalised, would be met.

b. Understanding of ‘serious harm’

One of the contractors’ duties under the draft Exploitation Regulations is to take all measures necessary to ensure that their activities are conducted so as not to cause ‘serious harm’ to the Marine Environment13. Currently, no operational definition has been put forward on ‘serious harm’ beyond it representing a ‘significant adverse effect’, with the current definition in the draft Regulations being too general in to regulate or enforce. It is unclear whether further developing the definition is planned by the 9 July 2023 deadline.

If the definition and guidance concerning serious harm changes between provisional and adopted Regulations, Standards and Guidelines, it could prove difficult for both the Contractors and regulators (ISA
and Sponsoring States) to know whether a mine is in compliance or not, given that the targets, indicators and metrics agreed to under provisional rules might not be consistent across projects and in some cases, may no longer be appropriate.

The challenge of changing environmental monitoring requirements was acknowledged by The Metals Company in its Securities and Exchange Commission (SEC) filing of June 22, 2021, noting that this uncertainty “... could require changes to any submissions made by DeepGreen’s subsidiaries in connection with an exploitation contract application. Environmental legislation is evolving in a manner which is likely to require stricter standards and enforcement, increased fines and penalties for non-compliance, more stringent environmental assessments of proposed projects and a heightened degree of responsibility for companies and their officers, directors and employees.”

Again, it would suggest that a higher level of precaution will need to be taken in any provisional rules concerning whether operations detailed in a Plan of Work may involve serious harm. Furthermore, for activities with increased potential to cause serious harm, for which comprehensive scientific information is unavailable, standard risk management practice also requires a higher burden of proof to show that serious harm is in fact not occurring, which in scientific terms would involve more powerful monitoring, and a wider and established suite of measurements, for assessing potential impacts across a broad spectrum of possibilities.

c. Environmental Performance Guarantee

To allow enforcement of the Environmental Performance Guarantee (EPG) Standard and Guideline, as currently drafted, several outstanding issues still need to be resolved, including a continued lack of clarity around its scope, as well as consistency with articles in the draft Exploitation Regulations. For example, there is uncertainty whether the EPG is based on ‘greatest reasonably credible costs’ in a ‘worst case scenario’, or whether it is based on ‘likely costs’. In terms of compliance, the difference between these could be considerable.

The acceptable range of instruments underpinning an EPG was recently questioned in responses to the Standards and Guidelines 2020 written consultation. Clearly, agreement on appropriate instruments will be necessary if environmental performance is to be adequately guaranteed. Again, if agreement cannot be found in the two-year period, provisional rules and regulations will need to be more stringent in the meantime.

Assembly Approval

Given the provisions of Article 162(2)(o)(ii) of UNCLOS which states that provisional rules, regulations and procedures adopted by Council are “pending approval by the Assembly”, Assembly is the correct avenue for States Parties, particularly those who are not members of Council, to express their opposition to any rules, Regulations, Standards and Guidelines that they feel have not been sufficiently well thought out and negotiated by the 36 members of Council.

However, it is currently unclear whether opposition from a States Party or a small group thereof, would be sufficient to force the issue back to the Council per consensus decision-making, or whether under the time pressures of the trigger it would instead force a vote. At least a two-thirds majority of members present and voting would be required to successfully adopt any rules, Regulations, Standards and Guidelines as per Rule 61(2) of the Rules of Procedure of the Assembly, or to make amendments to them (Rule 62). While only one-third of Assembly present and voting is required to reject a proposed regulation, twice that number is required to modify it.
Operationalisation of the Enterprise

The 1994 Agreement stipulates that the Council must take up the issue of the functioning of the Enterprise independently of the Secretariat of the ISA in the event of: (i) the approval of a Plan of Work for exploitation for an entity other than the Enterprise, or (ii) upon receipt by the Council of an application for a joint-venture operation with the Enterprise. However, unlike institutional, environmental and enforcement issues, where the Secretary-General has now presented a roadmap towards the adoption of the Exploitation Regulations, this has not yet occurred for operationalisation of the Enterprise.

The importance of creating a functional Enterprise has been noted by both the Special Representative of the Enterprise and academic studies, given the Enterprise’s role at the heart of equitable sharing of the seabed resources of the Area. Willaert (2021) further highlights that the operationalisation of the Enterprise should be a top priority, and submissions from Commonwealth countries, as part of the African Group to the ISA, have requested that the Enterprise should be ‘ready to go’, by the time the first exploitation application is under consideration. However, given the great number of considerations for the LTC and Council to progress in the two-year window, it appears unlikely that progression of the Enterprise will occur unless it is raised as a priority by interested States Parties.

Establishment of the Economic Planning Commission

The Economic Planning Commission (EPC) is one of the two organs of the Council established under Article 163(1) of UNCLOS. The other is the LTC. However, while the LTC has been operational for many years, the EPC has not yet been operationalised.

Under Article 164 of UNCLOS, the EPC has responsibility to develop for approval, “a system of compensation or other measures of economic adjustment assistance” for those developing States that are adversely affected by mining activities in the Area. Other core functions of the EPC include reviewing the trends and factors affecting supply, demand and prices of minerals which may be derived from the Area, considering the interests of both importing and exporting States, particularly of developing States among them; and examining any situation that may adversely affect the economies or export earnings of developing States as a result of a reduction in the price or volume of export of an affected mineral, and which is caused by activities in the Area. Under section 114 of the Annex to the 1994 Agreement, the functions of the EPC are being performed by the LTC until “such time as the Council decides otherwise or until the approval of the first Plan of Work for exploitation”.

If an application for a Plan of Work is approved after the trigger period has ended, then the immediate establishment of the EPC will be necessary. Given its role under UNCLOS, the EPC is expected to play a critical role in furthering the Council’s understanding of the economics of seabed mining in the Area, and therefore in realising obligations concerning the management of resources that are the common heritage of humankind. However, as with the Enterprise, there is as yet no roadmap or indication of how the EPC will be operationalised or prioritised.

Sponsoring States

A Sponsoring State has obligations under UNCLOS, including to have laws, regulations and administrative measures in place during the time that a Contract is in place. Due diligence, though not yet thoroughly understood in the context of seabed mining, typically includes abilities to monitor licensee activities and to enforce compliance as required.

In its 2011 advisory opinion, the Seabed Disputes Chamber of the International Tribunal for the Law of the Sea identified the following direct obligations of the sponsoring State as being ‘most important’:

- the obligation to assist the ISA set out in article 153, paragraph 4, of UNCLOS;
- the obligation to apply a precautionary approach as reflected in Principle 15 of the Rio Declaration and set out in the Nodules Regulations and the Sulphides Regulations; this obligation is also to be considered an integral part of the “due diligence” obligation of the sponsoring State and applicable beyond the scope of the two Regulations;
- the obligation to apply the “best environmental practices” set out in the Sulphides Regulations but equally applicable in the context of the Nodules Regulations;
the obligation to adopt measures to ensure the provision of guarantees in the event of an emergency order by the Authority for protection of the marine environment; and

e. the obligation to provide recourse for compensation.

Developing agency for such activities requires significant time and resources; i.e., to prepare legislation and establish the required institutional instruments. A rushed process to achieve this may therefore not augur well for Sponsoring States. Ill-prepared States will be limited in their capacity to enforce high quality measures that would ensure human safety and prevent damage to the environment, which may leave them open to significant liabilities.

Potential responses to the trigger

Now that the ISA Secretariat has indicated that face-to-face meetings will resume in December 2021 and February/March 2022, States Parties may wish to prepare beforehand their positions on, and options regarding, inter alia:

1. Utilising the trigger as an opportunity to accelerate discussions of particular interest; for example, on the establishment of the Enterprise and the Economic Planning Commission, and the continuation of Standard and Guidelines consultations.

2. Requesting the Chairs of Council and Assembly to provide space on their agendas to discuss topics identified by States Parties as priority items, such as equity in the payment regime, further discussion on Standards and Guidelines, operationalisation of the Enterprise and EPC, etc.

3. Encouraging the ISA to investigate remote participation methods for Members not able to travel to in-person meetings.

4. For Developed Member States, considering support to the Voluntary Trust Fund to allow all possible in-person participation at the upcoming sessions.

5. For those Member States in payment arrears, addressing the issue promptly, so that they will be able to vote.

6. Engaging fully and proactively in ISA decision making, including the informal ISA decision making, including the informal working groups for consideration of environmental, enforcement and institutional aspects of the Exploitation Regulations.

a. Including, where possible, relevant national experts in country delegations.

b. Requesting the ISA to provide relevant documentation on the working groups, such as remit, procedure, pre-reading and agendas to ensure efficient discussions within the time-limited group discussions.

c. Requesting clarity on how decisions made in the groups will be considered by the LTC in the continued formulation of the regulations, and in ensuing decisions by the Council.

d. Exploring the possibility of intersessional and/or remote working practices for the working groups.

7. Proactively engaging with other Members to reach consensus on critical issues.

8. Requesting the ISA to outline its expedited decision-making process during this trigger period.

9. Fully utilising the Assembly (as well as Council for those who are members), to ensure that final (or provisional) Standards, Guidelines, Rules or regulations are well conceived and are in accordance with the precautionary approach, particularly if they are provisional.

10. Ensuring that there is a clear plan and process in place for the approval of provisional regulations if final regulations are not adopted by the deadline of July 2023.

11. Considering in the absence of adopted final or provisional regulations, if, or how, it might be possible / appropriate for the LTC to assess, and Council to approve, plans of work.

12. Considering transition clauses to be included in all contracts signed under provisional rules that would provide for a smooth transition to the final regulations when ready.
13. Ensuring that inclusive and accountable public consultation remains an essential part of the decision-making process.

14. Ensuring accountability in ISA decision making; for example, how comments received to date through consultations have or have not been incorporated, and why.10

15. For Sponsoring States, prior to their sponsored contractor submitting a Plan of Work, developing / reviewing required legislation, institutional instruments and processes to ensure its full readiness to avoid issues and liabilities that may otherwise ensue.

Conclusions

Activating the trigger has led to the ISA announcing a new schedule for working in 2021 and 2022, allowing adoption of the Exploitation Regulations on 9 July 2023. This has opened up a number of opportunities for and threats to Commonwealth countries to consider both in their own internal deliberations and in their interactions at the ISA.

States Parties have the next two years to shape the outcome of the trigger request, pushing forward negotiations on areas of particular interest, and working with the ISA to ensure that adequate thought, discussion and levels of precaution are built in Regulations, Standards and Guidelines such that unresolved issues can be fully addressed. If this cannot be done before any Plan of Work is considered, then the drafting of provisional rules should consider how a smooth transition to the regulations can be achieved, when they are finalised.

Central to all aspects concerning the trigger and the new workplan for 2022–2023 is the need to ensure that the future health of the environment, and the benefits arising from the common heritage of mankind, are not unduly compromised. Finalisation of the rules, Regulations and Standards and Guidelines should not occur ‘at any cost’. Rather, the ISA and the Council in particular, should take a precautionary approach to any provisional decisions, rules or plans of work. Unresolved financial, technical or environmental conditions will need to be more stringent than what is being discussed in the negotiations, to allow for leeway when transitioning to whatever is ultimately adopted.

Starting as soon as the December 2021 meeting, Commonwealth countries may wish to seek greater clarity on the decision-making process for negotiating the (provisional) Regulations, Standards and Guidelines. Structured, considered and collaborative negotiation by all States Parties will be required to ensure that the results are robust, proportionate, reasonable, fair and equitable, and more broadly, that they meet the requirements of UNCLOS and the Part XI Agreement, as well as the norms of international law.
Table 1: Current status of Phase 1 and Phase 2 Standards and guidelines

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<td>Draft authored by a Commission technical informal working group. Consultation via written submissions in 2021. Revised version not yet available.</td>
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<td>Draft authored by the LTC and a consultant. Consultation via written submissions in 2021. Revised version not yet available.</td>
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Further information on the Standards and Guidelines can be found on the ISA website: https://isa.org.jm/mining-code/standards-and-guidelines
Endnotes

1 UNCLOS Article 162(2)(o)(iii). The two-year period applies only to the exploration for and exploitation of polymetallic nodules. For other resources, a three-year period applies.


4 ISBA/26/C/44. Ibid.


6 The ISA Assembly has to date never called a matter to a vote, though its rules allow it to do so, requiring a 2/3 majority.

7 ISA Rules of Procedure: for Council, 56(1); for Assembly, 61(1).

8 Ibid. Council 56(2); Assembly 61(2).

9 The ISA has an account of the Council membership on its website (https://isa.org.jm/files/files/documents/Composition_of_the_Council_1996-2024.pdf). This contains a partial account of membership from 2022-2024, where known. This includes the following Commonwealth countries:

   2022: India, Australia, Canada, South Africa, Bangladesh, Fiji, Jamaica, Uganda, UK, Indonesia, Singapore, Tonga, Cameroon, Nigeria, Ghana, Mauritius, Mozambique, Trinidad and Tobago

   2023: India, Canada, South Africa, Bangladesh, Uganda, Mauritius, Trinidad and Tobago

   2024: India, Canada, South Africa, Bangladesh, Uganda, UK, Mauritius, Trinidad and Tobago

10 For example, a regulatory issue that has proved contentious historically is the agreement of the payment regime. Given the complexities of designing a payment regime that meets requirements of UNCLOS and the various, and at times opposing, preferences of States Parties, and considering the slowness of discussions to date (e.g. concerning royalty rates), a real possibility exists that the payment regime may not be finalised within the two-year deadline.

11 ISBA/26/C/44

12 Submissions have been published on the ISA website: https://www.isa.org.jm/submissions-received-respect-stakeholder-consultations-standards-and-guidelines

13 https://isa.org.jm/files/files/documents/isba_25_c_wp1-e_0.pdf; e.g. draft Regulation 4(2)


16 https://undocs.org/en/ISBA/25/C/7


20 Commentary has not yet been provided by the ISA on the Communications and Stakeholder Engagement Strategy, or on the two Standards and Guidelines consultations.