

THE METALS COMPANY'S CONTRACT TO MINE: **A DEEP SEA FANTASY?**



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INTRODUCTION

The Metals Company (TMC) is arguably the most presumptuous of the small number of companies proposing to mine the deep seabed in international waters.

TMC states publicly it intends to start mining in late 2025 or early 2026 in the Pacific Ocean. As a start-up company with limited funds its rush to begin commercial mining is driven by financial imperatives. However, commercial deep sea mining (DSM) can only occur in international waters if approved by the International Seabed Authority (ISA).

This briefing paper provides a reality check on the likelihood of TMC being granted a contract by the ISA to mine in the Pacific Ocean. It analyses and clarifies the significant legal, technical and political barriers that are likely to delay, or even completely obstruct TMC receiving a contract and delivering on promises to investors.

THE REGULATORY CONTEXT

DSM refers to the extraction of minerals from the deep seafloor. DSM is a highly controversial, experimental proposition that is yet to be undertaken at commercial scale in either national or international waters. Interest in this high-risk enterprise is driven by a relatively small number of investors and companies.

The management of mineral resources in international waters (known as the 'Area') is governed by the United Nations Convention on the Law of the Sea (UNCLOS), a legal framework that came into force in 1994.ⁱ UNCLOS established the ISA with the contradictory mandate to both protect the environment and regulate the mining of the seabed.ⁱⁱ

The ISA has issued 31 contracts for exploration in the world's oceans. Nauru, Tonga and Kiribati have sponsored TMC, a Canadian-domiciled company,ⁱⁱⁱ for exploration contracts over vast tracts of the Pacific Ocean.^{iv}

Based in Jamaica, the ISA consists of several bodies:

- The **Assembly** is the ultimate decision-making body consisting of all the Parties to UNCLOS – 168 States and the European Union;
- The **Council** is a 36 member executive committee elected by the Assembly;
- The **Legal and Technical Commission (LTC)** is an advisory body, elected by the Council, which provides legal and technical support, and should review applications to mine;
- The **Secretary-General**, and their staff, who provide administrative support.

The regulations that would enable DSM exploitation are yet to be finalised. Consensus on many aspects of the ‘Consolidated Text’ of these regulations is far from settled,^v with important environmental management, financial and liability questions unresolved.^{vi} A peer reviewed paper published in January 2024 found that over 30 major issues in the ISA regulations are still outstanding and that the ISA’s target date to complete the regulations in mid-2025 is unrealistic.^{vii} Adoption of the regulations requires consensus in the ISA’s Council as well as a vote in the Assembly.^{viii}

In June 2021 TMC through its sponsoring state, Nauru, invoked a legal loophole – known as the ‘two year rule.’^{ix} It is an attempt to force a two year deadline on the ISA for the completion and adoption of the regulations. The rule enables TMC to submit an application for a mining contract within two years of being invoked. The two year deadline expired in June 2023. As this paper demonstrates, the process for consideration of any application by TMC is unclear.

TMC PUBLIC RELATIONS VS HARSH REALITIES

TMC’s CEO Gerard Barron has stated that “there is a process in place that gives certainty to us and so at the end of that two year period, if the International Seabed Authority has not completed the adoption of the rules and regulations as they were directed to do, they are

required to accept and provisionally approve a plan of work that is submitted to them.”^x In addition, TMC’s Chief Financial Officer stated that “[w]hether [the ISA] has finalized what the legal framework for deep-sea mining will look like or not, we’ll file our permit application and force them to process it.”^{xi}

These strident public statements are fundamentally different to the picture painted by TMC in the risk analysis of its annual US Security Exchanges Commission (SEC) filing. This correctly states: **“there can be no assurance that the ISA will provisionally approve our plan of work for exploitation, within one year from submission thereof, or at all, or that such provisional approval would lead to the issuance of an exploitation contract with the ISA.”**^{xii}

Given this reality, TMC’s survival depends on its ability to project a façade of certainty. As a small start-up company with a limited cash-flow, it’s a high risk investment. TMC’s March 2024 quarterly report, shows a rapid decrease in cash reserves, with under \$7 million cash in hand at the end of 2023, while their costs were \$15 million in the last three months of that year alone.^{xiii}

TMC have options for loans (including from insider shareholders), and the last resort of issuing new shares which would dilute the ownership of current shareholders. However, all these options put the company, and its owners, in a more vulnerable position, not least of bankruptcy. As such TMC needs to convince investors, and the markets in general, that it will receive approval for a mining contract and that this will happen quickly. In this, it is interesting to note the contrast between TMC’s attempt to rush negotiations for this unprecedented industry and the approach of other companies. For example, Belgian company GSR has paused further investment in its DSM technology until regulations are finalised.

The company has recently stated that they expect mining to start in the last quarter of 2025 or the first of 2026, and their financial projections are predicated on being a going concern to that point.^{xiv} This is based on the

assumption that TMC will submit an application within 6 months of their current July 2024 deadline (timed for the end of the ISA’s mid-year meeting), and that the ISA will review any application within one year, which is an estimated timeline without delays.

However, TMC has a history of not meeting its milestones harking back to 2020 when it was still DeepGreen Minerals (See Table 1). The repeated postponements underscore the extent to which TMC ignores the complexity of the ISA’s processes and the technology required to begin commercial mining. In such a situation delay seems inevitable. This is particularly the case in a context where a growing number of state members of the ISA argue for a moratorium on DSM. These include members of the ISA Council, the body ultimately responsible for the decision on whether to approve TMC’s application for a mining contract.^{xv}

OBSTACLES TO TMC OBTAINING A MINING CONTRACT

Significant obstacles exist to TMC gaining a DSM contract. The complexity of interpreting UNCLOS and the subsequent 1994 Part XI Agreement, the fact this is primarily a political process with a growing number of ISA member states hesitant to rush regulations and contract approvals, and the unprecedented nature of triggering the two year rule mean there is a lack of clarity surrounding the process for making a decision on an application for a mining contract by TMC.^{xvi}

Despite these challenges, Figure 1 represents a best good-faith interpretation of the likely process for decision-making. The diagram illustrates the complexity of that potential process, including the number of points at which different actors can challenge or delay the application.

There is uncertainty about the route for decision-making^{xvii} (which could lead to Council adopting lengthier options for deciding), delays due to requests for further information or clarifications, and either requests for advisory opinions from the International Tribunal for the Law of the Sea (ITLOS), or submitting a dispute to the Seabed Disputes Chamber (SDC) within ITLOS.^{xviii}

An agenda item has been tabled for the ISA Assembly’s August 2024 meeting to discuss a general policy on Article 145 for “the protection and preservation of the marine environment”. This will be a vehicle to debate the concerns of Member States over the unseemly pressure applied by TMC’s triggering of the two year rule.^{xix} It may lead to the establishment of a moratorium or precautionary pause on DSM, and/or the rejection by the ISA Council of TMC’s contract application (plan of work) under the two year rule in light of obligations in Article 145.

Many Council members – some clearly unhappy about being forced into a difficult situation by what appears to be an unnecessary use of the two year rule – have said they will not approve a plan of work to mine without finishing the regulations.^{xx} The Council has agreed two decisions by consensus stating that no plans of work should be approved in the absence of regulations.^{xxi} As an independent report of the 2023 meeting noted “Through its decision on the two-year rule, the Council reiterated that commercial exploitation of mineral resources in the Area should not be carried out in the absence of RRP [Exploitation Rules, Regulations and Procedures] relating to exploitation. This stance was repeatedly underscored by Council members throughout the meeting, and, as a participant noted, “now seems deeply rooted” in delegates’ minds.”^{xxii} There is also an election for a new Secretary General happening this year, and the challenging candidate’s position is that “no mining applications should be approved until that process is wrapped up.” **It seems clear that a significant number of states, including members of the Council, are working out strategies on how to block any application from TMC.**

There will clearly be problems in how certain provisions of any contract would work if the regulations are not completed. How will remaining outstanding issues be resolved? For example, international royalty payments seem to be one of the more difficult issues to resolve in the negotiations, and if they are not completed how will such royalties be assigned?

Table 1: TMC's history of unrealistic milestones

DATE	TARGET DATE	TMC's PREDICTION
Oct 2, 2020	Mid-2023	The EIS will be “completed by around the middle of 2022, and so we’ll then lodge our application, and the regulator has 330 days to give us an answer, and hopefully we’ll then be into business.” <i>Source: Crux Investors, Timestamp 32:57</i>
Dec 7, 2020	2024	“So (the acquisition of these assets) means that we can be in business pretty quickly. And our target is to be collecting nodules and turning them into metals in 2024.” <i>Source: Crux Investors, Timestamp 34:23</i>
May 17, 2021	2024	“2024: Contract: ISA-NORI. Commercial production: P0, 1Mtpa nodules. PFS & FS. Construction, P1. EIS: TOML. Final Application ISA-TOML. Exploitation Contract.” <i>Source: TMC presentation to Analyst Day</i>
March 24, 2022	Q4 2024	“Expected production readiness by Q4 2024.” <i>Source: TMC press release</i>
May 9, 2022	Q4 2024 (Project Zero)	“OFFSHORE: Expected start: Q4 2024” <i>Source: TMC Q1 2022 Corporate Update Presentation, slide 9</i>
Aug 15, 2022	2nd Half 2024	“NORI-D Project Zero Production Start Expected 2H (second half of) 2024.”
May 11, 2023	Late 2024 / early 2025	“July 2023 Roadmap date set in Q3 2021 for ISA to adopt final exploitation regulations. Late '24 / Early '25 Estimated initial commercial production on NORI-D area.” <i>Source: TMC, Q1 2023 Corporate Update Presentation, slide 8</i>
May 29, 2023	End 2024	“the mining final code is expected to be adopted by the regulator by the end of the year [i.e. 2023] ... we’re confident we’ll be in a condition to launch that application by the end of 2023.” <i>Source: Bloomberg</i>
Aug 1, 2023	Q4 2025	“NORI expects to be in production in the fourth quarter of 2025.” <i>Source: TMC press release</i>
Mar 25, 2024	Q1 2026	We now expect to commence production offshore at the end of the first quarter of 2026, assuming an ISA review process of approximately one year from the submission of our application.” <i>Source: Investors Metals</i>

Figure 1: Probable decision-making processes for applications to mine under two year rule



There is an argument that TMC's application can run concurrently with the continuing negotiations, and therefore regulations may be finalised by the time any application has been approved. However, there are a number of problems with this: first, as already noted there will almost certainly be continued delays to the regulation negotiations, so they may well not be finalised in time for any contract being granted; second, it's not clear how certain parts of the application or decisions can be made assuming the full set of regulations will not be complete; and third the very act of the two year rule having been triggered may have an impact on the negotiations, weakening the regulations and leaving them more open to legal challenge.

Indeed, given legal uncertainty any contract that is approved may well face a legal challenge. For example, there is a provision for appeal, via an advisory opinion, under the ITLOS. It is also possible that the ISA itself could face litigation if it has issued a contract before the regulations have been completed.^{xxiii}

CONCLUSION

Any company attempting to "force" the ISA Member States to process its application to mine in the absence of completed regulations is likely to be disappointed. However, this is not the picture painted by TMC in its public relations pitch to investors – although it is clearly alluded to in the risk analysis the company files with the US SEC.^{xxiv}

TMC may yet find that the backlash it has created by triggering the two year rule will work against its financial interests. ISA Council Members have already signalled that sovereign states do not appreciate TMC's attempt to force them to process the company's application to mine. In addition, the complexity of ISA negotiations and the lack of clarity regarding decision-making outcomes offer no certainty and the prospect of serious delays to TMC's investors.

ⁱ United Nations Convention on the Law of the Sea, 1982, https://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf

ⁱⁱ The International Seabed Authority, <https://www.isa.org/jm/>

ⁱⁱⁱ TMC publicly floated after a merger of DeepGreen and Sustainable Opportunities Acquisition Corp (SOAC) in September 2021. See - The Metals Company, <https://metals.co/-for-more-information-on-the-merger-see-DSMC-Shareholder-Advisory-May-2024>, <https://dsm-campaign.org/wp-content/uploads/2021/09/Advice-to-SOAC-Investors.pdf>

^{iv} In order to mine in international waters under UNCLOS States create relationships with commercial contractors who undertake the act of mining on their behalf. TMC has contracts with the Pacific island nations of Nauru, Tonga and Kiribati.

International Seabed Authority, 2024, Consolidated Text and Associated documents, <https://www.isa.org/jm/session-29-council-part-1-2-2/>

^v See, e.g., ISBA/28/C/IWG/ICE/CRP.3 Draft regulations on exploitation of mineral resources in the Area

^{vi} Part I, Part II (Regulation 5), Part V, Part VIII (Appendix II) <https://www.isa.org/jm/wp-content/uploads/2023/10/ICE-Fourth-revised-text-1.pdf>; ISBA/28/C/IWG/ICE/CRP.3 Draft regulations on exploitation of mineral resources in the Area Part XI: Regulations 96 to 105, <https://www.isa.org/jm/wp-content/uploads/2023/10/ICE-Fourth-revised-text-1.pdf>

^{vii} See, e.g. Pickens, C., Lily, H., Harrould-Kolieb, E., Blanchard, C., & Chakraborty, A. (2024). From what-if to what-now: Status of the deep-sea mining regulations and underlying drivers for outstanding issues. Marine Policy, 105967. <https://doi.org/10.1016/j.marpol.2023.105967>

^{viii} Rules of Procedure of the Council of the International Seabed Authority, Rule 58; UNCLOS Art. 162(o). <https://www.isa.org/jm/wp-content/uploads/2023/03/ISBAC12E.pdf>

^{ix} Section 1(15)(b), 1994 Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea, https://www.un.org/Depts/los/convention_agreements/convention_overview_part_xi.htm

^x The Metals Company Investor Call Transcript - November 15, 2022, page 4. <https://investors.metals.co/static-files/5b1f32a4-58cf-4a68-be1e-c0e3489c3335>

^{xi} The Northern Miner, 2023, Metals Company Targets Late 2025 for Ocean Mining Launch https://www.linkedin.com/posts/the-northern-miner_navigating-the-deep-the-metals-company-eyes-activity-7112081654550048768-gSW9?utm_source=share&utm_medium=member_desktop

^{xii} The Metals Company, 25 March 2024, 10-K Annual Report FY33, pp. 48 <https://www.sec.gov/ix?doc=/Archives/edgar/data/0001798562/000110465924038505/tmc-20231231x10k.htm>

^{xiii} The Metals Company, TMC Announces Fourth Quarter and Full Year 2023 Results, 25 March 2024, <https://investors.metals.co/news-releases/news-release-details/tmc-announces-fourth-quarter-and-full-year-2023-results>

^{xiv} The Metals Company, Q3 2023 Corporate Update Presentation, slide 22, <https://investors.metals.co/news-events/events-and-presentations>

^{xv} Deep Sea Conservation Coalition, Momentum for a Moratorium, <https://deep-sea-conservation.org/solutions/no-deep-sea-mining/momentum-for-a-moratorium/>; Matrix Chambers, In The Matter Of A Proposed Moratorium Or Precautionary Pause On Deep-Sea Mining Beyond National Jurisdiction, <https://www.pewtrusts.org/-/media/assets/2023/03/deep-sea-mining-moratorium.pdf>

^{xvi} As this legal blog notes "Council must strive to find agreement on the yet outstanding interpretation issues concerning section 1(15)(c). Consensus seems to be, however, difficult to achieve and recourse to the Seabed Disputes Chamber of ITLOS seems also very likely." Maria Madalena das Neves (2023) "Deep-Sea Minerals Exploitation: The 2-Year Rule Deadline is Running Out, What Happens Next?", online: https://site.uit.no/nclos/wp-content/uploads/sites/179/2023/06/MMN_Deepsea-Minerals-Exploitation-NCLOS-Blog_27062023.pdf

^{xvii} The July 2023 ISA meeting noted would need to be considered if an application was actually made, see Part 2 of Decision of ISA Council, July 2023, https://www.isa.org/jm/wp-content/uploads/2023/07/ISBA_28_C_25.pdf

^{xviii} There is an opportunity for the company to an appeal a decision via the SDC and theoretically for a state to ask for an opinion of ITLOS – see <https://www.wfw.com/articles/deep-seabed-mining-insights-understanding-the-international-seabed-authority-and-the-decision-making-process-for-the-adoption-of-exploitation-regulations/> and <https://www.wfw.com/articles/deep-seabed-mining-insights-dispute-settlement-options-under-unclos/>

^{xix} International Seabed Authority agenda, July 2024 - <https://www.isa.org/jm/sessions/29th-session-2024/>

^{xx} International Seabed Authority (2022) Meetings of the ISA Council Day 5 <https://mailchi.mp/86798eb744fc/27th-session-part-iii-bulletin-council-meetings-day-5>

^{xxi} International Seabed Authority Council, 2023 Decision of the Council of the International Seabed Authority relating to the understanding and application of section 1, paragraph 15, of the Annex to the Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea https://www.isa.org/jm/wp-content/uploads/2023/07/ISBA_28_C_25.pdf; International Seabed Authority Council (2023) Decision of the Council of the International Seabed Authority on a timeline following the expiration of the two-year period pursuant to section 1, paragraph 15, of the annex to the Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea <https://www.isa.org/jm/wp-content/uploads/2023/07/2314552E.pdf>

^{xxii} Earth Negotiations Bulletin, (2023),ISA summary report 10-28 July 2023, <https://enb.isd.org/international-seabed-authority-isa-council-28-2-summary>

^{xxiii} New York Times, 4 July 2024, Fight Over Seabed Agency Leadership Turns Nasty, <https://www.nytimes.com/2024/07/04/us/politics/seabed-agency-mining.html>

^{xxiv} Pradeep A Singh, a Fellow at the Research Institute for Sustainability noted, "The risk of exposure to litigation is certainly much higher if the Authority decides to approve an application in the absence of regulations, as opposed to rejecting one." Down to Earth, 2023, UN body can face litigation if seabed mining is approved before developing regulations: Paper, <https://www.downtoearth.org.in/news/world/un-body-can-face-litigation-if-seabed-mining-is-approved-before-developing-regulations-paper-20770>

^{xxv} The Metals Company, 25 March 2024, 10-K Annual Report FY33, pp. 48 <https://www.sec.gov/ix?doc=/Archives/edgar/data/0001798562/000110465924038505/tmc-20231231x10k.htm>