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OWNERSHIP IN THE DEEP SEAS

PARTICIPATION OF INDIGENOUS PEOPLES IN DECISION MAKING OVER DEEP-SEABED MINING

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In this essay, I reflect on the challenges and opportunities in ensuring the genuine and meaningful participation of Indigenous peoples at the International Seabed Authority (ISA), with a view to giving due consideration to Indigenous peoples' human rights and integrating their knowledge into international decisions on deep-seabed mining. The essay begins with an assessment of how the current limitations in transparency and public participation in the practice of the ISA[1] constitute barriers for the participation of Indigenous peoples. I then argue that existing international human rights obligations require Indigenous peoples' participation at the ISA and that entry points within the ISA regime already exist to comply with these obligations. I conclude by emphasizing the need to support meaningful participation by Indigenous peoples through social sciences expertise and the involvement of independent international human rights experts, to actively address any biases *vis-à-vis* Indigenous knowledge.

Challenges to Public and Indigenous Peoples' Participation at the ISA

At the outset, it is essential to place the quest for Indigenous peoples' participation at the ISA in the broader context of the limited consideration of human rights under that regime. Currently there is no practice among ISA member states to raise issues of compliance with their international human rights obligations towards Indigenous peoples, as well as other relevant human rights holders, in the context of decisions on deep-seabed mining.[2]

Public participation at the ISA is generally quite limited[3] and increasingly difficult,[4] despite high expectations to the contrary[5] due to the importance of the ISA's mandate to protect the marine environment and represent

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[1] Elisa Morgera & Hannah Lily, *Public Participation at the International Seabed Authority: An International Human Rights Law Analysis*, 31 RECIEL 374 (2022).

[2] *Id.* at 388.

[3] David Johnson et al., *Periodic Review of the International Seabed Authority pursuant to UNCLOS Article 154: Final Report*, Seascape Consultants, 22 (2016); Jeff A. Ardron, Henry A. Ruhl & Daniel O.B. Jones, *Incorporating Transparency into the Governance of Deep-Seabed Mining in the Area Beyond National Jurisdiction*, 89 Marine Pol'y 58 (2018).

[4] Catherine Early, *Deep Sea Mining Talks: Restrictions Threat*, Ecologist (July 18, 2023).

[5] Matthias Haeckel, Annemiek Vink, Felix Janssen & Sabine Kasten, *Environmental Impacts of Deep Seabed Mining*, *in* New Knowledge and Changing Circumstances in the Law of the Sea (Thomas Heidar ed., 2020).

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humankind.[6] This shortcoming is exacerbated by the fact that the legal mandate of the ISA organs is remarkably different from their actual contributions to decision making. Although the supreme organ comprising all member states, the ISA Assembly,[7] is meant to approve ISA policies and regulations, it functions mainly as a rubber-stamping forum in practice.[8] So, unless there is a significant reform of the Assembly's practices, it would be of limited impact for Indigenous peoples to be represented in that organ.

The ISA's executive body—the Council, comprising thirty-six member states[9]—makes key decisions on the content of the draft regulations on mineral exploitation, the award of contracts for exploration or exploitation in the Area (the seabed and subsoil beyond the limits of national jurisdiction), and the exercise of control over those contractors.[10] But, in practice, the Council is bound to follow recommendations by a subsidiary organ—the Legal and Technical Commission (Commission)—for approval of a new contract, unless two-thirds of the Council members present and voting object.[11] In other words, the "real decisions" are taken by the Commission. The Commission is made up of state-nominated subject-matter experts,[12] and focuses on contract awards, rules, and regulations of the ISA, and oversight of contractors.[13]And while the Council is meant to exercise political oversight over the Commission to ensure that decisions are in line with the international obligations of member states, the Commission's reports to the Council do not provide sufficient information to effectively exercise that role.[14] So while participation of Indigenous peoples in the Council would be more meaningful than in the Assembly, in practice it would not be sufficient to gain a real opportunity to influence decision making at the ISA. This is the case unless/until a reform of the practices of the Council in its relationship with the Commission is undertaken, as discussed below.

Crucially, the Commission prepared the first draft of the Exploitation Regulations for Council.[15] For Indigenous peoples to have an impact on the development of the international regulation of deep-seabed mining (through the drafting of the Exploitation Regulation and the issuance of contracts) and control over deep-sea mining operations (through the oversight of contractors), their participation should be secured within the Commission. Even before the adoption of the regulations, other decisions by the Commission may have negative environmental, social, or cultural impacts and may therefore benefit from participation by Indigenous peoples. For instance, there have been specific instances where the Commission made decisions on the testing of environmentally harmful technology without sufficient public participation or consideration of biodiversity or human rights impacts.[16]

Given the *de facto* powers of the Commission, it is therefore crucial to ensure the participation of Indigenous people's representatives in this organ. But this is, at present, an unlikely prospect, as the Commission's characterisation as a technical advisory body has avoided calls for broader representation. In addition, the lack of a legal requirement for Commission members to serve in an independent capacity[17] has allowed individuals with vested

[6] United Nations Convention on the Law of the Sea, Arts. 137, 140, 145, 1833 UNTS 397, 21 ILM 1261 (1982) [hereinafter UNCLOS].

[7] *Id.* Arts. 159–60.

[8] Morgera & Lily, *supra* note 1, at 382, 385.

[9] UNCLOS, *supra* note 6, Art. 161.

[10] *Id.* Art. 162.

[11] Agreement Relating to the Implementation of Part XI of the UN Convention on the Law of the Sea, Annex, Sec. 3(11), Aug. 17, 1994.

[12] UNCLOS, *supra* note 6, Arts. 163, 165.

[13] *Id.* Art. 165.

[14] Morgera & Lily, *supra* note 1, at 384–85.

[15] *Id.* at 385; Tara Davenport, *Formal and Informal Law Making by the International Seabed Authority: An Artificial Distinction*, *in* Unconventional Lawmaking in the Law of the Sea 194 (Natalie Klein ed., 2022).

[16] Morgera & Lily, *supra* note 1, at 385.

[17] Davenport, *supra* note 15, at 189.

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interests, either from a government or private sector perspective, to sit on the Commission.[18] A meaningful exchange within the Commission is further complicated by reliance on email exchanges, rather than a debate, and decision making within rushed timeframes.[19] It is difficult, at present, to challenge these practices through the oversight of other ISA organs because the Commission meetings are closed, despite repeated requests to the contrary from the ISA Assembly and Council.[20] An overall reform of the Commission practices is therefore an urgent imperative for the participation of Indigenous peoples at the ISA to make any difference.

Obligations and Opportunities to Ensure Indigenous Peoples' Participation in the ISA

There are specific international obligations under international human rights law treaties[21] for ISA member states to ensure that Indigenous peoples participate in decision making in matters that could affect their rights.[22] Deep-seabed mining can lead to irreversible loss of marine biodiversity,[23] which in turn can have significant negative effects on the capacity of the ocean to contribute to a safe climate[24] and knock-on effects on Indigenous peoples' human rights, including those inextricably linked to their distinctive knowledge related to marine areas and marine life.[25] In other words, deep-seabed mining can reduce the availability, accessibility, and acceptability of marine spaces and marine resources in the Area (but also in other marine areas that are ecologically connected to the Area[26]) that are essential for Indigenous peoples' culture on which their identity, well-being, and development are reliant. In addition, it has now been recognized that Indigenous knowledge should be relied upon in protecting the marine environment in areas beyond national jurisdiction,[27] which suggests that Indigenous knowledge would enhance the quality of the ISA decisions to the benefit of everyone's human right to a healthy environment.[28]

[18] *Id.*; discussed in Morgera & Lily, *supra* note 1, at 386.

[19] Morgera & Lily, *supra* note 1, at 385.

[20] *E.g.*, ISBA/23/A/13, para. G.4 (2017); ISBA-28-C-CRP-5-Rev.pdf, para. 15 (2023); ISBA/28/C/27, para. 15 (2023).

[21] Indigenous and Tribal Peoples Convention No. 169, Art. 6, adopted June 27, 1989, entered into force Sept. 5, 1991, 1650 UNTS 383; International Covenant on Civil and Political Rights, adopted Dec. 16, 1966, entered into force Mar. 23, 1976, 999 UNTS 171; International Covenant on Economic, Social and Cultural Rights, adopted Dec. 16, 1966, entered into force Jan. 3, 1976, 993 UNTS; Convention on the Elimination of All Forms of Racial Discrimination, Art. 5, adopted Dec. 21, 1965, entered into force Jan. 4, 1969, 660 UNTS 195; as well as the American Convention on Human Rights, Art. 13, adopted Nov. 22, 1969, entered into force July 18, 1978; and the African Charter on Human and Peoples' Rights, Art. 9, adopted June 1, 1981, entered into force Oct. 21, 1986. All the treaties have been interpreted so as to clarify specific obligations *vis-à-vis* Indigenous peoples, as enshrined in GA Res. 61/295, Declaration on the Rights of Indigenous Peoples, Art. 18 (Oct. 2, 2007).

[22] UN OHCHR, Key Human Rights Considerations on the Impact of Seabed Mining (2023).

[23] *E.g.*, Erik Simon-Lledó et al., *Biological Effects 26 Years After Simulated Deep-Sea Mining*, 9 Sci. Rep. 8040 (2019).

[24] Elisa Morgera et al., *Ocean-Based Climate Action and Human Rights Implications Under the International Climate Change Regime*, 38 Int'l J. Marine & Coastal L. 411 (2023); Elisa Morgera et al., *Addressing the Ocean-Climate Nexus in the BBNJ Agreement: Strategic Environmental Assessments, Human Rights and Equity in Ocean Science*, 38 Int'l J. Marine & Coastal L. 447 (2023).

[25] Mario Vierros et al., *Considering Indigenous Peoples and Local Communities in Governance of the Global Ocean Commons*, 119 Marine Pol'y 104039 (2018); Clement Yow Mulalap et al., *Traditional Knowledge and the BBNJ Instrument*, 122 Marine Pol'y 104103 (2020); Philip Turner et al., *Memorializing the Middle Passage on the Atlantic Seabed in Areas Beyond National Jurisdiction*, 122 Marine Pol'y 104254 (2020).

[26] Ekaterina Popova et al., *Ecological Connectivity Between the Areas Beyond National Jurisdiction and Coastal Waters: Safeguarding Interests of Coastal Communities in Developing Countries*, 104 Marine Pol'y 90 (2019).

[27] Agreement Under the United Nations Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine Biological Diversity of Areas Beyond National Jurisdiction, Arts. 7(j), 13, UN Doc. A/77/L.82 (July 10, 2023) [hereinafter BBNJ Agreement].

[28] GA Res. 76/300, The Human Right to a Clean, Healthy and Sustainable Environment (2022).

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These obligations, in turn, entail a series of requirements of transparency. First and foremost, international human rights law requires "affordable, effective, objective, understandable and timely access to information that should enable [Indigenous peoples] to understand how environmental harm may undermine their rights to life and health and support the exercise of participation rights."[29] In addition, the ISA has to provide a justification for how it took into account inputs from Indigenous peoples, indicating "the extent and range of expertise underpinning the decision and the range and extent of public inputs."[30] This would entail Indigenous peoples being made aware of how potential environmental harm and negative impacts on their human rights have been taken into consideration. Finally, ISA member states are expected to take additional measures, including strategies and programs, to make sure that marginalized groups and those holding specific rights that could potentially be affected, such as Indigenous peoples, can participate in decision-making processes.[31]

To comply with these obligations, I propose a series of legal interpretations of existing rules under the ISA that can change the practices of its organs. The rules on the composition of the Commission, for instance, should be interpreted to include representatives of Indigenous peoples, due to the need to include special interests and appropriate qualifications related to the protection of the marine environment, as well as on economic and legal matters.[32] In addition, the Commission can consult relevant UN bodies or other international organizations,[33] which should be relied upon to invite a representative of the UN Permanent Forum on Indigenous Issues, for instance.

In addition, Indigenous peoples' representative organizations or specialized UN bodies could seek observer status at the ISA Council and Assembly. The ISA secretary-general has the duty to put in place appropriate arrangements for consultation and cooperation with international organizations,[34] which may nominate observers to the meetings of the different ISA organs.[35] Representatives of Indigenous peoples or Indigenous issues experts could also be included in the ISA Finance Committee, which advises on the development of rules for the ISA's future benefit-sharing regime.[36]

Another venue for including Indigenous peoples are the intersessional webinars and expert workshops organized by the ISA Secretariat, which lead to the development of reports published on the ISA website. Although it remains unclear the extent to which these expert reports contribute to the decisions taken by the Commission,[37] this is still an important opportunity to interact with experts and stakeholders and influence the debate underpinning the decisions at the ISA. However, the ISA Secretariat has so far mainly invited contractors and scientists/academics already working in the area of deep-seabed mining.[38] A change in practice would therefore be needed at the ISA Secretariat to extend invitations to Indigenous peoples' representatives.

[29] John Knox, Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment: Framework Principles on Human Rights and the Environment, para. 46, UN Doc. A/HRC/37/59 (Jan. 24, 2018).

[30] Morgera & Lily, *supra* note 1, at 388.

[31] John Knox, Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment: Framework Principles on Human Rights and the Environment, *supra* note 29, para. 46.

[32] ISA Rules of Procedure for the Council, Rule 83; UNCLOS, *supra* note 6, Art. 165(1); Sophie Shields, Andrea Longo, Mia Strand & Elisa Morgera, *Children's Human Right to Be Heard at the Ocean-Climate Nexus*, 38 Int'l J. Marine & Coastal L. 545, 570 (2023).

[33] Rules of Procedures for the Legal and Technical Commission, Rule 15.

[34] UNCLOS, *supra* note 6, Art. 169(1).

[35] *Id.* Art. 169(2).

[36] Agreement Relating to the Implementation of Part XI of the UN Convention on the Law of the Sea, *supra* note 11, Annex, Sec. 9.

[37] Morgera & Lily, *supra* note 1, at 385.

[38] *Id.* at 385.

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Concluding Words of Concern and of Hope

Even if efforts to include Indigenous peoples more systematically across ISA organs and events were to be successful, it should be borne in mind that "a seat at the table" is not necessarily a genuine opportunity to be heard and to influence the process. Two underlying challenges must be considered, in addition to the general barriers to public participation at the ISA discussed above. First, it is necessary to overcome "prejudicial stereotypes" and "misconceptions" about Indigenous peoples' authority and credibility to contribute to this area of international decision making.[39] Second, it is necessary to identify and address any "unfair distribution of conceptual resources needed for speakers to have a say."[40] The current meeting formats and dominant understanding of science within the ISA (as well as in many other intergovernmental fora) are inherently stacked against an open and meaningful exchange with different world views and knowledge systems. ISA experts may be unaware of Indigenous peoples' preferred communicative practices and "fail to give appropriate uptake to their attempts to communicate."[41]

To address these concerns, it is recommended that appropriate resources and expertise are put in place to support meaningful dialogue across knowledge systems, also taking into account the history of marginalization of Indigenous peoples and the current power imbalances and vested interests at the ISA, in order to prevent further violations of Indigenous peoples' human rights. To that end, it would be essential to include experts in the social sciences and arts (or rely on their insights and approaches) to restructure the process and help build the capacity of existing ISA experts and decisionmakers to meaningfully listen and respectfully engage with Indigenous peoples.[42] In addition, advice from the UN Special Rapporteur on Indigenous Peoples' Rights, the UN Permanent Forum on Indigenous Issues, and/or the UN Office of the High Commissioner for Human Rights, as observers in the ISA Council and/or advisors to the Legal and Technical Commission, would be beneficial to build a more human rights-cognizant institutional culture at the ISA.

Finally, it is crucial to combine efforts to ensure the meaningful participation of Indigenous peoples in the current ISA decision-making structure with the push to bring about a more radical reform of the decision-making practices at the ISA. An opportunity to do so will be the upcoming periodic review of the ISA, on which a decision of the ISA Assembly is expected in July 2024.[43] The review process itself should include Indigenous peoples and human rights expertise, such as inputs from the UN Special Rapporteur on Indigenous Peoples' Human Rights, the UN Permanent Forum on Indigenous Issues, and the UN Office of the High Commissioner for Human Rights. The review could also draw on the standards on transparency and participation enshrined in the 2023 Agreement on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction,[44] where, for instance, the Scientific and Technical Body members are to serve "in their expert capacity and in the best interest of the Agreement." These members should have "suitable qualifications, taking into account the need for multidisciplinary expertise, including . . . expertise in relevant traditional knowledge of Indigenous Peoples and local communities."[45] Even if the Agreement is not yet in force, it provides clear evidence of the progressive development of the law of the sea in terms of recognition, participation, and protection of the human rights of Indigenous peoples, which should support an evolutive interpretation and change in practices also at the ISA.

[39] Dina Lupin & Leo Townsend, *The Right to Consultation is a Right to Be Heard*, *in* A Research Agenda for Human Rights and the Environment 103 (Dina Lupin ed., 2023).

[40] *Id.* at 107.

[41] *Id.*

[42] Mpume Mthombeni, Dylan McGarry & Elisa Morgera, *Deep Sea Decisions Can Consider Indigenous Knowledge*, 360 (July 5, 2023).

[43] UNCLOS, *supra* note 6, Art. 154.

[44] BBNJ Agreement, *supra* note 27, Arts. 16, 48.

[45] *Id.* Art. 49(2).

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