doi:10.1017/aju.2024.9

# ON THE CULTURAL STAKES OF DEEP SEABED MINING

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Ownership over the deep seabed and its mineral riches was unsettled until well into the twentieth century. Yet, by the 1960s, a remarkable spirit of universalism prevailed. States declared the deep seabed to be the common heritage of [hu]mankind, determining that its exploitation and protection would require collective management. The seabed beyond national jurisdiction (or, the "Area")[1] spans roughly half of the surface of the Earth. It contains critical minerals, such as cobalt and copper, which technological advances have rendered increasingly within reach. States have worked collectively and proactively to regulate the near-future exploitation of the deep seas, thus far acting squarely within the law of the sea. As the possibilities of commercial mining appear clearly on the horizon, and as the impacts of mineral extraction come more and more sharply into view, the time has come to reassess whether the (monumental) concept of common heritage—part of the law of the sea—is enough to balance equities among states, mining companies, and human populations affected by mining. Is the current law capable of adequately preserving fairness and equity among all stakeholders in isolation from the legal regimes for human rights, environmental protection, cultural heritage, and the protection of Indigenous peoples and local communities? These regimes emphasize that deep seabed mining is not just an economic pursuit, it is also one that affects the lives and identities of individuals and peoples—and provide legal tools and strategies for harmonizing those interests. Yet established rules and norms around participatory governance and cultural rights have been all but ignored within recent international negotiations about how to regulate seabed mining.

This *Unbound* Symposium uncovers neglected elements in the legal and political debates. While it is well understood that seabed mining will affect the marine environment, what impact might it have on underwater cultural rights and intangible cultural heritage? Can we expect litigation if our common heritage is not managed with future generations in mind? How can Indigenous peoples' right to participation and free, prior, informed consent be realized? This introductory essay situates the debate around ownership and extraction in the Area in light of the stakes and stakeholders too often left to the side—particularly those of Indigenous peoples with claims to cultural connections to the Area. These stakes offer context for the different contributions to this symposium, which seek to challenge and advance these debates.

## *A Very Brief History of Property Rights in the Area*

For much of history, the ocean was a vast, shared space of abundance. Until only relatively recently, the deep seabed was completely inaccessible to humans. In the late nineteenth century, the HMS Challenger first discovered metallic nodules on the seafloor, which gave rise to wild speculation as to what mineral wealth may be hidden in the

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[1] United Nations Convention on the Law of the Sea, Art. 1(1)(1), 1833 UNTS 397, 21 ILM 1261 (1982).

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https://doi.org/10.1017/aju.2024.9 Published online by Cambridge University Press

ocean's depths. There was, however, no sustained effort to legally enclose the ocean floor, either as territory or bundles of private property—perhaps due to its ongoing effective inaccessibility. Yet the dream of this untapped frontier remained alive. Realistic possibilities of extraction came into view by the late twentieth century, as captured in Ambassador Arvid Pardo's 1967 speech to the United Nations telling of the "vastness of untapped wealth" on the seafloor.[2] The ethical question before states was: who would be allowed to mine these minerals and claim the resulting profits? In a show of solidarity, states agreed that no one state or person was to exercise sovereignty or sovereign rights over the seafloor. Instead, they declared the Area to be the common heritage of (hu)mankind.[3] This principle is grounded in equity and fairness, not only among states but oriented to all of humankind. States were to manage the Area and its natural resources collectively, in an unprecedented experiment of multilateralism. Emphasis was placed on the rights and interests of developing states and on equitable sharing of any benefits from future mining. This vision is encapsulated in the legal concept of the common heritage of humankind, which became the foundation for the Area regime in the UN Convention on the Law of the Sea (UNCLOS).[4] The Convention created the International Seabed Authority as the relevant governance forum and equipped it with exceptionally far-reaching powers to regulate the exploration and exploitation of minerals, decide who can access these minerals, and ensure compliance and enforcement.

In recent years, the Seabed Authority has been negotiating regulations for commercial-scale mining. These regulations will decide whether and under what conditions seabed mining in the Area will be allowed. It is not only the outcome of these negotiations that matter but also who has a seat at the table. While scientists have been involved in the negotiations, particularly to advise on the environmental risks of seabed mining, Indigenous peoples and local communities have no formal role—even though they bear the brunt of the immediate negative impacts of deep seabed mining, and despite their participatory rights under human rights law. These peoples and communities have connections to the seabed that can be unsettled by deep seabed mining in ways that neither the logic of markets nor environmental values can fully capture.

### *Cultural Connections in and to the Deep Ocean*

Many peoples have deep connections to the oceans. They define their sacred and spiritual identities and practices in relation to the coast and sea.[5] For the Haida Nation in the North American Pacific Northwest, oral traditions link the Haidas' emergence from the ocean to the formation of the SGaan Kinghlas-Bowie Seamount Marine Protected Area in Canada's exclusive economic zone.[6] For the Scandinavian Sami as well, access to the ocean and ocean resources has been instrumental in structuring the boundaries across different communities.[7]

Not all such connections are as old or as tied to creation stories, but they can nonetheless be just as powerful and central to identity. For many African diasporic communities, the Atlantic seabed is central to their definition of selves because it is a massive underwater gravesite of those who perished during the transatlantic slave trade.

[2] United Nations General Assembly, Examination of the Question of the Reservation Exclusively for Peaceful Purposes of the Sea-Bed and the Ocean Floor, and the Subsoil Thereof, Underlying the High Seas Beyond the Limits of Present National Jurisdiction and the Use of Their Resources in the Interests of Mankind, para. 27, UN Doc. A/C.1./PV.1516 (Nov. 1, 1967).

[3] United Nations General Assembly, Declaration of Principles Governing the Seabed and the Ocean Floor, and the Subsoil Thereof, Beyond the Limits of National Jurisdiction, UN Doc. A/RES/2749(XXV) (Dec. 17, 1970).

[4] UNCLOS, *supra* note 1, Arts. 136–37.

[5] Bill Jeffery, Jennifer F. McKinnon & Hans Van Tilburg, *Underwater Cultural Heritage in the Pacific: Themes and Future Directions*, 17 Int'l J. Asia Pacific Stud. 135, 140 (2021).

[6] Deep Ocean Stewardship Initiative (DOSI), *Policy Brief: The Necessity of Traditional Knowledge for Management of Deep-Seabed Mining*, 4 (2021).

[7] Lars Ivar Hansen, *Sami Fisheries in the Pre-modern Era: Household Sustenance and Market Relations*, 23 Acta Borealia 56 (2006).

https://doi.org/10.1017/aju.2024.9 Published online by Cambridge University Press

Millions of people have their final resting places in the deep seabed, and their memories are kept alive through songs, storytelling, and other cultural practices that repeat and reinforce these connections to the ocean.[8]

In the Pacific, scholars and activists have long spoken of the ocean as territory and a source of identity. As a result, the ocean moves away from a static or transient place, becoming itself more permanent "territory," place, and belonging instead. "Territory-as-ocean" has always been integral to Pacific identities, underpinned by Pacific peoples' migration patterns and knowledge systems about the ocean.[9] Migratory patterns for marine life also speak directly to cultural connections, since they influence the rhythms of everyday life.[10] The connections between Indigenous peoples and the ocean, under the label of "culture," can function on two levels. Many of the stories presented thus far speak of the ocean as part of (1) foundational or origin stories of peoples, as well as (2) affecting current uses of and forms of engagement with the ocean. The distinction is arbitrary, since one bleeds into the other in the case of living and ongoing connections, underpinned by epistemologies that do not separate as neatly between past and present.[11] But each of these categories performs differently in international law.

On the one hand, the framing of culture around origin stories ties Indigenous peoples' interests more centrally to the interests being weighed by negotiators of deep seabed mining rules. Especially when there are clashes involving Indigenous peoples, their identities, and the rights of third parties tied to economic development projects, balancing of rights and interests is the usual legal test, and the proximity of a right to a "core" of identity allows it to weigh more heavily in the consideration of competing rights.[12] Framing interests around identity allows for a wholesale rejection of competing claims from other parties, and it also prevents most other types of engagement with the deep seabed—which may suit Indigenous peoples and local communities. Indigenous peoples from around the world, under the banner of the Blue Climate Initiative, have called for a ban on seabed mining, stating their "refus[al] to allow any further harm to our sacred ocean," to "further damage the intricate web of life that we are part of and depend on for our survival," and to "allow governments and corporations to sell out the future of our children and life on our planet."[13]

On the other hand, to imagine the relationship of Indigenous peoples with the ocean as being one of current uses of the ocean—as part of ongoing living cultures and the economic and social structures that underpin those cultures—raises different questions. In this conception, there is arguably more room for negotiation with stakeholders, for Indigenous peoples to exercise agency, and to participate in benefit-sharing. The legal test operates less as one of protection (whether to exploit—which is one of the effects of the focus on origin stories), and more as one of enabling (how to exploit). Notions like free, prior, and informed consent become more central in this latter space, as it can create leverage (in the form of a veto-as-lack-of-consent) for negotiations.[14] The claim here is less one of inalienable exclusive rights, and more one of quasi-proprietary control over impacts (i.e., a bundle of sticks approach, more open to negotiation).

[8] DOSI, *supra* note 6, at 4; Phillip J. Turner et al., *Memorializing the Middle Passage on the Atlantic Seabed in Areas Beyond National Jurisdiction*, 122 Marine Pol'y 1, 2 (2020).

[9] Elizabeth M. DeLoughrey, Routes and Roots: Navigating Caribbean and Pacific Island Literatures 22 (2007); *see also* Lucas Lixinski, Jane McAdam & Patricia Tupou, *Ocean Cultures, the Anthropocene, and International Law: Cultural Heritage and Mobility Law as Imaginative Gateways*, 23 Melb. J. Int'l L. 1, 11–12 (2022).

[10] Clement Yow Mulalap et al., *Traditional Knowledge and the BBNJ Instrument*, 122 Marine Pol'y 1, 4 (2020).

[11] DOSI, *supra* note 6, at 2.

[12] Lucas Lixinski, *Balancing Test: Inter-American Court of Human Rights (IACtHR)*, *in* Max Planck Encyclopedia of International Procedural Law (Hélène Ruiz Fabri ed., 2019).

[13] Blue Climate Initiative, *Indigenous Voices for a Ban on Deep Sea Mining*.

[14] See the contribution by Erick Fábian Guapizaca Jiménez in this symposium.

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Distinguishing between different types of cultural relationships with the ocean presents both a challenge and an opportunity. The challenge is that, once one embraces this distinction, it waters down the strategic use of Indigenous peoples' worldviews to stop all activity (because the distinction admits that Indigenous worldviews can in fact fit into international law categories). The opportunity is for tactical gains for Indigenous peoples and their allies in seabed mining negotiations to achieve better outcomes.[15]

The latter was embraced in the new 2023 Agreement on the Conservation and Sustainable Use of Marine Biological Diversity of Areas Beyond National Jurisdiction (BBNJ Agreement). While focusing on protecting marine biodiversity, this Agreement is directly relevant to deep seabed mining as its spatial scope encapsulates the Area and high seas. The Agreement significantly elevates the role of Indigenous peoples and local communities, for example by confirming that the Agreement is to be interpreted in accordance with existing rights of Indigenous peoples and local communities. Moreover, the BBNJ Agreement requires states to consider traditional knowledge alongside scientific information when making decisions about ocean management. It also centers Indigenous peoples in governance decisions and thereby changes the goalpost for participatory governance in ocean commons, including in relation to the Area. In other words, the BBNJ Agreement creates an obligation to foreground more than economic interests in deep seabed mining negotiations, which is what the essays in this symposium explore.

*Overview of the Symposium Essays*

The contributors to this symposium invite us to think more broadly about the oceans as connected to culture and identity. Doing so is necessary to protect those affected by deep seabed mining in existential ways, in particular since the architecture of the deep seabed mining regime tends to resist influence from outside regimes.

Pradeep Singh of Helmholtz Centre Potsdam and Aline Jaeckel of the University of Wollongong show the logical impossibility of hermetically sealing deep seabed mining from other areas of international law. They argue that deep seabed mining could undermine a plethora of other ocean uses and prevent states from meeting existing obligations under international marine environmental law. What is more, mining could undermine the objectives of the new BBNJ Agreement. As they show, the legal and institutional framework for the seabed mining regime in the Area was negotiated from the 1970s to 1990s when environmentally benign seabed mining seemed to constitute a genuine possibility. We now have to interpret UNCLOS and the Seabed Authority regime in light of a new reality, in which the significant environmental and cultural impacts of seabed mining are better understood.

Lucas Lixinski of the University of New South Wales shows that cultural heritage law can do much to help advance cultural uses of the ocean. Specifically, he argues that intangible cultural heritage helps navigate the binary between origin stories and current uses of the ocean we discussed above, because of its strong intergenerational element (shared with the concept of common heritage of humankind, central to the Seabed Authority's mandate). The legal regime for intangible cultural heritage facilitates a better relationship between origin stories and current uses of the ocean. Indigenous peoples and local communities can use the validation of their stories through the listing mechanisms of the Intangible Cultural Heritage Convention to build stronger arguments for their participation rights, free, prior, and informed consent prerogatives, and even control of areas potentially affected by seabed mining.

Erick Guapizaca Jiménez of the University of Michigan tackles the potential of free, prior, and informed consent for deep seabed mining. He argues that free, prior, and informed consent, as a norm of customary international law, can work as a means to help balance the power asymmetries between Indigenous peoples and deep

[15] Robert Knox, *Strategy and Tactics*, 21 FINNISH Y.B. INT'L L. 193, 194–95 (2012).

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seabed mining interests. This norm forces negotiators and implementers of deep seabed mining rules to give voice to a broader range of stakeholders and seeks to ensure that their interests are taken into account.

However, these levers of cultural heritage law and free, prior, and informed consent may not be enough. Surabhi Ranganathan of Cambridge University provides a sobering account of how the burden of shifting the debate beyond the economic logics of deep seabed mining falls on Indigenous peoples and local communities, as well as other marginalized actors. Such shifts are typically only allowed where they do not disturb the fundamental (that is, economic) goals of the overarching regime. It may thus be necessary to draw on other legal possibilities to crack open the overarching regime.

Elisa Morgera of Strathclyde University offers some pathways to increase participation in this context. Her detailed examination of the internal workings of the Seabed Authority shows the deep embeddedness of presumptions against broad participation. Yet, she also identifies pathways for Indigenous peoples and local communities to exploit. Ultimately, however, Morgera suggests that, in line with Ranganathan's admonition, a mere seat at the table for Indigenous peoples is not enough. Rather, it needs to be accompanied by full consideration of other ways of seeing the world and producing knowledge, for which Lixinski's argument in particular seems to open a (limited) door.

In the end, perhaps other ways of seeing and thinking about the ocean can only become apparent at the stage of operationalizing regimes of ocean governance—particularly in the face of conflict. To that effect, Viren Mascarenhas of Milbank LLP closes this symposium by examining pathways for participation in dispute resolution. His contribution reminds us that dispute resolution mechanisms can foreground private interests and norms in ways that can elude the consideration of cultural identities and diverse epistemologies. It also highlights the importance of Guapizaca Jiménez's intervention, which sees free, prior, and informed consent as a key means to correct asymmetries in private lawmaking spaces, ensure other ways of seeing the ocean, and break through the economic logics associated with private interests that dominate current debates and regime design.

This symposium seeks to contribute to the design and implementation of a deep seabed mining regime that is fairer in all its facets and does not assume economic outcomes to be the only or even the most prominent measure of fairness. We also wish to contribute to broader debates about what international law might look like when different ways of understanding and knowing the world inform what it is, for whom it is, and why it is.

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