doi:10.1017/aju.2024.13

OWNERSHIP IN THE DEEP SEAS

ASSESSMENT OF STAKEHOLDER OPTIONS TO PARTICIPATE IN DISPUTES OVER SEABED MINING

*Viren Mascarenhas**

Exploitative mining in the deep seas is coming, and with it will arrive a new wave of international disputes. Numerous stakeholders will be interested in these disputes, such as those seeking to profit from exploitative mining activity; developing states seeking to benefit from equitable sharing of wealth and lessons learned; and environmentalists all over the world worried about environmental catastrophes that could result from such activity. Stakeholders include the mining contractor, the sponsoring state of the contractor, the International Seabed Authority (ISA) created by the UN Convention on the Law of the Sea (UNCLOS) to control mining activity in the deep seas, states (both states parties to UNCLOS and those that are not) and affected communities, which includes Indigenous peoples and climate activists. However, the dispute settlement system of UNCLOS treats these different stakeholders unequally in terms of whether they may be parties to a dispute proceeding and, if so, what claims they may bring. Unsurprisingly, the system excludes non-states parties and non-state entities (apart from the International Seabed Authority and the contractor), such as Indigenous peoples and climate activists, from serving as parties (claimant or respondent) to a dispute. This essay explores the limited ways in which excluded stakeholders nonetheless may be able to participate in a dispute initiated under UNCLOS. Specifically, they may serve as witnesses, experts, or *amicus curiae* in proceedings before the International Tribunal for the Law of the Sea (ITLOS), the Seabed Disputes Chamber, or a commercial arbitral tribunal. This essay also advocates for the ISA to establish administrative processes for ongoing monitoring and whistleblower complaints. Such processes would allow excluded stakeholders to submit relevant evidence and information that could—and should—be used in any formal dispute settlement processes initiated by those stakeholders who enjoy direct participatory rights.

Disputes Over Provisional Approval of Exploitation Activity

The 1994 Implementing Agreement, one of the ISA's constituent treaties, contains a "two-year rule" allowing any member state of the ISA whose national intends to apply for the approval of a plan of work for exploitation to request that the ISA Council complete the elaboration and adoption of the necessary regulations within two years. If the ISA Council fails to do so and an application is submitted, the ISA Council would still have to "consider" and "provisionally approve" the application, even though the exploitation regulations would not yet be in force.[1] The

* *Partner, Milbank LLP, and Lecturer-in-Law, Columbia Law School, United States.*

[1] Agreement Relating to the Implementation of Part XI of the UN Convention on the Law of the Sea, Annex S.1, para. 15, Aug. 17, 1994.

Republic of Nauru submitted such a request to the ISA on July 9, 2021.[2] The Metals Company has announced it will apply for an exploitation contract in July 2024.[3]

If the ISA does not consider the prospective contractor's application and/or does not provisionally accept it, then the prospective contractor may have grounds to initiate a dispute proceeding against the ISA under UNCLOS and the 1994 Implementing Agreement for failing to execute its duties. Additionally, the 1994 Implementing Agreement provides limited guidance to the ISA Council, indicating only that the ISA Council may rely on "rules, regulations and procedures that the ISA Council may have adopted provisionally," "norms contained in the Convention" or "principles contained in this Annex." The dispute proceeding could address the content of these items.

While a bilateral dispute could be initiated by either the prospective contractor or the ISA against each other before ITLOS, the Seabed Disputes Chamber, or a commercial arbitration tribunal, the dispute resolution procedures allow for the state sponsoring the contractor to participate in the proceeding.[4] The nature of the participation is not defined in the Convention. Presumably, the interests of the sponsoring state(s) and the prospective contractor would be aligned substantially in a dispute against the ISA over provisional approval (otherwise the sponsoring state would not sponsor the contractor).

The Statute of ITLOS also allows for the participation of other states parties to UNCLOS in a dispute before ITLOS regarding the interpretation or application of UNCLOS, assuming certain requirements are met. ITLOS or its Seabed Disputes Chamber[5] may permit individual states parties to intervene if it decides that the state party "has an interest of a legal nature which may be affected by the decision in any dispute."[6] Additionally, the Registrar shall notify all states parties of their right to intervene should the dispute implicate the interpretation or application of UNCLOS.[7]

States parties to UNCLOS do not have to wait for a prospective contractor or the ISA to initiate a dispute proceeding and then intervene. Instead, they could initiate proceedings themselves. States parties may sue the sponsoring state of the contractor or the ISA directly over provisional approval of a mining application regarding the interpretation and application of UNCLOS and Annex Section 1(15). The Chamber opined in its 2011 Advisory Opinion that the purpose of contractors requiring a sponsoring state was to "achieve the result that the obligations set out in the Convention, a treaty under international law which binds only States Parties thereto, are complied with by entities that are subjects of domestic legal systems."[8] States parties who oppose provisional approval of exploitation activities may sue the sponsoring state over whether it has satisfied its "responsibility to ensure" that exploitation activities that the contractor will perform "shall be carried out in conformity with [the Convention],"[9] in addition to other obligations identified in the Convention and elaborated upon in the 2011 Advisory Opinion.

The dispute settlement system regarding provisional activity while the exploitation regulations are pending contemplates states parties to UNCLOS being able to participate in disputes initiated by the prospective contractor or the ISA, and/or being able to initiate certain disputes themselves. This is understandable as UNCLOS is a

[2] *See* ISBA/26/C/38, Enclosure to Annex I, and Annex II (deferring the earlier operative date of June 30, 2021).

[3] The Metals Company, *TMC Announces Corporate Update on Expected Timeline, Application Costs and Production Capacity Following Part II of the 28th Session of the International Seabed Authority* (Aug. 1, 2023).

[4] United Nations Convention on the Law of the Sea, Art. 190(1), 1833 UNTS 397, 21 ILM 1261 (1982) [hereinafter UNCLOS].

[5] ITLOS Rules of the Tribunal, Art. 115.

[6] ITLOS Statute, Article 31(1).

[7] *Id.* Article 32.

[8] Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area (Request for Advisory Opinion Submitted to the Seabed Disputes Chamber), Case No. 17, Advisory Opinion, para. 75 (ITLOS Feb. 1, 2011); *see also* para. 79.

[9] UNCLOS, *supra* note 4, Art. 139.

https://doi.org/10.1017/aju.2024.13 Published online by Cambridge University Press

multilateral treaty and states parties should be able to express their views on its interpretation and application. It allows for wide participation of states parties in these disputes which have public dimensions given that the exploitation activity would be conducted in the seabed and subsoil beyond the limits of national jurisdiction, and does not limit its application to bilateral disputes between the prospective contractor and the ISA.

But the dispute settlement system contains a constraint in that non-states parties to UNCLOS as well as non-state actors (except for the ISA and the contractor), such as environmental activists, Indigenous peoples, non-governmental organizations, and commercial actors are excluded from direct access to the dispute settlement system. These groups may have an interest in exploitation activity and how it is being conducted, especially during a period when the relevant rules, regulations, and procedures to mitigate risks of such activity have not been finalized. Their lack of direct participatory rights to be a party to the dispute (especially as a claimant) is especially problematic given that the Area and its resources are the common heritage of (hu)mankind.

Participation of Excluded Stakeholders: Existing Options

The remainder of this essay discusses the existing limited ways in which non-states parties and non-state entities may be able to participate in the dispute settlement system and/or express their views through administrative processes.

Excluded stakeholders may be able to participate in a contentious proceeding before the Chamber or in binding commercial arbitration under the UN Commission on International Trade Law (UNCITRAL) Rules (currently an option in the draft exploitation contract[10]) in forms other than as a party to the proceeding, such as by serving as witnesses, experts, or *amicus curiae*. The Rules of ITLOS and the UNCITRAL Rules permit parties to a dispute to submit witness evidence. While the pool of witnesses likely would be drawn from consultants, employees, or representatives of the contractor or the ISA, it may be possible for other stakeholders to serve as witnesses. For example, Greenpeace has published video footage it took of tests performed by one of the contractors, the Metals Company, and its Swiss operating partner and shareholder Allseas, using the drill ship *Hidden Gem* in the Clarion Clippertone Zone in 2022.[11] A party to the dispute could present such observers who have direct and personal knowledge of facts relating to the dispute as witnesses.

Second, excluded stakeholders may also be able to participate as experts. Both the ITLOS Rules and the UNCITRAL Rules allow for the parties to submit expert evidence. They also permit the Chamber or ITLOS to appoint its own experts. The type of expertise relevant to a dispute over exploitation activity could vary considerably. For example, the draft exploitation contract provides that the contractor shall implement the plan of work in good faith and in accordance with industry practice.[12] A potential breach of the plan of work could implicate a range of expertise, especially on technical and scientific matters. Serving as an expert appointed by one of the parties to the dispute or by ITLOS is an important opportunity for stakeholders to ensure that the adjudicator takes into account issues within their expertise.

Third, stakeholders may be able to seek permission to intervene as *amicus curiae*. Neither the Statute nor the Rules of ITLOS make any reference to participation of *amicus curiae* in proceedings. Nevertheless, the Chamber retains discretion as to the conduct of proceedings and could in principle admit *amicus curiae* submissions into the record. Similarly, an UNCITRAL tribunal has discretion regarding whether to admit *amici* into the record.[13] It is not uncommon in investment treaty cases in the mining sector for stakeholders who are not parties to the dispute

[10] UNCLOS, *supra* note 4, Art. 188(c).

[11] Greenpeace, *Raw Footage of TMC Spill in the Pacific Ocean* (Sept. 15, 2022).

[12] ISBA/28/C/CRP.4, Annex X, Sec. 3.

[13] UNCITRAL Arbitration Rules 2021, Art. 33(2).

https://doi.org/10.1017/aju.2024.13 Published online by Cambridge University Press

to seek participation in the proceedings as *amici*.[14] *Amici* may be more successful in having their submissions entered into the case record in arbitral proceedings over exploitation activity in the Area given the Convention's fundamental premise that "[t]he Area and its resources are the common heritage of [hu]mankind"[15] and that activities in the Area shall be "carried out for the benefit of [hu]mankind as a whole . . . ."[16]

Additionally, excluded stakeholders have been trying to express their points of view on critical international law issues through limited participation in advisory opinion proceedings. The ISA's constituent parts (such as the Council or the Assembly) may seek an advisory opinion from the Seabed Disputes Chamber regarding a request from a prospective contractor for an exploitation contract while the exploitation regulations are pending.[17] It would be relatively straightforward for the ISA to certify a question of a legal nature that is within the scope of its activities to the Chamber. For example, the ISA could ask the Chamber to elaborate the "norms contained in the Convention" that may be relevant to the provisional acceptance of an application for exploitation activity. The ISA could also seek guidance on how to reconcile the provisional approval provided for in Annex Section 1(15) with UNCLOS Article 145's exhortation that "[n]ecessary measures shall be taken in accordance with this Convention with respect to activities in the Area to ensure effective protection for the marine environment from harmful effects which may arise from such activities." Part of that reconciliation could address whether a precautionary pause or a moratorium on exploitation activity would be consistent with states parties' and the ISA's obligations under UNCLOS. The ISA secretary-general has expressed the view that a precautionary pause or moratorium would be inconsistent with UNCLOS.[18]

A request for an advisory opinion would allow for wider participation by stakeholders in those proceedings, including by non-states parties and intergovernmental organizations.[19] In the 2011 Advisory Opinion proceedings, which addressed the legal responsibilities and obligations of states parties seeking to sponsor contractors, twelve states and four intergovernmental organizations made written submissions to the Chamber. Additionally, the routine practice of the Chamber has been to publish submissions from NGOs filed in the advisory opinion proceedings while indicating that the submissions do not form part of the case file. In the climate change advisory opinion pending before ITLOS, several diverse actors who are not parties to UNCLOS have made submissions. For example, the submission from the UN Human Rights Rapporteurs on Climate Change, Toxics, and the Environment focused on how climate change-related pollution of the marine environment impairs the effective enjoyment of human rights and argued that UNCLOS cannot be interpreted and applied without consideration of international human rights laws.[20] While these submissions do not form part of the case file, the practice has been for the authors to disseminate the submissions to states parties and intergovernmental organizations who are authorized to make submissions that form part of the case file. The objective is to influence those stakeholders with direct participatory rights and encourage them to adopt in whole or at least in part the views expressed by excluded stakeholders.

Broadening Participation to Include Excluded Stakeholders

It likely will not be politically feasible for states parties to agree to amend UNCLOS to allow for non-states parties and other excluded stakeholders such as Indigenous Peoples and environmental activists to participate as parties to

[14] International Institute for Sustainable Development Investment Treaty News (Mar. 30, 2022).

[15] UNCLOS, *supra* note 4, Art. 136.

[16] *Id.* Art. 140(1).

[17] *Id.* Art. 191.

[18] La Chambre des Représentants, Energy, Environment and Climate (Erasmus): Proposal for Resolution 887 – Hearing (June 24, 2020).

[19] Rules, Art. 133(2).

[20] Amicus Brief by the UN Special Rapporteurs on Human Rights & Climate Change, Toxics & Human Rights, and Human Rights & the Environment (2023).

https://doi.org/10.1017/aju.2024.13 Published online by Cambridge University Press

disputes proceedings and/or have rights equal to what states parties enjoy. This inequality might be acceptable for non-states parties because they have the option of ratifying UNCLOS. But this option is not available to non-state actors, such as Indigenous peoples, who cannot become parties to UNCLOS.

The ISA Council therefore should promulgate dispute resolution procedures that recognize some degree of participatory rights of these excluded stakeholders. *First*, the record of all proceedings should be public, including the oral and written submissions by the parties. A party to a proceeding seeking for any part of the record to be confidential should bear the burden of demonstrating why confidentiality is warranted. *Second*, the regulations promulgated by the ISA could provide for a fund to which states parties generally and the litigants to a specific proceeding have to contribute and that would be used as a form of legal aid to allow for indigent stakeholders to participate in some way in the proceedings. *Third*, a fund could also be created by states parties and/or the losing party to a specific dispute to compensate any excluded stakeholders who demonstrate they have suffered harm as a result of the provisional exploitation activity. The dispute resolution procedures should allow for affected excluded stakeholders to be able to make submissions justifying why they should be entitled to proceeds from any such fund. Indemnity or insurance provisions in the exploitation contract could also require the contractor to obtain coverage for excluded stakeholders in some meaningful way.

Not all of the solutions need to be focused on the dispute settlement system itself. Rather, it may be more politically achievable for the ISA to ensure that excluded stakeholders at least participate in the administrative procedures relating to the exploitation activity. Options include ensuring that excluded stakeholders have input into and access to the environmental impact assessment being conducted and proposed by the contractor and the sponsoring state to the ISA. Additionally, excluded stakeholders should be able to continue their monitoring vigilance while the exploitation activity is underway and then provide whistleblowing input, if any, to the ISA, which the ISA mandatorily must provide to all parties to review and investigate independently. All stakeholders could therefore monitor exploitation activity and warn against actual or potential harms, which would be addressed administratively by the ISA as it supervises the work of the contractor on an ongoing basis.

A critical advantage of having this evidentiary record is that it could become part of the judicial record in any disputes brought by those stakeholders who may serve as parties to the proceeding (such as a contractor or the ISA). The procedural rules could require that the entire administrative file be made available to the parties to the proceeding. In this way, the views of the excluded stakeholders in the real-time as the exploitation activity was underway would be available to the Chamber or the arbitral tribunal in a subsequent proceeding assessing the harms resulting from such exploitation activity.

Conclusion

The UNCLOS dispute settlement system prioritizes the contractor, the ISA, and states parties regarding disputes over exploitation activity, while excluding stakeholders that are non-states parties and non-state entities. This essay has considered the ways in which excluded stakeholders may participate as witnesses, experts, and *amici* in contentious proceedings. They could also publicize their positions and influence stakeholders in advisory proceedings even though their submissions do not form part of the official case record.

Ultimately, it may be more politically feasible for the ISA to promulgate procedures allowing these excluded stakeholders to play a role in the administrative oversight of any exploitation activity by giving them access to the environmental impact assessment(s), allowing for independent monitoring, and providing a whistleblower mechanism. Additionally, the dispute settlement rules may allow for this administrative case file to be turned over to the adjudicator, as well as the parties to the dispute, in any contentious matter. Provisions in the exploitation contract could help protect excluded stakeholders in some capacity. The dispute resolution options under UNCLOS and the 1994 Implemented Agreement are limited, hence creative solutions in the exploitation contract and administrative processes need to be considered.