

OWNERSHIP IN THE DEEP SEAS

AN OLD DILEMMA IN DEEP SEABED MINING: FREE, PRIOR, AND INFORMED CONSENT OF INDIGENOUS PEOPLES IN AREAS BEYOND NATIONAL JURISDICTION

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Free, prior, and informed consent of Indigenous peoples (prior consent) is a principle of international law that requires states to consult and obtain the consent of Indigenous peoples before projects or legislation that may affect their rights are approved. This principle is applicable to land-based mining projects unfolding in lands titled to Indigenous peoples. The extractive industry's extension to the deep sea is imminent, with the promising but controversial prospect of critical minerals essential for the transition to renewable energy. The application of prior consent in deep seabed mining is open to question because these projects are being developed beyond Indigenous peoples' territories and the impacts on their rights would primarily manifest indirectly. In this essay, I focus on the current plans to approve the new International Seabed Authority (ISA) mining code and to award grant exploration and exploitation contracts to mining companies. I put forward three arguments for why the consent principle applies to deep seabed mining projects. First, despite being developed outside lands titled to Indigenous peoples, mining projects can affect the rights of Indigenous peoples, and therefore, their consent is required. Second, the prior consent principle is applicable to deep seabed mining as a matter of treaty law under the International Labour Organization Indigenous and Tribal Peoples Convention No. 169. Finally, prior consent has the potential to qualify as a rule of international customary law applicable to the "specially affected states" with Indigenous populations under the United Nations Declaration on the Rights of Indigenous Peoples.

Free, Prior, and Informed Consent for Extractive Legislation and Projects

The prior consent principle has the aim of seeking and obtaining Indigenous peoples' consent before approving legislation or projects that may have the potential to affect their rights.¹ Of particular importance are the rights of Indigenous peoples to their lands, to live in a healthy environment, to access water and food, and to enjoy a myriad of cultural rights.

Grounded in the rights to self-determination and non-discrimination, the prior consent principle serves a triple purpose: (1) restoring Indigenous control over their territories and cultural heritage (self-determination); (2) mitigating adverse impacts on their collective rights; and (3) mitigating the imbalance of powers between Indigenous peoples on the one hand and private actors and states on the other (mitigation claims). Prior consent is thus clearly applicable when it comes to the approval of legislation concerning extractive industries and in all phases of natural resources exploration and exploitation projects within or near Indigenous lands.² This is because

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¹ See STEPHEN YOUNG, *INDIGENOUS PEOPLES, CONSENT AND RIGHTS: TROUBLING SUBJECTS* 3–4 (2021).

² Natalie Jones, *Self-Determination and the Right of Peoples to Participate in International Law-Making*, *BRIT. Y.B. INT'L L.* (2021).

extractive projects could significantly impact Indigenous rights, for example, causing forced displacements and environmental harm; adverse social and cultural effects, including decline in social cohesion and lack of spaces to perform sacred rituals; and even economic effects, such as the deprivation of use and development of natural resources within their lands.³ There is no fixed scheme as to how the consultation with Indigenous peoples should be carried out or the type of agreements that should be reached. It is clear that the consultation should be done in good faith, with the genuine intent to inform Indigenous peoples about the scope of the project and with a commitment to take their concerns seriously.⁴

However, conflicting views on the scope of prior consent emerge from the diverse interests around extractive industries.⁵ Unsurprisingly, these conflicting views often arise when domestic courts or legislatures are tasked with interpreting the concepts of “consent” and “consultation.”⁶ On the one hand, Indigenous leaders claim that they have veto power over projects on their lands pursuant to the right to self-determination. Conversely, corporations (interested in profits) and states (interested in a mix of profit, development, and other public policy goals) contend that prior consent entails a mere procedural requirement limiting Indigenous intervention to project approval.⁷ Thus, even if an Indigenous people rejects a project, the project could continue. Seeking to balance these interests, James Anaya and Sergio Puig propose a human rights-based approach to prior consent. They reject both the extreme notion of inflexible Indigenous veto power and its treatment as a purely procedural requirement of mere consultation. Instead, they advocate for prior consent to “mitigate imbalances and adverse consequences and advance mutual benefits” to secure an agreement that safeguards human rights. They go further and describe the aim of prior consent as reaching an agreement with all the involved parties so the impacts can be mitigated, and the benefits can be redistributed.⁸ This position assumes—correctly in my view—that finding a balance between the Indigenous peoples, state, and corporate interests in the context of extractive industries is feasible.

Why Does the Free, Prior, and Informed Consent Principle Extend to Deep Seabed Mining Projects?

Let us begin with a basic premise: the difference between land-based mining and deep seabed mining is that the latter does not unfold on lands titled to Indigenous Peoples but in areas beyond national jurisdiction (Area), comprising the seabed “belonging to all humankind.”⁹ From this premise flow two conceptual and one normative implication. The first conceptual implication is not good news for Indigenous peoples. It is possible to invoke the right to self-determination when an exploitation project unfolds in or near their territories because Indigenous peoples are the affected parties, and they should have the last word over matters in/on their

³ See Expert Mechanism on the Rights of Indigenous Peoples, [Draft Study on Free, Prior and Informed Consent: A Human Rights Based Approach](#), at 6–11, UN Doc. A/HRC/39/62 (2018).

⁴ Laurence Klein, María Jesús Muñoz-Torres & María Ángeles Fernández-Izquierdo, *A Comparative Account of Indigenous Participation in Extractive Projects: The Challenge of Achieving Free, Prior, and Informed Consent*, 15 *EXTRACTIVE INDUS. & SOC'Y* 101270, 5 (2023).

⁵ Gail Whiteman, *All My Relations: Understanding Perceptions of Justice and Conflict Between Companies and Indigenous Peoples*, 30 *ORG. STUD.* 101, 110–14 (2009).

⁶ Marina Brillman, *Consenting to Dispossession: The Problematic Heritage and Complex Future of Consultation and Consent of Indigenous Peoples*, 49 *COLUM. HUM. RTS. L. REV.* (2017).

⁷ Belen Olmos Giupponi, *Free, Prior and Informed Consent (FPIC) of Indigenous Peoples Before Human Rights Courts and International Investment Tribunals: Two Sides of the Same Coin?*, 25 *INT'L J. MINORITY GROUP RTS.* 485, 487–88 (2018).

⁸ S. James Anaya & Sergio Puig, *Mitigating State Sovereignty: The Duty to Consult with Indigenous Peoples*, 67 *U. TORONTO L.J.* 435 (2017).

⁹ [United Nations Convention on the Law of the Sea](#), Art. 136, 1833 *UNTS* 397, 21 *ILM* 1261 (1982).

lands.¹⁰ However, the fact that seabed mining exploitation occurs far from their lands weakens the claim of self-determination.¹¹ Accordingly, decisions related to seabed mining cannot be taken solely by Indigenous peoples by invoking the principle of self-determination since they pertain to spaces that benefit humankind.

The second implication is normative and based on the sources of international law. Each seabed mining application must comply with the principle of prior consent relevant to extractive industries, including prior consent under human rights treaties and customary international law. The governing framework for deep seabed mining exploration and exploitation, namely Article 138 of UNCLOS, mandates adherence to international legal rules.¹² Likewise, the Vienna Convention on the Law of Treaties requires the consideration of “any relevant rules of international law applicable in the relation between the parties.”¹³ States parties to the International Labour Organization 169 Convention, when sponsoring a seabed mining project that may have effects on Indigenous rights, are bound by the prior consent principle.¹⁴

Moreover, I argue that states with significant Indigenous populations should recognize the customary international rule of prior consent. A customary rule of international law is formed and becomes enforceable for states when it aligns with both state practice and *opinio juris*. Establishing a rule of custom requires state practice that “has to be virtually uniform, extensive, and representative.”¹⁵ Furthermore, *opinio juris* is required, which is defined as the conviction that a rule has binding legal effects for the “specially affected states.”¹⁶

In certain cases, non-binding instruments that have widespread support from states can serve as evidence of customary international law.¹⁷ One such non-binding instrument is the United Nations Declaration on the Rights of Indigenous Peoples. Under Article 32 of the Declaration, states shall consult and obtain the consent of Indigenous peoples when projects affect their resources and their rights.¹⁸ Because of the recognition of the Declaration among states with significant Indigenous populations when it was adopted at the United Nations General Assembly,¹⁹ I argue that these states have shown acceptance of prior consent bindingness.²⁰ States with significant Indigenous populations should therefore begin to recognize the declaration as a rule of international custom.

¹⁰ Gisela Zarembek & Marcela Torres Wong, *Participation on the Edge: Prior Consultation and Extractivism in Latin America*, 10 J. POL. LAT. AM. 29, 40–41 (2018).

¹¹ Violeta S. Radovich, *Indigenous Peoples and Local Communities' Participation Provisions in Negotiations on Conservation of Marine Areas Beyond National Jurisdiction*, in *SUSTAINABILITY THROUGH PARTICIPATION?* 423–26 (Birgit Peters & Eva Julia Lohse eds., 2023).

¹² UNCLOS, *supra* note 9, Art. 138; see also Julian Aguon & Julie Hunter, *Second Wave Due Diligence: The Case for Incorporating Free, Prior, and Informed Consent into the Deep Sea Mining Regulatory Regime*, 38 STANFORD ENVTL. L.J. 3, 47–54 (2019).

¹³ *Vienna Convention on the Law of Treaties*, Art. 31, May 23, 1969, 1155 UNTS 331.

¹⁴ International Labour Organization, *Indigenous and Tribal Peoples Convention*, Art. 15, June 27, 1989, 1650 UNTS 383.

¹⁵ JEFFREY L. DUNOFF, MONICA HAKIMI, STEVEN R. RATNER & DAVID WIPPMAN, *INTERNATIONAL LAW: NORMS, ACTORS, PROCESS: A PROBLEM-ORIENTED APPROACH* 64–67 (5th ed. 2020).

¹⁶ Kevin Jon Heller, *Specially Affected States and the Formation of Custom*, 112 AJIL 191 (2018).

¹⁷ *Texaco Overseas Petroleum Co., California Asiatic Oil Co. v. Government of the Libyan Arab Republic*, *Award*, 17 ILM 1 (Jan. 19, 1977).

¹⁸ *GA Res. 61/295, United Nations Declaration on the Rights of Indigenous Peoples*, Art. 32 (Sept. 13, 2007); see also *THE UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES: A CONTEMPORARY EVALUATION* 12 (Damien Short, Corinne Lennox, Julian Burger & Jessie Hohmann eds., 2021).

¹⁹ *GA Res. 61/295, United Nations Declaration on the Rights of Indigenous Peoples*, *supra* note 18. Voting record: 143 in favor, 4 against, and 11 abstained.

²⁰ Sylvanus Gbendazhi Barnabas, *The Legal Status of the United Nations Declaration on the Rights of Indigenous Peoples (2007) in Contemporary International Human Rights Law*, 6 INT'L HUM. RTS. L. REV. 242 (2017).

Another conceptual implication arises from the Area's *effects* on Indigenous life. This zone is important for climate change mitigation, resource availability, and cultural heritage. Matters that naturally concern Indigenous rights extend beyond the divisions imposed by the law of the sea.²¹ The Area should not be viewed in isolation from the rest of the planet because what takes place in the oceans holds profound implications for the rights and cultural heritage of coastal Indigenous peoples.²²

Although it is yet to be implemented, the exploitation of minerals in the Area has raised concerns among Indigenous activists and their scientific and academic allies regarding the availability of certain biological resources.²³ For example, in the Hawaiian cultural tradition, hawksbill turtles hold a significant role in the practice of hula, a venerable form of traditional dance. Similarly, in the North Pacific region, the utilization of seal meat for medicinal purposes is observed among the Aleut, Inuit, and Makah Indigenous communities.²⁴ The availability of these resources can be impacted by deep sea mining projects that do not take into consideration their importance for Indigenous peoples. While these adverse impacts should be considered before the decision to move forward with deep seabed mining, one cannot overlook the benefits that this industry could bring. This is especially in relation to the extraction of critical minerals, which has been argued to be fundamental to the transition to green energy.²⁵

How to Include Free, Prior, and Informed Consent in Deep Seabed Mining Activities

Currently, the Mining Code, which develops a process for prospecting, exploration, and mining, is being discussed at the ISA, the organization that controls and organizes activities in the Area.²⁶ What is at stake is a repeat of the debates around land-based mining. On the one hand, we have mining companies and state sponsors who promise profit from seabed minerals and emphasize their utility for energy transition. On the other hand, there are states, individuals, Indigenous peoples, and organizations that are against seabed mining exploration and exploitation and call for a moratorium due to adverse impacts on biodiversity and cultural heritage.²⁷ Thus, Indigenous peoples could advocate for a prior consent principle in deep-sea mining. However, I believe that based on the human rights-based approach, prior consent should not be seen as an Indigenous veto or a mere check-in-the-box process, but rather as an opportunity to reach agreements to mitigate the impacts of deep seabed mining.

First and foremost, at the policy level, the ISA must engage in consultations with Indigenous peoples while discussing regulations on deep seabed mining, i.e., the upcoming Mining Code, given their status as directly

²¹ Unwana Udo, Tahnee Prior & Sara L. Seck, *Human Rights at the Ocean-Climate Nexus: Opening Doors for the Participation of Indigenous Peoples, Children and Youth, and Gender Diversity*, 36 OCEAN Y.B. ONLINE 93, 96–97 (2022); see also Aline Jaeckel et al., *Deep Seabed Mining Lacks Social Legitimacy*, 2 NPJ OCEAN SUSTAINABILITY 1, 1 (2023).

²² 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, 18 (2022).

²³ Elisabetta Menini, Anindita Chakraborty & Stephen E. Rody, *Public Participation in Seabed Mining in Areas Beyond National Jurisdiction: Lessons Learned from National Regulators in the Terrestrial Mining Sector*, 146 MARINE POL'Y 105308, 3–6 (2022).

²⁴ Marjo K. Vierros et al., *Considering Indigenous Peoples and Local Communities in Governance of the Global Ocean Commons*, 119 MARINE POL'Y 104039, 2 (2020).

²⁵ Ryan Murdock, *Deep Sea Mining and the Green Transition*, HARV. INT'L REV. (2023), see also Christopher Ewell, *The Potential for Meaningful and Mandatory Corporate Due Diligence to Ensure Free, Prior and Informed Consent Rights in the Renewable Energy Transition*, 407 YALE J. INT'L L. 309 (2022).

²⁶ *Vienna Convention on the Law of Treaties*, *supra* note 13, Art. 157.

²⁷ Catherine Blanchard et al., *The Current Status of Deep-Sea Mining Governance at the International Seabed Authority*, 147 MARINE POL'Y 105396 (2023).

affected stakeholders. Of course, given that the regulation is in an advanced stage of discussion at the ISA Council, that ship may have sailed. Here, the recently adopted Biodiversity Beyond National Jurisdiction Agreement (BBNJ), which regulates activities in the area, such as mining, would be applicable. Its duty to conduct an Environmental Impact Assessment mandate the verification of the environmental impact of activities conducted in the area.²⁸ As for the states that ratify the BBNJ Agreement, the Environmental Impact Assessment rules set a bar for the ISA before approving deep seabed mining applications.²⁹

Under the BBNJ Agreement requirements, first, parties are mandated to conduct a “scoping” process aimed at identifying “the key environmental and any associated impacts, such as economic, social, cultural, and human health impacts” of activities in the deep-sea.³⁰ The environmental impact assessment could not only include the input of Indigenous peoples through their traditional knowledge of environmental effects, but also present an opportunity to understand the potential cultural and environmental impacts on their rights.³¹ This is because such an assessment, beyond being a legal duty, is a technical process in which the effects are corroborated with scientific evidence. Thus, the assessment bridges gaps by determining the eligibility of projects that necessitate consultation with Indigenous peoples. It also identifies areas where agreements must be reached to mitigate adverse effects. In this context, impact assessment is not a substitute for the prior consent principle. On the contrary, the environmental impact assessment serves as a tool for the ISA’s organs and Indigenous peoples to form an understanding of the risks associated with a project.³²

Concluding Remarks

Applying prior consent to deep seabed mining presents challenges distinct from the context of land-based mining. While seabed mining has the potential to adversely impact the rights of Indigenous peoples, it could also bring significant benefits for humanity, especially because of the scarcity of critical minerals essential for the transition to renewable energy. Deep seabed mining, therefore, holds considerable promise for humankind. Accordingly, as the custodian of these areas, the ISA must meticulously weigh and balance the diverse interests of states, corporations, and Indigenous communities in seabed mining. This will necessitate active engagement and agreement-seeking among all stakeholders to ensure that deep seabed mining projects do not result in the erosion of Indigenous ways of life and means of subsistence.

²⁸ Tseming Yang, *The Emergence of the Environmental Impact Assessment Duty as a Global Legal Norm and General Principle of Law*, 70 UCLJ. 525, 529 (2019).

²⁹ Samantha Robb, Aline Jaeckel & Catherine Blanchard, *How Could the BBNJ Agreement Affect the International Seabed Authority’s Mining Code?*, EJIIL:TALK! (Apr. 13, 2023).

³⁰ [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](#), Art. 31, UN Doc. A/77/L.82 (July 10, 2023).

³¹ Neil Craik & Kristine Gu, *Implementing Environmental Impact Assessment in Areas Beyond National Jurisdiction: Epistemic, Institutional and Normative Challenges*, in [RESEARCH HANDBOOK ON INTERNATIONAL MARINE ENVIRONMENTAL LAW](#) (Rosemary Gail Rayfuse, Aline L. Jaeckel & Natalie Klein eds., 2d ed. 2023).

³² Almut Schilling-Vacaflor, *The Coupling of Prior Consultation and Environmental Impact Assessment in Bolivia: Corporate Appropriation and Knowledge Gaps*, in [THE PRIOR CONSULTATION OF INDIGENOUS PEOPLES IN LATIN AMERICA: INSIDE THE IMPLEMENTATION GAP](#) (Claire Wright & Alexandra Tomaselli eds., 2019).