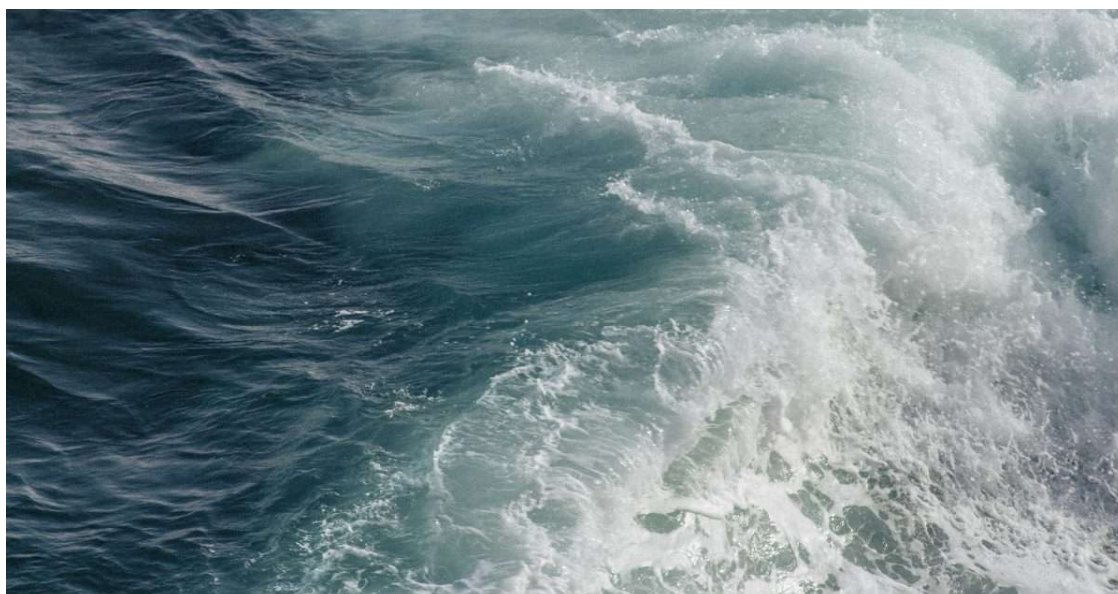


April 13, 2023

How could the BBNJ Agreement affect the International Seabed Authority's Mining Code?

Written by [Samantha Robb](#), [Dr Aline Jaeckel](#) and [Dr Catherine Blanchard](#)



On 4 March 2023, a new [treaty text](#) was finalized for an agreement on the conservation and sustainable use of marine biodiversity beyond national jurisdiction (BBNJ Agreement). This historic achievement could change the way we manage and use the ocean in areas beyond national jurisdiction (ABNJ). Once the BBNJ Agreement is formally adopted, a key question will be how it interacts with existing institutions that govern specific industries. In fact, under the BBNJ Agreement, states will be required to enhance international cooperation and promote the BBNJ Agreement's objectives within other international bodies.

One such institution is the International Seabed Authority (ISA), which regulates, controls, and manages seabed mineral mining on the

future seabed mining.

This blog offers initial reflections on key elements of the BBNJ Agreement that should be considered when negotiating the ISA's [Mining Code](#).

Area-based management tools

The Conference of the Parties (COP) to the BBNJ Agreement will be mandated to establish area-based management tools (ABMTs), including marine protected areas (Art. 19). Consultations will need to be held with the ISA when a proposed ABMT involves the international seabed or the water column near ISA mining sites (Arts 18(2)(b), 19). The success of such ABMTs will likely depend on how amenable the ISA will be towards the measure in question. The BBNJ Agreement attempts to strike a delicate balance between requiring the COP to not undermine the ISA (Art. 19(2)) while also requiring it to consult with the ISA regularly 'to enhance cooperation and coordination' and to 'promote the adoption' of ABMTs through the ISA (Art. 19(1)(c), (3)). This might prove to be one of the most difficult provisions to realize in practice.

The ISA already has developed [various ABMTs](#), including in its [Regional Environmental Management Plan \(REMPs\) for the Clarion-Clipperton Zone \(CCZ\)](#). Further REMPs are being developed for the [northern Mid-Atlantic Ridge](#) and the [Indian Ocean](#). These plans will be relevant for ABMTs developed under the BBNJ Agreement, though their scope is limited to environmental considerations in the context of seabed mining.

Area-based management tools under the BBNJ Agreement aim not only to protect the marine environment but also cultural values (Art. 14(d)). To that end, Indigenous Peoples and local communities should be consulted in developing ABMTs (Arts. 17(2), 18(2)(c)) and their traditional knowledge is relevant in identifying areas requiring protection (Art. 17(3), (4)(j)). The ISA is only just starting to consider

developing ABMTs.

Environmental impact assessments

The BBNJ Agreement sets a high standard for environmental impact assessments (EIAs), which may affect EIAs for seabed mining. If an EIA required for seabed mining by the ISA can be regarded as 'equivalent' to an EIA under the BBNJ Agreement, the latter does not apply (Art. 23(4)). In terms of the threshold to trigger an EIA, both regimes appear to be broadly equivalent. For the current mineral exploration phase, as opposed to commercial-scale exploitation, the ISA requires an EIA for any activity that has the potential to cause 'harmful effects' ([ISBA/25/LTC/6/Rev.2](#), paras. 8, 33). This meets the threshold for EIAs specified in Article 24 of the BBNJ Agreement, namely 'may cause substantial pollution of or significant and harmful changes to the marine environment'.

However, the BBNJ rules appear to set a higher bar with respect to several procedural and substantive requirements.

First, the BBNJ Agreement clearly requires an EIA **before** an activity is authorised (Arts. 22(1), 38), while the ISA currently only requires an EIA **after** it has already authorized mineral exploration work. Indeed, once an EIA is submitted, the ISA does not formally approve or reject it but merely reviews it for 'completeness, accuracy and statistical reliability' ([ISBA/25/LTC/6/Rev.2](#), para. 41). This has been extensively criticised [here](#) and [here](#). It is important to note that these rules apply to mineral exploration, which can include test mining but not commercial-scale mineral exploitation. For future commercial-scale mining, the ISA will require an EIA **before** issuing a mining contract.

Second, contrary to Article 24 of the BBNJ Agreement, the ISA does not require a screening phase, which poses a problem for EIAs conducted during an exploitation contract.

EJIL:Talk!

Blog of the European Journal of International Law

([ISBA/25/LTC/6/Rev.2](#)). The Draft Exploitation Regulations do not consider [human health impacts](#) but contain reference to sociocultural impacts in bracketed text ([ISBA/28/C/IWG/ENV/C RRP.1](#), annex IV section 6).

Fourth, a novel aspect of EIAs under the BBNJ Agreement is the requirement for them to be based not only on best available science and scientific information but also on ‘relevant traditional knowledge of Indigenous Peoples and local communities’ (Art 30(1)(c)). Indeed, Indigenous Peoples and local communities, and their traditional knowledge, enjoy a central focus in the BBNJ Agreement (see eg Art. 5(i), (j)) and are specifically mentioned with respect to stakeholder consultations on EIAs (Art. 34(3)). In contrast, the ISA’s legal framework for mineral exploration makes no mention of Indigenous Peoples or traditional knowledge, though the Draft Exploitation Regulations contain a number of references in bracketed text. If state interventions at the March 2023 session are anything to go by, the BBNJ Agreement may serve as a catalyst for the ISA regime to become more attuned to the rights of Indigenous Peoples and local communities under international law. An intersessional working group is now exploring the role of underwater cultural heritage, intangible cultural heritage, and traditional knowledge for the Mining Code.

Lastly, the BBNJ Agreement provides for regional strategic environmental assessments (SEA) by either States or the Conference of the Parties (Art 41 ter). Despite [calls to conduct SEAs](#), the ISA has rejected the concept and has not evaluated the regional scale risks of multiple mining operations. The ISA’s existing [Regional Environmental Management Plan for the Clarion-Clipperton Zone](#) is neither based on an SEA, nor elaborates regional limits for the number of mining operations.

In short, the BBNJ Agreement sets a higher bar for EIAs than the ISA currently does, which can and should affect the way in which impacts of deep seabed mining are assessed in the future. Indeed, the BBNJ

BBNJ Agreement in other bodies, such as the ISA (Art. 23(1)).

Marine genetic resources and capacity-building

Marine genetic resources (MGRs) occur on sites earmarked for seabed mining. If MGRs and digital sequence information are collected by mining companies, eg as part of environmental baseline studies, such activity should be subject to the BBNJ Agreement. This implies that contractors would need to offer capacity building opportunities for scientists from developing States (Art. 10(2)(g)), though it remains unclear whether these would be in addition to the capacity building obligations under the [ISA framework](#). Additionally, the notification rules of the clearing-house mechanism would apply to seabed mining voyages that collect MGR samples, requiring a notification to the BBNJ clearing-house mechanism 6 months in advance (Art. 10).

Transparency of ISA environmental data could improve following the BBNJ Agreement. Any genetic information collected by mining companies would need to be based on a 'data management plan prepared according to open and responsible data governance' (Art. 10(2)(i)) that provides free access to samples (Art 11(2)). Given the [widespread criticism](#) of the ISA's lack of transparency, this would be a welcome, albeit potentially small, change.

A final question relates to which State(s) are bound by certain obligations. Under the BBNJ Agreement, States will have to submit periodic reports to the Access and Benefit-Sharing Committee on their implementation of MGRs obligations (Art 13(3)). Yet, for MGRs collected in the context of seabed mining, it is unclear whether this obligation rests with the sponsoring State, the flag State, or the State of the place of registration of the mining company.

Concluding remarks

[harm](#) to the marine environment, including [noise pollution](#). Managing it in a manner that is compatible with the BBNJ Agreement will be a key step towards realising the aims of this new treaty.

Encouraging signs emerged from the March 2023 meeting of the ISA, with [several delegations highlighting](#) the importance of considering the BBNJ Agreement when negotiating the future of seabed mining. This blog has only scratched the surface. Detailed analysis will be needed on the ways in which coherence can be achieved between the new BBNJ Agreement and existing ocean governance regimes.

CATEGORIES

International Environmental Law

Law of the Sea

TAGS

biodiversity

environment

environmental law

environmental protection

Jurisdiction

mining



Samantha Robb

Samantha Robb is a South African qualified attorney with experience in public interest advocacy and litigation. She is currently employed as a legal research assistant by the Royal Netherlands Institute...

EJIL:Talk!

Blog of the European Journal of International Law



Dr Aline Jaeckel

[@AlineJaeckel](#)

Dr Aline Jaeckel is an Associate Professor at the Australian National Centre for Ocean Resources and Security (ANCORS) at the University of Wollongong. Her research focuses on law of the...



Dr Catherine Blanchard

[@ca_blanchard](#)

Dr Catherine Blanchard is Assistant Professor of Public International Law at Utrecht University, and Senior Research Associate at NILOS and UCWOSL. Her research focuses on the law of the sea,...

LEAVE A COMMENT

[HIDE COMMENTS](#)

2 comments

Nicolas Boeglin says

April 13, 2023

Dear Professor Jaeckel

Many thanks for your very valuable post.

Concerning indigenous communities and mining (or others activities with environmental impact), may I indicate that the Interamerican Court of Human Rights in its Advisory OPinion OC-23 of 2018 ruled the following (paragraph 227):

"In the context of indigenous communities, this Court has determined that the State must ensure the rights to consultation and to participation at all stages of the planning and implementation of a project or measure that could have an impact on the territory of an indigenous or tribal community, or on other rights that are essential for their survival as a people in keeping with their customs and traditions. This means that, in addition to receiving and providing information, the State must make sure that members of the community are aware of the possible risks, including health and environmental risks, so that they can provide a voluntary and informed opinion about any project that could have an impact on their territory within the consultation process. The State must, therefore, create sustained, effective and trustworthy channels for dialogue with the indigenous peoples, through their representative institutions, in the consultation and participation procedures".

Source: https://www.corteidh.or.cr/docs/opiniones/seriea_23_esp.pdf

EJIL:Talk!

Blog of the European Journal of International Law

BBNJ's treatment of indigenous communities rights and knowledge seems to take into consideration IACHR's opinion and also many other relevant decisions.

Yours sincerely

Nicolas Boeglin

Nicolas Boeglin says

April 13, 2023

Dear Professors Robb, Jaeckel and Blanchard

Many thanks for your very valuable post.

Concerning indigenous communities and mining (or others activities with environmental impact), may I indicate that the Interamerican Court of Human Rights in its Advisory OPinion OC-23 of 2018 ruled the following (paragraph 227):

"In the context of indigenous communities, this Court has determined that the State must ensure the rights to consultation and to participation at all stages of the planning and implementation of a project or measure that could have an impact on the territory of an indigenous or tribal community, or on other rights that are essential for their survival as a people in keeping with their customs and traditions. This means that, in addition to receiving and providing information, the State must make sure that members of the community are aware of the possible risks, including health and environmental risks, so that they can provide a voluntary and informed opinion about any project that could have an impact on their territory within the consultation process. The State must, therefore, create sustained, effective and trustworthy channels for dialogue with the indigenous peoples, through their representative institutions, in the consultation and participation procedures".

EJIL:Talk!

Blog of the European Journal of International Law

In fact, this OC-23 mentions 70 times the word "indigenous".

BBNJ's treatment of indigenous communities rights and knowledge seems to take into consideration IACHR's opinion and also many other relevant decisions.

Yours sincerely

Nicolas Boeglin

Subscribe to EJIL:Talk!

Sign up to receive updates on our latest posts.

SUBSCRIBE!

EJIL:Talk!

Blog of the European Journal of International Law

Categories

Analysis

Symposia

Editorials

EJIL: Live!

EJIL:Talk!

Blog of the European Journal of International Law

