



Incorporating transparency into the governance of deep-seabed mining in the Area beyond national jurisdiction

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ABSTRACT

In the governance of natural resources, transparency has been linked to improved accountability, as well as enforceability, compliance, sustainability, and ultimately more equitable outcomes. Here, good practices in transparency relevant to the emerging governance of deep-seabed mining in the Area beyond national jurisdiction are identified and compared with current practices of the International Seabed Authority (ISA). The analysis found six areas of good transparency practice that could improve the accountability of deep-seabed mining: i) access to information; ii) reporting; iii) quality assurance; iv) compliance information / accreditation; v) public participation; and vi) ability to review / appeal decisions. The ISA has in some instances adopted progressive practices regarding its rules, regulations, and procedures (e.g. including the precautionary approach). However, the results here show that overall the ISA will need to consider improvements in each of the six categories above, in order to reflect contemporary best transparency practices, as well as meeting historical expectations embodied in the principle of the 'common heritage of mankind'. This would involve a revision of its rules and procedures. The ongoing review and drafting of the ISA's deep-seabed mining exploitation regulations offers a once-in-a-generation opportunity to improve upon the current situation. Findings from this analysis are summarised in 18 recommendations, including publication of annual reports submitted by contractors, publication of annual financial statements, development of a transparency policy, compliance reporting, and dedicated access to Committee meetings.

1. Introduction

This paper identifies good practices in transparency that could lead to improved accountability in the emerging governance of deep-seabed mining in 'the Area' beyond national jurisdiction. To do so, recognised best practices from related marine and natural resource sectors are considered.

1.1. Transparency in the governance of natural resources

In the governance of natural resources, transparency is found to be a necessary factor for improved accountability, as well as enforceability, compliance, sustainability, and ultimately more equitable outcomes [13,22]. In the extractive resource industries in particular, transparency is emphasised with regard to improving governance ills, particularly

accountability [13], and has been hailed as an important step to resolving governance-related problems emanating from natural resources in national jurisdiction, such as fiscal responsibility, the choice of investments, and project suitability [22,45]. Well-established non-governmental organisations, including Transparency International,¹ the Natural Resources Governance Institute,² and the U4 Anti-Corruption Resource Centre³ promote transparency as a way to deter corruption [11]. Other factors, such as political stability, regulatory quality, and institutional competence, also play critical roles in the good governance of marine natural resources [11,42,50]. However, without transparency in deep-seabed mining, the details concerning allocation of international seabed mineral resources to private and state operators, ensuing environmental impacts, and regulatory compliance, will remain largely unknown. Greater transparency is necessary to allow for meaningful review or appeals, and can lead to greater public accountability and

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¹ <https://www.transparency.org/> accessed Oct. 2017.

² <https://resourcegovernance.org/> accessed Oct. 2017.

³ <http://www.u4.no/> accessed Oct. 2017.

engagement, which has been interpreted as consistent with the principle of the common heritage of humankind [40].

1.2. Deep-seabed mining

The potentially vast mineral wealth of the ocean was popularised over fifty years ago in an academic book, 'The Mineral Resources of the Sea', that captured the imagination of scientists, businessmen, and government representatives alike [16,51]. Spurred by record-high mineral commodity prices in 2011,⁴ the evolution of technical capabilities, and the approval of international regulations for prospecting and exploration, the prospect of deep-seabed mining (DSM) has had renewed attention. In the three years from 2011 to 2014, thirteen applications were made to the International Seabed Authority (ISA) for exploration contracts – more than any period before or since. As of August 2017, there had been a total of twenty-nine exploration applications to the ISA, including seven that were carried over from 'pioneer' contractors in the 1970s and 1980s. In response to this renewed industrial interest, DSM has also attracted renewed scientific, legal, and policy attention (e.g. [52,41,71]).

Combined with the pending expiration of the original 15-year contracts issued in the early 2000s, this renewed interest spurred the ISA towards development of its *exploitation* regulations. A preliminary 'Zero Draft' of these regulations was released for public comment in July 2016 [33]. Subsequently, a 'tentative working draft' discussion document concerning environmental aspects of these regulations was released in early 2017 (henceforth, 'Discussion Document'; [34]). In August of 2017, the ISA released 'Draft Regulations on Exploitation of Mineral Resources in the Area' (henceforth, 'Draft Regulations'; [35]).

The deep-seabed beyond national jurisdiction, administered through the ISA, has a unique legal status. In 1970, the United Nations (UN) General Assembly Resolution 25/2749 declared the seabed and its resources to be the 'common heritage of mankind' [68] – language that was later incorporated into the UN Convention on the Law of the Sea ([67]; Art. 136).⁵ In what is termed 'the Area' beyond national jurisdiction, UNCLOS stipulates that all rights in seabed natural resources are vested in humankind⁶ as a whole (Art. 137(2)). Financial and other economic benefits derived from activities in the Area, including DSM, are to be shared equitably (Art. 157(1)), again for the benefit of humankind (Art. 140(1); [65]). Also, DSM activities in the Area shall be carried out in such a manner as to foster healthy development of the world economy and balanced growth of international trade, and to promote international cooperation for the overall development of all countries, especially developing States (Art. 150). However, it has been questioned whether deep-seabed mining will actually achieve these lofty benefits, with some calling for a pause in developing the industry until there is a re-assessment of the legal obligations and whether these are being met [40,44,69].

Concerning the common heritage of the seabed's mineral resources, it has been suggested that the ISA's States Parties are "...meant to act as a kind of trustee on behalf of mankind as a whole." [71]. The principle, in being so defined, necessarily brings with it governance requirements beyond normal business-as-usual, particularly concerning fair and equitable benefit-sharing, and protection and preservation of the marine environment [39,40]. Given the as yet unknown impacts of full-scale commercial DSM on the environment and ecosystems, a

precautionary approach has been identified by the ISA in its 'Mining Code'⁷ (e.g. [28]; reg. 33.2) to reduce risk of unintended outcomes. The Seabed Disputes Chamber of the International Tribunal for the Law of the Sea (ITLOS) in its 2011 Advisory Opinion noted this as part of a trend towards making the precautionary approach part of customary international law ([38], para 135).

When discussing the contractual agreements between a sponsoring State and a Contractor, the Seabed Disputes Chamber linked the need for transparency with the common heritage of humankind principle. The Chamber noted that the contractual arrangement would, "... moreover, lack transparency. It will be difficult to verify, through publicly available measures, that the sponsoring State had met its obligations." ([38], para 225). It goes on to say that "...the role of the sponsoring State is to contribute to the common interest of all States in the proper implementation of the principle of the common heritage of mankind [...] Contractual arrangements alone cannot satisfy the obligation undertaken by the sponsoring State." (ITLOS, 2011, para 226). Thus, the lack of transparency that can arise from confidential contractual arrangements is seen by the Chamber as a hindrance to the proper implementation of the common heritage of humankind principle. Contractual agreements have to date been the basis of sponsoring State-Contractor relationships, and the relationships between the ISA and these parties.

The transparency of the ISA has been evaluated by stakeholders as insufficient, particularly concerning access to Commission meetings, data, and information to assess if a Contractor has met its obligations (ISA, [33]; [57]). When compared to the management of international fish stocks by regional fisheries management organisations, the ISA's practices were found to be least transparent [6]. Whilst many international maritime-focussed organisations began discussing transparency in the mid-late 1990s, such discussions did not occur within the ISA, and only appear in the records of the ISA's annual meetings very recently, after 2014 when a study on the topic was published [5]. However, over the past two years, the procedures of the ISA appear to be opening up somewhat to external participation; for example, proceedings have included internet-based consultations for the first time.

1.3. Elements of good governance

Aguilera and Cuervo-Cazurra [3] compiled a database of codes of good governance developed worldwide from 1978 until the end of 1999. According to their research, these codes of governance began in the corporate sector, mainly in the late 1980s and early 1990s. Only in the late 1990s did governments and inter-governmental bodies begin to issue their own codes of good governance. In 1997, the United Nations Development Program (UNDP) published a policy document, *Governance for Sustainable Human Development*, which set the mould for many others that would follow [66,17].

Codes and guidance concerning good governance generally include transparency, public inclusiveness & participation, accountability, and rule of law (Supplementary materials, Table s1). These four elements are inter-dependent in practice. The focus of this paper is mainly on the first two of them – transparency, which is taken to include public participation, as well as to some extent the third element, accountability, as reflected in the ability to review and appeal decisions.

The purpose here is not to further evaluate the above good governance elements beyond what has already been published by these authors and many others. However, it is worth noting that in natural resource governance, positive outcomes as a result of transparency can be difficult to demonstrate [43]. The limited mandate and power of voluntary initiatives, stakeholder resistance, and dependence on strong

⁴ World Bank Commodity Price Data (The Pink Sheet); <http://www.worldbank.org/en/research/commodity-markets#1> accessed Oct. 2017.

⁵ Reflecting the internationalist spirit of those times, similar text can be found in the Outer Space Treaty (1967; 'common interest of mankind') and the [54], though these have proven to be far less influential than UNCLOS. Arguably the other side of the same coin, the UN Declaration on the Establishment of a New International Economic Order (1975) emphasised regaining effective state control of natural resources from foreign interests.

⁶ Although UNCLOS uses the term 'mankind,' this paper shall use the more contemporary 'humankind' unless in direct quotation.

⁷ The ISA uses the term 'Mining Code' to collectively refer to all its regulations concerning mining exploration and exploitation. Currently, only exploration regulations have been finalised.

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