CHAPTER 13

Indigenous Peoples and Local Communities' Participation Provisions in Negotiations on Conservation of Marine Areas Beyond National Jurisdiction

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1 Introduction

The objective of this chapter is to analyse Indigenous peoples and local communities' (IPLCs) participation provisions in the Draft Agreement on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction (BBNJ)[1] to the United Nations Convention on the Law of the Sea (UNCLOS)[2] to provide an insight into whether they will lead to sustainability on the high seas and the Area.

This analysis will be led by a paradigm oriented towards putting the ocean centre stage, which includes incorporating IPLCs knowledge and participation as crucial elements, and by legal criteria defining participation as effective.

In addition to this, a comparison will be made between the participation standards established in the Aarhus Convention (AC),[3] the European Water Framework Directive (WFD)[4] and the Marine Strategy Framework Directive (MSFD).[5]

Finally, a comparison will be established with the participation standards contributions from the Human Rights Courts and Committees. Decisions of human rights bodies may be classified along a spectrum moving from the more

1 UNCLOS, Draft Agreement of an international legally binding instrument under the United Nations Convention on the Law of the Sea, <www.un.org/bbnj/sites/www.un.org.bbnj/files/revised_draft_text_a.conf_.232.2020.11_advance_unedited_version.pdf>, last accessed 17 August 2022.

2 UNCLOS entered into force 16 November 1994,1833 UNTS 397.

3 Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, entered into force 30 October 2001, 2161 UNTS 447.

4 Water Framework Directive (WFD) 2000/60/EC.

5 Marine Strategy Framework Directive (MSFD) 2008/56/EC.

general and less demanding forms of participation to procedural requirements that give IPLCs the ultimate power to decide on certain matters.

2 Regulating the High Seas and the Area through the Lens of Sustainability. Negotiations for a Binding Treaty for the Conservation of Biodiversity in Areas beyond National Jurisdiction

The current system of ocean governance has been challenged since 1992 when the UN Rio Declaration on Environment and Development (Rio Declaration),[6] adopted at the Conference on Environment and Development held in Rio de Janeiro, introduced the concept of sustainable development. Moreover, chapter 17 of the Agenda 21, adopted in the same Conference, emphasised the challenges and opportunities for the protection and sustainable development of the marine environment, integrated coastal zone management and the protection of biological resources.[7] Sustainable development goal 14, also adopted in the same Conference, mandates to conserve and sustainably use the oceans, seas and marine resources for sustainable development.[8] Recently, the Intergovernmental Oceanographic Commission, a body of the UN, declared the Oceanic Science Decade for Sustainable Development (2021–2030), a ten-year programme of joint action to advance research and technological innovation to comply with sustainable development goal 14.

The elaboration of many historical resource conservation schemes almost always included the participation of local stakeholders, such as Indigenous populations. Since the 1980s, these early manifestations of the connection between sustainability and participation have experienced a powerful renaissance with the international establishment of the principle of "sustainable development"[9] comprising the three pillars: economic development; environmental protection; and the protection of current and future generations.

Profs. Lohse and Peters state in their Deutsche Forschungsgemeinschaft project that contrary to their use in other disciplines, such as the social

6 UN, Rio Declaration on Environment and Development, Doc. A/CONF.151/26 (vol. I).

7 Report of the UN Conference on Environment and Development, 'Protection of the oceans, all kinds of seas, including enclosed and semi-enclosed seas, and coastal areas and the protection, rational use and development of their living resources', chapter 17, art 17.1, A/CONF.151/26 (Vol. II), 13 August 1992.

8 UNGA, *'Transforming our world: the 2030 Agenda for Sustainable Development*, 21 October 2015, A/RES/70/1, <www.refworld.org/docid/57b6e3e44.html>, last accessed 17 August 2022.

9 United Nations Environmental Programme, 'Report of the World Commission on Environment and Development – Our Common Future' (14 April 1987), para 27.

and political sciences,[10] in law the relationship between sustainability or sustainable development and participation has remained sketchy. Several questions remain and focus on how sustainabilty can be achieved and by which means of participation. It also remains unclear which procedures must be observed, and who must or should be considered participants. Moreover, does "sustainability" and "participation" describe particular substantive or procedural rules, standards, principles, programmes, or optimisation requirements and, under which circumstances may they be subject to enforcement? Is participation going beyond defence and consultation and leading to negotiation or co-decision? Finally, are participatory rights given to NGOs in the same manner as to individuals?[11] I aim to answer these questions in the present chapter in relation to the law of the high seas in the BBNJ Draft Agreement.

Covering three quarters of the earth's surface area, oceans are the world's largest ecosystem. BBNJ, including the high seas and the international seabed (the Area), comprise more than sixty percent of the ocean.[12] The legal framework for ocean governance in BBNJ does not operate in a void, however, it is largely fragmented and uncoordinated, resulting in a patchwork of regulatory schemes covering issue ranging from: protection of migratory birds; deep sea mining; the dumping of illegal waste from ships; and pollution from land-based sources. There are at least 190 multi- and bi-lateral agreements addressing a spectrum of issues affecting the ocean, not including other forms of global governance such as customary international law, working practice, or informal rules.[13]

In its Resolution 72/249 of 24 December 2017,[14] the UN General Assembly (UNGA) convened an Intergovernmental Conference (IGC) to consider the recommendations of the Preparatory Committee established by Resolution

10 Cf. especially: Virginie Barral, 'Sustainable Development in International Law: Nature and Operation of an Evolutive Legal Norm' (2012) European Journal of International Law 377; *Elinor Ostrom/Larry Schroeder/Susan Wynne, Institutional Incentives and Sustainable Development* (1993).

11 Eva J Lohse/Giulia Parola/Margherita Poto, 'Introductory remarks on the idea and the purpose of a German-Italian dialogue on participation in environmental decision making' in Eva J Lohse/Margherita Poto (eds), *Participatory Rights in the Environmental Decision-Making Process and the Implementation of the Aarhus Convention: a Comparative Perspective* (Dunker & Humblot 2015).

12 Elizabeth De Santo and others, 'Stuck in the middle with you (and not much time left): The third intergovernmental conference on biodiversity beyond national jurisdiction' (2020) Marine Policy 103957 117. See Art.1.4 Draft BBNJ Agreement.

13 Ibid.

14 UNGA on an International legally binding instrument 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, Res 72/249 (24 December 2017).

69/292 of 19 June 2015.[15] Further, it elaborated the text of an international legally binding instrument under UNCLOS on the conservation and sustainable use of BBNJ, with a view to developing the instrument as soon as possible. Resolution 69/292 creates an opportunity for a new and remarkable evolution of the Law of the Sea and provides evidence that the political momentum exists for negotiating an international legally binding instrument under UNCLOS on the conservation and sustainable use of marine biodiversity of BBNJ.[16]

In accordance with Resolution 72/249, the Conference held a three-day organisational meeting in New York, from 16 to 18 April 2018, to discuss organisational matters, including the process for the preparation of the zero draft of the instrument. The first session was convened from 4 to 17 September 2018, the second from 25 March to 5 April 2019 and the third from 19 to 30 August 2019. The fourth session was planned for March 2020, but was suspended because of the COVID pandemic. It was rescheduled on 16 to 27 August 2021, and suspended again due to the same reason.

The so-called Package 2011[17] identifies the following as the main substantive elements of the negotiation: first, marine genetic resources (MGRS), including questions on the sharing of benefits; second, measures such as area-based management tools, including marine protected areas (MPAS); third, environmental impact assessments (EIAS); and, fourth, capacity building and the transfer of marine technology. United Nations General Assembly (UNGA) Resolution 72/249 stressed the need for widest possible participation and the use of consensus-based decision-making.

The new BBNJ Agreement is intended to connect and coordinate fragmented governance institutions to ensure the conservation and sustainable use of marine biodiversity in BBNJ.[18] In this sense, the term 'integration' may be attributed to the following meaning in the third paragraph of UNCLOS Preamble: "Conscious that the problems of ocean space are closely interrelated and need to be considered as a whole."[19]

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15 <https://sustainabledevelopment.un.org/index.php?page=view&type=111&nr=7897&menu=35> last accessed 20.10.2022.

16 Marta C Ribeiro, 'South Atlantic Perspectives on the Future International Legally Binding Instrument under the LOSC on Conservation and Sustainable Use of BBNJ' 32 (2017) The International Journal of Marine and Coastal Law 733.

17 UNGA, Res 69/292 (2015) para 2 (n 2).

18 Elisabeth Druel and Kristina M Gjerde, 'Sustaining marine life beyond boundaries: options for an implementing agreement for marine biodiversity beyond national jurisdiction under the United Nations Convention on the Law of the Sea' (2014) 49 Marine Policy 90.

19 Richard Barnes, 'The Law of the Sea and the Integrated Regulation of the Oceans' (2012) The International Journal of Marine and Coastal Law 27 (4) 860.

In addition to this, the Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services (IPBES) last report in 2019 states that "integrative" governance shall be achieved in order to combat policy sectorial incoherence. Integrative governance is presented as one of the components to achieve "transformative" governance, along with informed, adaptative and inclusive governance.[20]

However, a "should not undermine" commitment has been consistently deployed throughout the four negotiation elements to argue that a new BBNJ instrument should not be empowered with any oversight or coordination functions in its relationship with existing institutions. This means that biodiversity conservation in BBNJ must be achieved without the treaty itself exerting any direct control over shipping or fishing activities.

IPLCs are the holders of a vast amount of traditional knowledge relating to the ocean and its resources.[21] However, IPLCs have generally been underrepresented in the debate about governance of BBNJ, as evidenced by the lists of participants in the intergovernmental meetings, although there are some regional exceptions within the context of the Convention on Biological Diversity (CBD). Nonetheless, IPLCs are custodians of many globally-significant migratory species that travel between coasts and high seas,[22] and are mentioned several times in the draft text of the Treaty.[23]

3 Towards an Ocean-centred System of Governance, Where IPLCs Should Have a Leading Role towards the Rights of Nature Perspective

Critical concerns have been raised regarding the adequacy of the current strategies offered by international law and the law of the sea regime for tackling climate change, and their integration and effectiveness in dealing with the challenges posed by environmental threats.[24] The ontology and the institu-

20 IPBES, *Global assessment report on biodiversity and ecosystem services of the Intergovernmental Science - Policy Platform on Biodiversity and Ecosystem Services*, chapter 6. E Brondizio and others (eds) (IPBES Secretariat 2019).

21 Clement Mulalap and others, 'Traditional knowledge and the BBNJ instrument' (2020) Marine Policy.

22 Marjo Vierros and others, 'Considering Indigenous Peoples and local communities in governance of the global ocean commons' (2020) 119 Marine Policy 104039.

23 Clement Mulalap and others, n 21, at 5.

24 Margherita Poto, 'The Law of the Sea and Its Institutions. Today's Hermeneutic Approach and Some Suggestions for an Ocean-Centred Governance Model' in Elise Johansen/ Signe V Busch/Ingvild UJakobsen (eds), *The Law of the Sea and Climate Change: Solutions and Constraints* (Cambridge University Press 2021).

tional framework of ocean governance should be reoriented and restructured towards a more effective ocean-centred system of governance.[25] The ocean shall be put at the centre of scene, restoring the connection between the seas and humanity. I have also proposed a similar approach in decided not to use the misleading word "offshore" when referring to exploration and exploitation of hydrocarbons at sea. Instead, I chose to use the word "marine", and call these structures, "sea or marine" platforms.[26] The use of the word "offshore" is at odds with the notions of sustainable development and the ecosystem approach.

The word "offshore" is traditionally used as an adjective to describe "away from or at a distance from the coast". It was adopted as a means of describing something that was the opposite of "onshore". However, in the context of installations, "offshore" identifies structures from a shore-based perspective and carries implications in the form of "non-shore" that do not adequately capture recent developments in seabed and subsoil exploration. For example, while exploration and exploitation initially took place in close proximity to the shore, over the last 80 years, exploration and exploitation have taken part in deeper waters. This has implications for environmental safety measures, which should be appropriate to evolving techniques; especially techniques deployed in deep water, which are subject to aggravating effects such as high water pressure. In reality, the structures in question are located in the marine, sea or ocean environment, rather than the "non-shore" environment.

This centrality contrasts with the regulatory approach of the law of the sea that emphasises the sovereign right of the state and state-like organisations towards the sea based on the presumption of the exploitable value of the world's oceans and seas.[27] When negotiated, the CBD was more oriented towards conservation than was the UNCLOS, which was oriented more towards resource exploration and exploitation.[28]

The conceptual framework of the law of the sea is based on the premise of the superiority of humans over nature. This has generated top-down regulatory patterns, with sovereign states at the top, and exploitable marine resources at the bottom. By contrast, integral and holistic views on the relationship between oceans and humans have recognised the oceans as an inseparable part of

25 Ibid.

26 Violeta Radovich, 'Governance of oil and gas exploration and exploitation at sea: towards coastal marine biodiversity preservation' in Ed Couzens, E/AlexanderPaterson/SophieRiley /Yanti Fristikawati(eds), *Protecting Forest and Marine Biodiversity: The Role of Law* (Edwar Elgar 2017).

27 Ibid.

28 Rüdiger Wolfrum/Nele Matz, 'The Interplay of the United Convention on the Law of the Sea and the Convention on Biological Diversity' (2000) 4 Max Planck Yearbook of United Nations Law 445.

existence. Examples of this vision may be found among Indigenous communities all over the world who acknowledge the unconditional value of water, independent of any economic appraisal. Coastal and marine people understand the oceans in terms of connections: between land and sea, earth and sky, day and night; between the spiritual and physical past, present and future; and between knowledge and practice, people and places.[29] In this sense, the IPBES Report[30] found that the loss of biodiversity and ecosystem function is much less pronounced on lands managed by IPLCs. In addition to this, UN's Agenda 21 acknowledges that over many generations, Indigenous peoples have developed a holistic traditional scientific knowledge of their lands, natural resources and environment.[31]

A re-reading of the concept of "institutions" shall include structures that are socially embedded, because they are generated by the interaction of all the actors beyond the states: collective organisations; individuals; and the ocean itself. This may pave the way for further reflection on the need to rethink the relationship between humanity and the sea in terms of connectivity, not mere superiority. This renewed definition not only expands the horizon of the actors involved and their mutual interactions, but also helps facilitate the integration of systems of laws that already focus on the connections that exist between peoples, knowledge, and ecosystems, such as the CBD.[32]

This approach supports a critical analysis of the system of the law of the sea in the context of interaction with climate change. Even though the issue of state sovereignty has been re-discussed in depth by new global actors like environmental NGOs and civil society, the regulation of the seas, when intersecting with the multi-actor-net of environmental governance, has remained a fine meshed system where non state actors have never served as decision makers. The response must involve recognising and developing the role of Indigenous peoples and marine communities as stewards of the ocean. UNCLOS Part XII provisions are linked to the Westphalian approach that gives precedence to the state action in any environmental decision. In other words, they are state-oriented. States are the sole actors with a major role in decision making.[33]

29 Margherita Poto (2021), n 24, at 5.

30 IPBES, 'Global assessment report of the Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services;, S Díaz/J Settele/E. Brondízio/H T Ngo (eds) (IPBES Secretariat: 1753) <https://ipbes.net/global-assessment> last accessed 17 August 2018.

31 Paul Simon in Daniel Sitarz (ed), *Agenda 21: The Earth Summit Strategy to Save our Planet 30* (1st Edn., 1993).

32 Margherita Poto (2021) n 24, at 5.

33 Margherita Poto (2021) n 24, at 5.

Globalisation and environmental challenges have offered great opportunities for re- conceptualising and re-orientating international law and the law of the sea regime, especially after the Rio Declaration. Gradually, the scope of ocean governance has moved beyond the need to regulate the seas at an interstate affair, pushing the debate in the direction of defining the oceans as global commons.

Western systems of knowledge tend to delineate knowledge into areas such as "fisheries" or "management" or "species" while Indigenous knowledge is more circular and layered.[34] This is related to integrated ocean management approach as opposed to a sectorised one. The effect of globalisation on the domain of public law has contributed to changing perceptions of the relationships between actors and rules. Before the advent of globalisation, law was organised mainly within national boundaries.[35]

The opening towards a model of global governance marks a first step in the path towards a holistic approach, by strengthening the participation of non-state actors and by implementing a toolbox of rules that hold users accountable for damage caused to the environment. The centrality of the protection of the seas marks the second step, with the revitalisation of regenerative practices in Indigenous and local marine communities who have always understood the importance of paying central attention to the oceans.[36]

In recent years, for the most part in Latin America, Australia and New Zealand, there has been a shift from the anthropocentric approach of regulating natural resources to an ecocentric one. The first approach is well embedded in UNCLOS and the Rio Declaration where humans actions are recognised as the main centre of concern. Pursuant to the ecocentric shift, nature is conceived of as holding its own rights, rather than being an entitlement for human use.[37] The idea of human representatives providing a voice for nature is central to the idea of nature's rights. The development of rights of nature laws in Ecuador and Bolivia has applied the concept of *Buen Vivir,* the idea of living a good life, inspired by Indigenous communal societal goals. Ecuador and Bolivia also recognise the rights of *Pachamama*, Mother Earth.[38]

34 Melissa Nursey-Bray and Jacobson Chris, 'Which way?': The contribution of Indigenous marine governance' (2014) 6:1 Australian Journal of Maritime & Ocean Affairs 27.

35 Margherita Poto and Lara Fornabaio, 'Participation as the Essence of Good Governance: Some General Reflections and a Case Study on the Arctic Council' (2017) 8 Arctic Review on Law and Politics 139.

36 Margherita Poto (2021) n 24, at 5.

37 Elizabeth Macpherson, *Indigenous Water Rights in Law and Regulation* (Cambridge, 2019).

38 Maria V Berros, 'Defending Rivers: Vilcabamba in the South of Ecuador. Perspectives' (2017) Rachel Carson Center for Environment and Society Munich 37.

Proponents of the rights of nature focus on the need for natural resources to have standing before the courts in order for their rights to be protected. Most commonly, these declarations or the granting of legal personality has been related to rivers. Regulatory models that protect the rights of rivers have been largely driven, not by environmentalists, but by Indigenous and tribal communities, who claim distinct relationships with water based on their cosmovision of guardianship, symbiosis and respect, as opposed to western liberal utilitarianism.[39] As Māori legal scholar Linda Te Aho explains, "we see ourselves as direct descendants of our earth mother and sky father and consequently not only of the land but as the land."[40] Legal rights for rivers, at least when they directly involve Indigenous peoples, are an attempt to resolve historical and contemporary grievances about resource use and reconstitute governance arrangements. Therefore, I believe a next step in ocean regulation would be to grant them legal personality. In fact, the literature has proposed the establishment of a such new body, a "Council of Ocean Custodians" to provide a voice for the ocean areas beyond national jurisdiction (ABNJ).[41]

4 Environmental Participation in European Provisions

Three legal criteria will be employed as a reference to evaluate to what extent environmental participation has democratic features and/or contributes to the emergence of new forms of democracy.[42] These are: 1) the level of inclusiveness; 2) the influence of participatory experiences on final decisions; and 3) the level of accountability of final decision-makers with respect to the intermediate input provided by citizens during participatory processes.

Regarding the third criteria, as decisions taken by participatory instances are usually not mandatory, it is worth addressing the question of whether citizens have the means to check whether their opinions have been taken into account. Is there a way to sanction decision makers if they fail to take into account the result of participation? Because if not, participation is limited to exercising a

39 Elizabeth Macpherson (2021) n 37, at 7.

40 Linda Te Aho, 'Indigenous challenges to enhance freshwater governance and management in Aotearoa New Zealand- The Waikato River Settlement' (2009) 20(5–6) Journal of Water Law 285.

41 Harriet Harden-Davies and others, 'Rights of Nature: Perspectives for Global Ocean Stewardship' (2021) 122 Marine Policy 104059.

42 Federica Cittadino, 'Public Participation in the Water Framework Directive (WFD): A Contribution to Deliberative Democracy?' in Eva Lohse and Margherita Poto (eds.), *Best Practices for the protection of water by law* (Berliner Wissenschafts-Verlag 2017).

consultative role. Representative institutions shall be required to justify decisions not to include the results of public deliberation in final measures.[43]

Further development in the recognition of participatory rights in environmental decision-making is marked by the AC, which provides for free, prior and informed consent (FPIC) in the form of rights of access to information and participation in decision-making. More specifically, the AC has structured participation into three main pillars, dealing with: a) the right of access to information; b) the right to participate in decision-making; and c) the right of access to justice in environmental matters. AC in art 6.4. states that, "Each Party shall provide for early public participation, when all options are open and effective public participation can take place."

It should been analysed the extent to which the participatory mechanisms foreseen in the European WFD respond to the legal criteria employed. Public participation is foreseen under art 14 of the WFD, which reads as follows:

> Member States shall encourage the active involvement of all interested parties in the implementation of the directive in particular in the production, review and updating of the river basin management plans.

This provision contains at least two vague clauses whose content needs to be discussed in more detail, namely "active involvement" and "all interested parties".[44] In this respect, the Commission, in cooperation with the Member States, has elaborated a Common Implementation Strategy (CIS) for the WFD. Guidance document no 8 of the CIS[45] is specifically dedicated to public participation and thus may be used to interpret the above-mentioned open clause.

The CIS defines "active involvement" to be more than just consultation because it also implies participation in the whole planning process. More explicitly, public involvement is considered a "share in decision-making".[46] How is public involvement intended to be carried out in concrete terms?[47] Art 14 (2) provides some indication when it foresees that the public "has six months to comment in writing". Also, the CIS indicates some new legal tools, such as,

43 Ibid.

44 Federica Cittadino (2017) n 42, at 8.

45 CIS, Guidance document no 8 (2003) <https://circabc.europa.eu/sd/a/0fc804ff-5fe6-4874-8e0d-de3e47637a63/Guidance No 8 - Public participation (WG 2.9).pdf> last accessed 17 August 2022 p 12.

46 CIS, Guidance document no 8 (2003) <https://circabc.europa.eu/sd/a/0fc804ff-5fe6-4874-8e0d-de3e47637a63/Guidance No 8 - Public participation (WG 2.9).pdf> last accessed 17 August 2022, p 95.

47 Federica Cittadino (2017) n 42, at 8.

citizens' juries and creative sessions that are also discussed in the context of deliberative democracy. The former requires "randomly selected people, who represent a microcosm of their community [to discuss] a specific issue and make public their conclusions"[48] upon payment. The latter aims to develop common ground for the public involved and to understand and evaluate issues with the help of facilitators.[49]

The CIS of the WFD defines "interested parties" as "any person, group or organisation with an interest or "stake" in an issue, either because they will be directly affected or because they may have some influence on its outcome." Therefore, the WFD favours a broad notion of the public involvement because it is not only limited to the inclusion of affected parties, and is so broader than the AC.[50] In the AC, "The public concerned" means the public affected or likely to be affected by, or having an interest in, the environmental decision-making; for the purposes of this definition, non-governmental organisations promoting environmental protection and meeting any requirements under national law shall be deemed to have an interest (art 2.5), so it does not include individual people. The MSFD also provides for active involvement and participation of all interested parties, as does the WFD.

5 IPLCS Rights

The most commonly referred definition of Indigenous peoples at international level is in art 1 (1)(b) of the International Labour Organisation's (ILO) Convention concerning Indigenous and Tribal Peoples (ILO No 169),[51] which states that Indigenous peoples are:

> ... peoples in independent countries who are regarded as indigenous on account of their descent from populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonisation or the establishment of present states boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions.

48 CIS Guidance document no 8 (2003) <https://circabc.europa.eu/sd/a/0fc804ff-5fe6-4874-8e0d-de3e47637a63/Guidance No 8 - Public participation (WG 2.9).pdf> last accessed 17 August 2022, p 95.

49 CIS (2003), p 11.

50 Federica Cittadino (2017) n 42, at 8.

51 International Labour Organization Convention No 169 (27 June 1989) <https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:55:0::NO::P55_TYPE,P55_LANG,P55_DOCUMENT,P55_NODE:REV,en,C169,/Document> last accessed 20.10.2022.

Several core international human rights treaties and their treaty bodies affirm the rights of Indigenous peoples to own, develop, control, and use their traditional territories and resources, as well as obligate States to ensure and protect those rights.[52] Additionally, various non-binding international instruments also acknowledge the crucial role that Indigenous peoples play in environmental management and decision-making, especially for the purposes of sustainable development.[53]

The acronym IPLCs encompasses not just indigenous peoples, but also local communities. Local communities, unlike Indigenous peoples, do not necessarily have a history of being invaded or colonised by external entities. However, like Indigenous peoples, local communities have cultural values, practices, and systems developed through multiple generations and poised to be passed to future generations. This is the approach taken in the CBD.[54]

As regards "traditional knowledge", the so-called CBD art 8(j) Working Group makes use of an informal working definition, as follows:

> Traditional knowledge refers to the knowledge, innovations and practices of indigenous and local communities around the world. Developed from experience gained over the centuries and adapted to the local culture and environment, traditional knowledge is transmitted orally from generation to generation. It tends to be collectively owned and takes the form of stories, songs, folklore, proverbs, cultural values, beliefs, rituals, community laws, local language, and agricultural practices, including the development of plant species and animal breeds. Sometimes it is referred to as an oral tradition for it is practiced, sung, danced, painted, carved, chanted and performed down through millennia. Traditional knowledge is mainly of a practical nature, particularly in such fields as agriculture, fisheries, health, horticulture, forestry and environmental management in general.[55]

52 See eg: UNGA, International Convention on the Elimination of All Forms of Racial Discrimination (1966); see also the provisions on economic self-determination for indigenous peoples in UNGA, International Covenant on Civil and Political Rights(1966) and International Covenant on Economic, Social, and Cultural Rights (1966).

53 See eg, UN Conference on the Human Environment(1972) Stockholm Declaration Principle 22; UN Conference on Environment and Development (1992) Rio Declaration on Environment and Development, Principle 22, UN Doc A/ CONF.151/26.

54 Clement Mulalap and others, n 21 at 5.

55 Secretariat of the Convention on Biological Diversity, Traditional Knowledge and the Convention on Biological Diversity, <www.cbd.int/doc/publications/8j-brochure-en.pdf> last accessed 17 August 2022.

Three major types of traditional knowledge may be mentioned: traditional knowledge based on the connectivity of species and marine processes (both active and passive) between ABNJs and coastal waters; traditional knowledge emerging from environmental management best practices in coastal waters that can be models for similar measures in ABNJs; and traditional knowledge derived from traditional instrument-free navigation between coastal communities and across ABNJs that is still utilised in voyaging in various parts of the world. The examples reveal, among other things, the interconnected nature of the natural environment (from highlands to shores to the deep ocean), a keen awareness among IPLCs of the need to balance sustainable use with ambitious conservation, the importance of involving all stakeholders (including IPLCs with relevant traditional knowledge) in environmental governance practices, the profound cultural and spiritual values IPLCs associate with the natural environment, and the necessity of interacting with the natural environment with caution and respect. As an example of the interconnected nature of the natural environment, it has been recently proved that rainfall causes microplastics in the ocean to be transported into the atmosphere.[56]

This body of knowledge and associated custodianship, particularly as relating to the ocean and its resources, predates the establishment of current national borders and continues to inform access and use of marine areas and resources throughout the world. As such, it has precedent and great relevance for consideration under the BBNJ instrument.[57]

Indigenous peoples' groups in the Arctic Council are granted the status of permanent participants, which has a number of consequences in terms of their involvement in any environmental decision which affects them. The reason for allowing this full engagement lies in the high level of consciousness of their connection with the land they live in. Arctic peoples consider themselves as a part of the whole with the natural resources with which they live, they self-identify with their natural environment and therefore they self-determine by participating in decisions that affect them.[58] In this way participation becomes transformative, since the empowerment of the parties so engaged leads to a transformation of the communities involved.[59]

56 Moritz Lehmann and others, 'Ejection of marine microplastics by raindrops: a computational and experimental study' (2021) Microplastics and Nanoplastics 1, 18.

57 Clement Mulalap and others, n 21 at 5.

58 Margherita Poto, 'Participatory rights of indigenous peoples: The virtuous example of the Arctic region' (2016) 2018 Environmental Law and Management 81.

59 Ibid.

6 Contributions of the CBD and the UN Framework Convention on Climate Change (UNFCCC) Regarding IPLCs Participation

6.1 Synergies from the UNFCCC

The world's oceans are affected by global warming, which leads to increases in temperatures, the generation of more severe storms, rising sea levels, coastal erosion and vertical stratification, to which the marine ecosystem is particularly sensitive. Moreover, ocean acidification is also on the increase, which may entail severe effects on marine animals.[60] Ocean acidification, along with climate change, are grounded reasons to propitiate a reduction in global CO_2 emissions. The ocean has a fundamental function in the carbon cycle, by absorbing approximately 0.5% of the CO_2 emitted to the atmosphere in the last 200 years.

In 2015, progress was made in the regulation of the climate change-ocean relationship, because for the first time the role of the ocean was mentioned in the Paris Agreement as a result of the Nº 21 Convention of the Parties (COP) to the UNFCCC.[61]

As regards the UNFCCC, in the preamble to the Paris Agreement, Parties acknowledge that they "should", when taking action to address climate change, respect, promote, and consider their respective obligations on "The rights of indigenous peoples [and] local communities." Toward that end, per para 136 of the decision adopting the Paris Agreement, the Parties to the UNFCCC established in 2015 a Local Communities and Indigenous Peoples Platform (LCIPP).[62] In order to operationalise the LCIPP, Parties to the UNFCCC established the Facilitative Working Group for the LCIPP per para 3 of a 2018 decision, with membership comprising of an equal number of representatives from States and from Indigenous peoples organisations — a landmark achievement in international law and discourse with respect to participation of holders of traditional knowledge.[63,64]

60 IPCC Climate Change 2014: Synthesis Report. <https://www.ipcc.ch/site/assets/uploads/2018/05/SYR_AR5_FINAL_full_wcover.pdf> last accessed 17 August 2022.

61 UN, Paris Agreement (2015), entered into force 16 November 1994, Doc. FCCC/CP/2015/Add.1 Decision 1/CP 21.

62 UN Framework Convention on Climate Change, 21st Meeting of the Conference of the Parties, Decision 1/CP 21.

63 Clement Mulalap and others, n 21 at 5.

64 UN Framework Convention on Climate change, 24th meeting of the conference of the Parties, Decision 2/CP.24.

6.2 *Synergies from the CBD*

The Nagoya Protocol on Genetic Resources to the CBD[65] regulates the components of biodiversity in areas within national jurisdiction.[66] Many of the initiatives taken under the CBD are inspiring[67] and the geographical limitations of the CBD have not prevented the COPs debating, since 2004, issues concerning the conservation of ABNJ.[68] One concrete outcome of the initiatives taken, especially since 2008, is the work being done on the identification of ecologically or biologically significant marine areas (EBSAs).[69] In the EBSA process, CBD Contracting Parties hold regional workshops to identify maritime areas that meet the criteria for EBSA designation and lay the groundwork for future efforts by relevant and competent national, regional and international entities to impose special conservation and management measures on those areas.

In accordance with Decision XI/17 of the CBD Conference of the Parties, CBD Contracting Parties, other governments, competent intergovernmental organisations, and relevant IPLCs are invited to use guidance from the CBD on integrating traditional knowledge (with the approval and involvement of the holders of that knowledge) in any future descriptions of maritime areas qualifying as EBSAs as well as future conservation and management measures for those areas,[70] including extensive work done on the matter by the CBD

65 Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity (2010) UN Doc. UNEP/CBD/COP/DEC/X/1.

66 Article 4, CBD; Article 3, Nagoya Protocol.

67 For instance, acceptance of overarching principles, such as the precautionary approach and the ecosystem-based approach (Article 5 of the 1995 UN Fish Stocks Agreement); consultation processes and compatibility provisions in the case of transboundary impacts requiring EIA; review, monitoring, compliance and dispute settlement mechanisms; international minimum environmental standards; MPA definition and substantive criteria; benefit sharing mechanism with respect to genetic resources; institutional *governance*. In the case of networks of MPAs and other effective area-based conservation measures see the following decisions of the Conference of the Parties (COP) of CBD: COP 7-2004, Decision VII/30, Annex II, Target 1.1, and COP 10, Decision X/2 (*The Strategic Plan for Biodiversity 2011–2020 and the Aichi Biodiversity Targets*), Annex, IV, 13, Target 11. <www.cbd.int/cop/default.shtml> last accessed 17 August 2022.

68 See COP 7-2004, Decision VII/5, paragraphs 29–31, and subsequent decisions on marine and coastal biodiversity.

69 See COP 9-2008, Decision IX/20, paragraph 14; COP 10-2010, Decision X/29; and COP 11-2012, Decision XI/17. See also the EBSAs website: <www.cbd.int/ebsa/about?tab=relevantDecisions> last accessed 17 August 2022.

70 Decision adopted by the Conference of the Parties to the Convention on Biological Diversity at its eleventh session, held in Hyderabad, India, from 8 October to 19 October 2012, 24, UNEP/CBD/COP/DEC/XI/17 (Dec. 5, 2012).

Subsidiary Body on Scientific, Technical and Technological Advice (SBSTTA). Furthermore, in the same Decision, the CBD Conference of the Parties called for the development of training materials on the use of traditional knowledge to be included in the description and identification of EBSAs. A training manual on this topic was produced and presented to SBSTTA at its 20th meeting in 2016.[71,72] The CBD training manual refers to full, effective and meaningful participation, and states that there are several reasons why participation of IPLCs in the EBSA description process has been thus far challenging. Amongst these reasons are that providing full and effective participation is time consuming in that sufficient time will need to be scheduled for building relationships with communities, gaining prior informed consent, and collecting and applying traditional knowledge. Another reason is that many Indigenous peoples and local communities have limited resources for engaging in third party research projects or assessment work, providing traditional knowledge or travelling to workshops. Furthermore, communication barriers may arise from different languages spoken and styles of expression. From the above challenges, it becomes clear that simply inviting Indigenous peoples and local communities to participate in an EBSA workshop is not enough to achieve integration of traditional knowledge. This goal also requires that those compiling information related to the application of the EBSA criteria should actively arrange opportunities for meaningful IPLC participation.

Art 8(j) of the CBD obligates its Contracting Parties to "respect, preserve and maintain knowledge, innovations and practices of IPLCs embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilisation of such knowledge, innovations and practices." This art does not explicitly define traditional knowledge, but the so-called art 8(j) Working Group makes use of an informal working definition.[73]

Traditional knowledge and the rights of knowledge holders features prominently in another set of standards adopted by the CBD COP: "The Akwé: Kon Voluntary Guidelines for the Conduct of Cultural, Environmental and Social Impact Assessment regarding Developments Proposed to Take Place on, or which are Likely to Impact on, Sacred Sites and on Lands and Waters

71 UNEP/CBD/SBSTTA/20/INF/21: Training Manual on the Incorporation of Traditional Knowledge into the Description and Identification of EBSAs.

72 Clement Mulalap and others, n 21 at 5.

73 Clement Mulalap and others, n 21 at 5.

Traditionally Occupied or Used by Indigenous and Local Communities" (Akwé: Kon Voluntary Guidelines).[74] The Akwé: Kon Voluntary Guidelines, in building on art 8(j) of the CBD, aim to advise relevant entities on incorporating "cultural, environmental… and social considerations of IPLCs into new or existing impact-assessment procedures".

The international mandate for this endeavour is specified in many CBD COP decisions. Consistent with CBD art 8 (j) and Aichi Biodiversity Target 18 and together with decisions IX/20, X/29 and XI/17, COP called for a need to ensure the full, effective and meaningful participation of IPLCs and the integration of traditional knowledge into the EBSA description process.

In July 2021, the CBD released a draft of its newest ten-year global plan,[75] with non-binding duties for States. The fundamental difference between the biodiversity plan and the Paris Agreement is that binding commitments are a key component of the Paris Agreement. References to Indigenous participation and knowledge in the draft plan do not go much further than in the Aichi targets.[76]

In October 2021, representatives from nearly 200 countries met in Kunming, China in COP15 to finalise The Kunming Declaration and Framework.[77] The Declaration, as well as the IPBES last report acknowledge that IPLCs contribute to the conservation and sustainable use of biodiversity through the application of traditional knowledge, innovations and practices, and through their stewardship of biodiversity on their traditional lands and territories.

7 Contributions from Human Rights Law

The decisions of human rights bodies may be classified along a spectrum that goes from the more general and less demanding forms of participation to procedural requirements that give Indigenous peoples the ultimate power to

74 Decision adopted by the Conference of the Parties to the Convention on Biological Diversity at its seventh session, held in Kuala Lumpur, Malaysia, from 9 February to 20 February and 27 February 2004, Annex, UNEP/CBD/COP/DEC/VII/16 (13 Apr. 2004).

75 Convention on Biological Diversity, 'A new global framework for managing nature through 2030: first detailed draft agreement debuts' <www.cbd.int/article/draft-1-global-biodiversity-framework> last accessed 17 August 2022.

76 Convention on Biological Diversity, 'A new global framework for managing nature through 2030: first detailed draft agreement debuts' <www.cbd.int/article/draft-1-global-biodiversity-framework> last accessed 17 August 2021.

77 Kunming Declaration, <www.cbd.int/doc/c/df35/4b94/5e86e1ee09bc8c7d4b35aaf0/kunmingdeclaration-en.pdf> last accessed 17 August 2022.

decide on certain matters. Along this spectrum, four main types of participatory model that have been concretely applied by human rights bodies can be identified. These are: political rights; formal standards of participation; the paradigm of effective participation; and the FPIC.[78]

The first and lighter conceptualisation of participatory rights is one in which general political rights to participate democratically by the vote to influence public decision-making is deemed sufficient to satisfy the conditions for public participation in environmental matters. In its decision concerning the case *G. and E. v. Norway* of 1984, the European Commission of Human Rights has spelled out the criteria for this model of participation.[79] In the second strand of decisions, participatory rights are valued as a fundamental step in the fulfillment of other rights. However, the mechanism to assess whether the consultation of interested groups has occurred is merely formal, just the existence of a legal framework on consultation is considered sufficiently adequate to fulfill the procedural requirements of participation.

An example of this formal approach is the position adopted by the ILO supervisory mechanism in relation to the ILO No 169 on Indigenous and tribal peoples. Art 6 of the Convention establishes some requirements for consultation to take place. This must be done in good faith, should be culturally appropriate and should be carried out with the aim "of achieving agreement or consent". Although participation and consultation have been framed as the "cornerstone" of the ILO No. 169, the requirement of achieving consent has never been interpreted by the ILO Committee as implying an obligation to obtain consent before the initiation of any project. The Committee has concluded in two reports on Colombia adopted in 2001, that although the failure to consult with Indigenous people was in breach of ILO No. 169, consent is to be considered mainly as an objective of consultation, and does not represent a requirement in itself.[80] Moreover, analysis of the Committee usually stops at the acknowledgment that a legal framework on consultation has been adopted nationally, thus falling short of any consideration of the effectiveness of these

78 Federica Cittadino, 'The Public Interest to Environmental Protection and Indigenous Peoples' Rights: Procedural Rights to Participation and Substantive Guarantees' in Eva Lohse and Margherita Poto (eds), *Participatory Rights in the Environmental Decision-Making Process and the Implementation of the Aarhus Convention: a Comparative Perspective* (Duncker & Humblot 2015).

79 European Commission of Human Rights, *G. and E. v Norway*, Judgment (29 August 1990) Application no. 11701/85.

80 See Reports on Colombia: Central Unitary Workers' Union (CUT), Colombian Medical Trade Union Association, para 59; Central Unitary Workers' Union (CUT), para 77.

mechanisms.[81] A third tendency in the spectrum of international decisions on Indigenous rights is recognisable in the jurisprudence of the Human Rights Committee, which is the supervisory body of the International Covenant on Civil and Political Rights, and of the Inter-American Court of Human Rights, which oversees the correct application of the American Convention on Human Rights.

Regarding Indigenous participation in public decision-making affecting the environment, these bodies go beyond merely acknowledging the existence of participatory mechanisms to look at their effectiveness. The contribution of the Inter-American Court and Commission in the *Marie and Carrie Dann v. US and Sarayaku v. Ecuador* cases is significant in this respect.[82] Drawing from the *Saramaka v. Suriname* case, the Court requires States to carry out consultations "in accordance with (…) customs and traditions", thus operationalising the requirement of cultural appropriateness.[83] In the *Dann* case, this requirement translates into the need to ensure that the representatives of Indigenous peoples should have a clear mandate from the group affected and should be adequately involved in the decision-making process. The Commission in the Dann case also insisted on the need to ensure informed participation.

In the *Sarayaku case*, in responding to Ecuador's arguments that political participation of Indigenous peoples has been guaranteed by the State, the Court recalled the requirements elaborated in *Saramaka,* consultations must be in good faith, through culturally appropriate procedures and with the objective of reaching an agreement. Furthermore, IPLCs must be consulted, in accordance with their own traditions and at the early stages of a development or investment plan. Furthermore, the Court affirmed that the obligation to consult Indigenous peoples at any time their rights may be affected is a general obligation of international law that has been consolidated beyond treaty provisions.

The Court additionally emphasised the difference between consultation and participation, while concluding that both are mandatory requirements. It seems that while consultation is an *ad hoc* process that may be activated in cases where Indigenous rights are affected by particular decisions, participation requires well-established procedures that Indigenous peoples should have access to. The Court said that participatory requirements have become

81 Federica Cittadino (2015) n 78 at 17.

82 IACtHR, *Marie and Carrie Dann v United States*, Judgment, 27 December 2002, Report no.75/02 case no. 11.400; IACtHR, *the Kichwa Indigenous People of Sarayaku v. Ecuador*, Judgment, 27 June 2012, Report no.75/02 case no. 12.465.

83 IACtHR, *Saramaka v. Suriname,* Judgment, 28 November 2007, Series C No. 172.

obligatory for Ecuador since the entry into force of the ILO No. 169. In para 167 the Court said that the involvement of Indigenous people must occur in a timely manner, meaning from the very beginning of the decision-making process. Consultation must be conducted in good faith and with the aim of achieving an agreement. Consultation must be informed, which could also imply that an EIA should be carried out beforehand. The Court, therefore, derived participatory rights from an extensive interpretation of the American Convention in light of the ILO No. 169.[84]

At the far end of the participation spectrum, it is possible to recognise a fourth tendency in which consent, rather than being interpreted as a mere objective of consultation, becomes a requirement of effective participation. This trend is transversal to the decisions of several human rights bodies. In its General Recommendation No. 23 of 1997 on Indigenous peoples, the Committee on the Elimination of Racial Discrimination condemns the expropriation of traditional lands if obtained without FPIC of Indigenous peoples. This is the first, though implicit, international reference to consent as an essential component of Indigenous participation, it establishes the duty for States to obtain the meaningful consent of Indigenous peoples whenever Indigenous rights are affected.

Consent must be interpreted in a theological sense as a prerequisite for ensuring the very survival of Indigenous peoples. This often depends on the possibility for Indigenous groups to have access to traditional land and resources. In this sense, therefore, survival may be linked to a form of economic self-determination of Indigenous peoples. The Human Rights Committee has endorsed this approach in *Poma Poma v. Peru*[85] where it explicitly affirmed that for participation to be effective it requires not mere consultation but the FPIC of the members of the community.

The Saramaka decision was adopted a few months after the adoption of the UN Declaration on Indigenous Peoples. Participation has emerged as a collective interest, although in the AC it has often been conceptualised as a classical human right to be exercised by individuals or alternatively by a group of individuals sharing common interests. Since the decision of the Inter-American Court in *Mayagna* (Sumo) *Awas Tingi v. Nicaragua*,[86] Indigenous land rights have been conceived as collective rights, a communal form of property. This

84 Federica Cittadino (2015) n 78 at 17.

85 HRC, *Poma Poma v. Peru*, Judgment, Communication No. 1457/2006 UN Doc CCPR/C/95/D/1457/2006(27 March 2009).

86 IACtHR, *Case of the Mayagna Sumo Awas Tingi Community v Nicaragua,* Judgment, 31 August 2001, case No. 11, 577.

element is further confirmed by the UN Declaration on Indigenous Peoples, with the Preamble explicitly referring to collective rights in para 23. This is also confirmed by the fact that all Indigenous rights concerning land are granted to Indigenous peoples as such, as opposed to indigenous individuals.

As regards self-determination as a legitimating factor of Indigenous peoples' occupation of a certain land/landscape/territory, this implies that they do not have to provide evidence of being a part of an environmental non-governmental organisation (ENGO) in order to be entitled to participate in environmental decision-making. This is crucial, since participatory rights – seen as instrumental to legal standing in cases of liability – are usually granted to ENGOs on behalf of individuals who have suffered harm.[87] Therefore, the Indigenous peoples' participatory rights are not connected to any external recognition of their status, instead they are closely linked to the these peoples' self-determination and ultimately their discretionary power in evaluating whether they regard themselves as indigenous.

Judgment *Llaka Honhat against Argentina* issued in December 2020 by the Inter-American Court of Human Rights[88] mentions that FPIC and effective communication is needed. But, para 179 states that it may be pertinent – in relation to the right to consultation – to distinguish between the maintenance or improvement of existing infrastructure and the execution of new projects or public works. Furthermore, it adds that activities activities undertaken with the purpose of only maintaining or improving public works do not always require the intervention of prior consultation procedures. Siano and Clérico affirm that this distinction between maintenance of existing infrastructure and the execution of new projects may work contrary to the situation of this collective group in a state of structural inequality.[89]

8 Analysis of Participation Provisions in the BBNJ Draft

The current revised BBNJ draft text does not provide for any guidance on how holders of relevant traditional knowledge will be identified or designated or how to ensure that these holders are legitimate. This may be left to a later stage,

87 Margherita Poto (2016) n 58 at 13.

88 IACtHR, *Llaka Honhat Association* (*Our Land*) *v. Argentina,* Judgment, 6 February 2020, Series C No. 420.

89 Martín Aldao and Laura Clérico, 'El caso Lhaka Honhat vs. Argentina y las tendencias de su interamericanización' in E. Ferrer Mac-Gregor/Mariela Morales Antoniazzi/R. Flores Pantoja (coords), *Instituto de Estudios Constitucionales del Estado de Querétaro* (2021).

once the BBNJ instrument enters into force, perhaps through the work of a subsidiary body established by the COP to the BBNJ instrument under art 48 (4) (d). It is notable that the number of delegations that have voiced support in the IGC for substantive references to traditional knowledge and its holders has grown as the IGC has progressed, swelling beyond the initial Pacific Small Island Developing States, to gaining the support of the Group of 77 and China (representing over 130 developing countries), numerous developed countries, and observers. Indeed, there is currently no delegation calling for the universal deletion of references to traditional knowledge in the BBNJ instrument.[90]

An analysis of the BBNJ Treaty Draft[91] shows that in the Preamble an aspiration "to achieve universal participation" has been declared. In art 1 where the terms are defined, "Strategic environmental assessment" is said to include:

> the carrying out of public participation and consultations and the taking into account of the environmental report and the results of the public participation and consultations in a plan or programme.

This seems to include Cittadino's legal criteria 2 and 3.

Following this line of thought, art 34 in Section IV entitled "Environmental Impact Assessment" states that:

> States Parties shall ensure early notification to stakeholders about planned activities under their jurisdiction or control and effective, time-bound opportunities for stakeholder participation throughout the environmental impact assessment process, including through the submission of comments, before a decision is made as to whether to proceed with the activity.

Although the art states "before a decision is made as to whether to proceed with the activity", there is no direct reference to obtaining FPIC, which would be preferable, taking into account the decisions of the Inter-American Court of Human Rights and the four types of participatory models previously studied.

Section 2 art 34 enumerates stakeholders. All the Section is between brackets, which means that this is not the definite version. However, some possible stakeholders, such as IPLCs, scientists and affected parties remain between

90 Clement Mulalap and others n 21 at 5.

91 Available at <www.un.org/bbnj/node/391> last accessed 17 August 2022.

double brackets. The classical stakeholders – international organisations and NGOs – remain without double brackets:

> [2. Stakeholders in this process include potentially affected States, where those can be identified, [in particular adjacent coastal States] [, indigenous peoples and local communities with relevant traditional knowledge in adjacent coastal States,] relevant global, regional, subregional and sectoral bodies, non-governmental organisations, the general public, academia [, scientific experts] [, affected parties,] [adjacent communities and organisations that have special expertise or jurisdiction] [, interested and relevant stakeholders] [, and those with existing interests in an area].]

Of course, it would be essential that IPLCs be included as stakeholders for their rights to be totally guaranteed.

Section 3 art 34 then states that "Public notification and consultation shall be transparent and inclusive." A reference to "active involvement" as employed in the WFD and MSFD, which has proved to be effective, would be recommended.

In addition to this, in Part V, titled "Capacity building and transfer of marine technology", art 42 establishes that one of the objectives of this Part is to: "Enable inclusive and effective participation in the activities undertaken under this Agreement."

If we look up the words "traditional knowledge" in the Draft, art 5 which establishes the principles that the States Parties shall follow to achieve the objectives of this Agreement, states that, still in brackets, that one of the principles is:

> (i) The use of the best available [science] [scientific information and relevant traditional knowledge of indigenous peoples and local communities].

Art 10 bis states that traditional knowledge held by IPLCs associated with MGRs in areas beyond national jurisdiction shall only be accessed with the FPIC or approval and involvement of these IPLCs.

Moreover, art 16 under Part III titled "Measures such as area-based management tools, including marine protected areas" establishes as regards identification of MPAs that:

> Areas requiring protection through the establishment of area-based management tools, including marine protected areas, shall be identified

> on the basis of the best available [science] [scientific information and relevant traditional knowledge of indigenous peoples and local communities], the precautionary [approach] [principle] and an ecosystem approach.

As regards consultation on and assessment of MPAs proposals, art 18 states that consultations shall include IPLCs with relevant traditional knowledge, the scientific community, civil society and other relevant stakeholders.

In relation to EIAs, the relevant traditional knowledge of IPLCs may be used to define the scope of these impacts, as described by art 31 already between brackets. Art 32 imposes a duty to use the best available scientific information and relevant traditional knowledge of IPLCs when evaluating impacts in EIAs.

Art 49 provides for the creation of a Scientific and Technical Body:

> … which shall be composed of experts, taking into account the need for multidisciplinary expertise [, including expertise in relevant traditional knowledge of indigenous peoples and local communities], gender balance and equitable geographical representation.

In order to achieve an effective participation of IPLCs in the topics governed by the BBNJ Agreement, it is essential that the brackets are eliminated and IPLCs become members of the Scientific and Technical Body.

9 Conclusions

In this chapter, an analysis was made of the provisions of the BBNJ Draft Agreement through the lenses of three legal criteria to evaluate participation: inclusiveness; the influence of participatory experiences on final decisions; and the level of accountability of final decision-makers. Moreover, provisions in the AC and the WFD and MSFD were also analysed.

A paradigm based on putting the ocean at center stage, which involves a protagonist role of the IPLCs has led this chapter. The goals of environmental participation are achieved when participation implies co-negotiation and co-decision making during the entire process of the environmental project at issue, not just consultation.

In particular, as regards IPLCs' participation, another classification concerning four types of participation within the human right law was explained. The requirement of IPLCs' FPIC before authorising an activity is the most demanding form of participation, which gives Indigenous peoples the ultimate say in

decision making. FPIC should be taken into account in this Draft Agreement within the Law of the Sea, not only when IPLCs convey traditional knowledge, but also when they express their opinion in an EIA as stakeholders. IPLCs' participation as stakeholders in EIAs still remains between brackets in the Draft; these brackets should be eliminated in order to provide for their effective participation.

The active involvement of all affected parties established in the WFD and MSFD has been highlighted as efficient as regards environmental participation. The Draft mentions the adjectives "inclusive, transparent and effective". The "active involvement" as mentioned in the Directive should be included in the Draft.

Finally, the Draft provides for the creation of a Scientific and Technical Body, however, the participation of IPLCs in this Body remains between brackets. These brackets should be eliminated in order to guarantee an active involvement of IPLCs in the governance of conservation and sustainable use of BBNJ.

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