

Integrating human rights in the regulation and oversight of blue economies and just transitions

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Introduction

With growing interest in the human rights impacts of extractive and just transition activities by the United Nations, there is an urgent need to include blue economies, other ocean-related economic development planning, and marine spatial planning into any consideration of the human rights impacts of their policies, plans and projects. It is essential to pay particular attention to protecting everyone's human right to a healthy environment, as well as the human rights of ocean-dependent, vulnerable and historically excluded groups. In addition, the negative impacts on the human right to a healthy environment arising from large-scale fisheries and deep-seabed mining should be included, also because of their contributions to climate change.

Energy transition in blue economies

Business interest in the so-called 'blue economy' has increased, including among multinationals investing in well-established sectors such as shipping, port infrastructure, fisheries, aquaculture, coastal tourism and offshore oil and gas, and in emerging activities such as offshore wind and deep seabed mining. Many blue economy policies have placed significant



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KEY MESSAGES

National law-makers should:

- prevent foreseeable negative impacts from blue economy and just transition policies on:
 - marine biodiversity, to protect everyone's human right to a healthy environment
 - the livelihoods, health, food and culture of Indigenous peoples, small-scale fishers and other ocean-dependent communities
- require environmental and socio-cultural impact assessments and strategic environmental assessments for large-scale fisheries projects, policies and programmes
- recognise and protect ocean defenders as environmental human rights defenders across natural resource legislation
- ensure genuine public participation and protection of human rights in the development of blue economy and just transition policies, and relevant assessments
- clarify that foreign investors must contribute to government's efforts to ensure environmental sustainability and respect for human rights in blue economy and just transition projects.

emphasis on energy transitions, notably with regard to marine renewables, but also a renewed push for offshore oil and gas extraction. These trends have led to concerns about 'ocean resource grabbing' and increasing documentation of negative impacts on human rights, including for "ocean defenders" as environmental human rights defenders in the context of the blue economy.

A One Ocean Hub's inter-disciplinary analysis in 2022¹ found that national blue economy policies:

- are strongly influenced by international aspirations for sustainability and justice, but the translation of these international aims to national actions remains limited;
- focus on technical solutions that do not address systemic and complex tensions, such as the balance between securitisation of the ocean for management purposes and issues of appropriation and justice (SDG 16), or gender equality (SDG 5);
- are not informed by understanding of local contexts through genuine public participation; and
- are not flexible enough to adjust to the current and future challenges posed by climate change (SDG 13).

These findings also have legal implications for international foreign investors involved in the blue economy. The 2020 One Ocean Hub's international law study on foreign investment in blue economies unveiled that blue economy policies may restrict the opportunities for national governments and judiciary to protect local communities' human rights because of separate international obligations to protect the legitimate expectations of foreign investors that arise from the terms of national blue economy policies (SDG 17.5).²

In addition, our empirical socio-legal research in South Africa, Ghana and Namibia has identified several instances in which ocean economy/blue economy projects can marginalise

1 Niner H, Baum T., Diz D, del Pozo DL, Laing S, Lancaster AM, McQuaid K, Mendo T, Morgera E, Maharaj PN, Okafor-Yarwood I, Ortega-Cisneros K, Warikandwa T, Rees S. 'Issues of context, capacity and scale: Essential conditions and missing links for a sustainable blue economy' (2022) 130 Environmental Science and Policy 25-35.

2 I Cotula and T Berger, "Blue Economy: Why We Should Talk about Investment Law" (IIED/One Ocean Hub 2020).

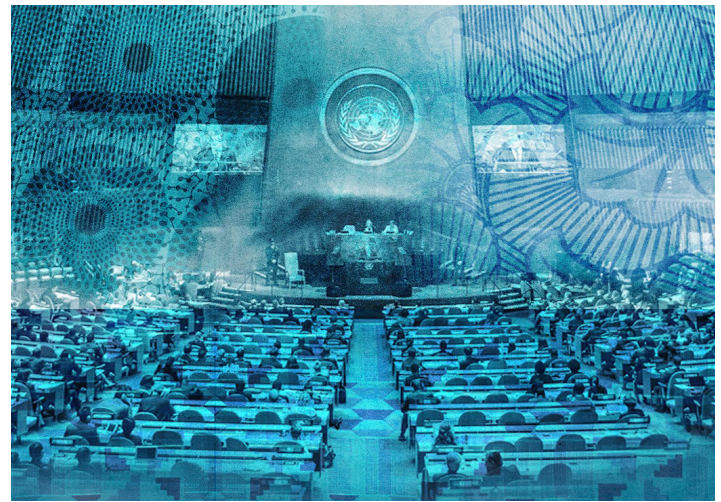


Photo: Dylan McGarry

Indigenous peoples and small-scale fishers. Our evidence has already been relied upon in the 2022 report of the UN Special Rapporteurs on Cultural Rights on principles for sustainable development. The Rapporteur devoted a paragraph to evidence submitted from the One Ocean Hub (A/77/290), in stating that "sustainable development cannot be separated from the recognition of individual and collective cultural rights, including spiritual and heritage rights" (para 20). The Rapporteur also noted that these threats can arise from blue economy projects: At the national level, our natural and social sciences evidence of negative human rights impacts of proposed offshore oil and gas

"...One Ocean Hub observed how the South African, Namibian and Ghanaian Governments' project to develop an ocean economy (blue economy) has marginalised Indigenous peoples and small-scale fishers. The low regard for knowledge pluralism, including of small-scale fishers, and the historical stereotyping of Indigenous peoples hindered their potential contribution to sustainable economic development, in particular their potential contribution through a holistic and integrated environmental ethos. Hub researchers have witnessed how marine space and resources have been appropriated with little or no consultation with local communities and peoples..."

exploration through seismic surveys in South Africa has led to a series of judicial decisions (currently subject to appeal) that have effectively stopped Shell and Impact Africa from proceeding for the time being. Significantly, the judicial decisions took into account: 1) the negative impacts on marine biodiversity and on climate change, which can be understood as protection of everyone's human right to a healthy environment; and 2) negative impacts on the livelihoods, right to food and right to culture of small-scale fishers. On the latter point, it is particularly

notable that our evidence of ocean-related intangible cultural heritage was relied upon to support communities in successfully contesting exploration rights on the Wild Coast that had been granted to Shell, on the grounds of inadequate consultation with communities. A first interdict in December 2021 represented a key victory for the community, with the judiciary relying also on One Ocean Hub's artistic outputs to evidence intangible cultural heritage that had been disregarded in previous consultations on ocean use. A judgement in September 2022 – which has now been appealed – was widely reported in international media and has historical importance as it recognises 1) the crucial role of coastal communities as ocean custodians, including at the ocean-climate nexus; 2) the sacred nature of this relationship in terms of cultural human rights; and 3) the need to protect the participatory rights of these communities in environmental impact assessments and decision-making on the ocean.

Large-scale fisheries

The large-scale industrial fisheries sector is supported by voluminous capital investment that supply the modern technology deployed in highly motorised fishing fleets and sophisticated fishing gears, including industrial trawlers (bottom and pelagic ones), longlines, purse seines, and gillnets. Large-scale fishing vessels and factory fishing ships with powerful propulsion systems and intense high fuel cause significant impacts on the marine environment. They potentially emit more than 130 million tonnes of carbon dioxide,³ thereby contributing to ocean acidification

3 PH Tyedmers, R Watson and D Pauly, 'Fueling Global Fishing Fleets' (2005) 34 *Ambio* 635. See also RWR Parker and PH Tyedmers, 'Fuel Consumption of Global Fishing Fleets: Current Understanding and Knowledge Gaps' (2015) 16 *Fish and Fisheries* 684.



Research in South Africa, Ghana and Namibia has identified several instances in which ocean economy/blue economy projects can marginalise Indigenous peoples and small-scale fishers. Photo: Pixabay



Photo: Christian Bueltemann from Pixabay

and aggravating the impacts of climate change.⁴ Fishing vessels in general have recently accounted for large emissions of black carbon, which contribute to global warming.⁵ The large-scale industrial fisheries sector may also operate, particularly on the high seas, with the support of bunkers or tankers for refuelling of fishing vessels, as well as reefers or refrigerated cargo ships and other transport vessels used for transshipment.⁶

These structures are powered by different types of fossil fuels, including marine diesel oil, four-cycle diesel engines generating nitrogen oxide emissions,⁷ all of which add more stresses to the marine environment and intensify climate change.⁸ While the infrastructure is needed to avoid multiple travels to port, the offshore location of these supporting facilities complicate the effective flag States' monitoring, control, surveillance and enforcement of applicable rules. This creates opportunities for large-scale industrial fishing vessels to continuously (over)fish in distant waters, launder catches from illegal, unreported and unregulated (IUU) fishing in transshipment operations,⁹ and undermine safe and decent working conditions for the crew, who can spend months at sea without appropriate support.¹⁰

4 B Haas et al, 'Big Fishing: The Role of the Large-scale Commercial Fishing Industry in Achieving Sustainable Development Goal 14' (2019) 29 *Reviews in Fish Biology and Fisheries* 161, 165–166.

5 B McKulin and JE Campbell, 'Emissions and Climate Forcing from Global and Arctic Fishing Vessels' (2016) 121 *Journal of Geophysical Research Atmospheres* 1844.

6 AM Cabanelas et al, 'Transshipment: A Closer Look' (FAO 2020) 6.

7 R Latorre, 'Reducing Fishing Vessel Fuel Consumption and NOX Emissions' (2001) 28 *Ocean Engineering* 733.

8 Tyedmers, Watson and Pauly (n 3) 638.

9 C Ewell et al, 'Potential Ecological and Social Benefits of a Moratorium on Transshipment on the High Seas' (2017) 81 *Marine Policy* 293.

10 D Tickler et al, 'Modern Slavery and the Race to Fish' (2018) 9 *Nature Communications* 1, 2.

In addition, large-scale industrial fisheries negatively impact on Indigenous peoples, small-scale fishers and fishing communities dependent on fishing for their survival, livelihoods, and culture because of their negative impacts on fisheries and the marine environment. But currently no environmental impact assessments (EIAs) are required prior to the development or reform of fisheries at the national level.¹¹

The 2022 One Ocean Hub's international legal study to clarify that States' general international duty to carry out an EIA should be interpreted in conjunction with the UN Convention on the Law of the Sea, UN Fish Stocks Agreement, and Convention on Biological Diversity (CBD), as well as guiding instruments adopted under the aegis of the FAO and CBD, and relevant international human rights treaties. This mutually supportive interpretative approach serves to clarifying the existence and scope of an international obligation to carry out integrated environmental and socio-cultural impact assessments of large-scale industrial fisheries (including of existing projects, to assess continuing impacts) and Strategic Environmental Assessment (SEAs) of plans, programmes and policies related to large-scale industrial fisheries.

States need to recognise and implement these international obligations by legislating on EIAs and SEAs for existing and new large-scale industrial fisheries, ensuring that such assessments integrate socio-cultural dimensions as well. Moreover, States need to create binding rules for, and effectively monitor, large-scale industrial fishing operators to respect human rights (particularly those of Indigenous peoples and small-scale fishers whose sacred sites, and traditionally occupied and used areas, are involved or affected by large-scale industrial fisheries), as well as to protect biodiversity and contribute to climate change mitigation.¹²

11 P Duffy, 'Agriculture, Forestry and Fisheries: The Orphans of Environmental Impact Assessment' (2004) 22 Impact Assessment and Project Appraisal 175, 176.

12 J Nakamura, D Diz and E Morgera, "International legal requirements for environmental and socio- cultural assessments for large-scale industrial fisheries" (2022) RECIEL 1-13.

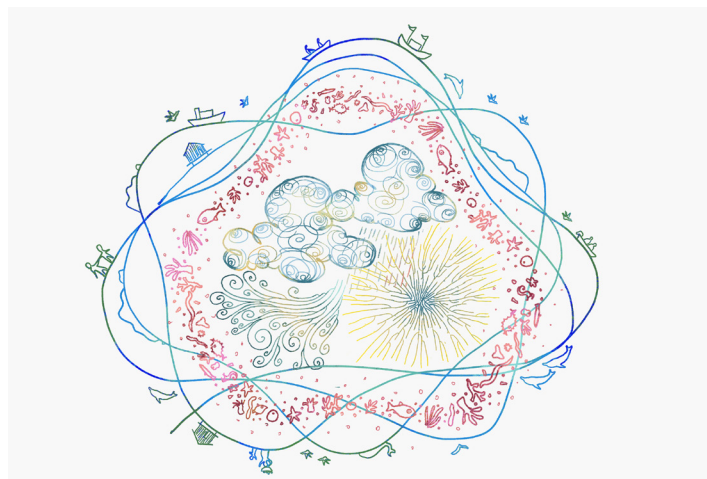


Photo: Nessim Stevenson

The need to regulate foreign investors and manage their expectations

Since the late 1980s, foreign investors have initiated at least 56 publicly known arbitrations based on investment treaties relating to sea-related activities. Challenges arising from investor-State disputes are the result of, and compounded by, the shortcomings of national governance frameworks on natural resources, including marine resources, notably with regard to poor consultation and environmental assessment processes. These shortcomings are even more worrying with regard to the threats faced by "ocean defenders", whose recognition as environmental human rights defenders continues to lag behind compared to the protection of land defenders, at the national level and internationally. Investor-State disputes compound asymmetries in rights and remedies, because they offer foreign investors more effective remedies and thus leverage in decision-making than local communities whose human right to a healthy environment may be infringed. On the whole, investor-State disputes can also make it more difficult for States to take action to conserve and use sustainably biodiversity and combat climate change, because of the structural issues of broad protections afforded to investors under international investment treaties and the significant amounts of compensation which arbitral tribunals routinely award against a State.

For all these reasons, it is essential that national laws on natural resources, as well as national policies on the blue economy and just transition, clearly integrate the protection of the marine environment and ocean-dependent human rights, including of environmental human rights defenders, and prioritise them over the interests of foreign investors in the extractives and energy sectors.



Artwork: Margherita Brunori