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The common of heritage of mankind as a means to assess and advance equity in deep sea mining ☆

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ABSTRACT

A key objective of the United Nations Convention on the Law of the Sea (UNCLOS) as stated in its Preamble, is to contribute to the realisation of a just and equitable international economic order which takes into account the interests and needs of mankind as a whole and, in particular, the special interests and needs of developing countries. As for any other principles of international law, the context within which the principle of the common heritage of mankind (CHM) has been developed is essential to understanding the philosophy behind it, its evolution and more particularly, the challenges faced today for is effective implementation as a means to advance the concept of equity in the context of deep sea mining (DSM mining).

1. Introduction

A key objective of the United Nations Convention on the Law of the Sea (UNCLOS) [1] as stated in its Preamble, is to contribute to the realisation of a just and equitable international economic order which takes into account the interests and needs of mankind as a whole and, in particular, the special interests and needs of developing countries [2]. Although the aim of this paper is not to provide a systematic and detailed analysis of the provisions of UNCLOS, as revised by its associated 1994 Implementing Agreement [3], relating to the principle of the common heritage of mankind (CHM) and neither to examine its evolution [4], due consideration shall be given to these fundamental aspects in order to be able to assess the value of this principle today and how its effective implementation can contribute to advance the concept of equity in the context of deep sea mining (DSM mining). Therefore, the first section of this paper will be directed to clarify the content of the CHM principle whilst the second section will be dedicated to the role of the International Seabed Authority (ISA or Authority) in implementing it as well as the challenges it faces in that regard. Some suggestions and recommendations on how to advance equity both through application of the CHM principle in a DSM mining context and beyond, are proposed in a third section.

2. The CHM principle: definition, context and legal regime

The principle of CHM is an essential element of UNCLOS. It exclusively applies in relation to the regulation and management of the resources which lie outside the limits of national jurisdiction. As for any other principles of international law, the context within which the principle of CHM has been developed is essential to understanding the philosophy behind it, its evolution and more particularly, the challenges faced today for is effective implementation.

2.1. UNCLOS: philosophy of a compromise

Although UNCLOS does not provide any definition of the CHM principle, two main characteristics can be identified. Firstly, it applies specifically to the international seabed area (Area) [5] and its resources [6] which are defined as "all solid, liquid or gaseous mineral resources *in situ* in the Area at or beneath the seabed, including polymetallic nodules" [7]. Secondly, it needs to be understood based on the functions that are assigned to it. It has a universalist intention, designed to support the ultimate objective to achieve a more egalitarian society. UNCLOS then makes the delivery of this objective a shared responsibility on all States and organisations (art.139).

Tracing its roots in legal arguments formulated at the end of

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the 19th century, [8] then presented in the speech of Ambassador Arvid Pardo of Malta to the United Nations General Assembly (UNGA) in August 1967 [9], the CHM principle was legally defined in 1970 through the adoption by the UNGA of the Declaration of Principles Governing the Sea-Bed and the Ocean Floor, and the Subsoil Thereof, Beyond the Limit of National Jurisdiction [10]. This was later formalised when the principle was inserted into the Treaty on principles governing the activities of States in the exploration and use of outer space, including the moon and other celestial bodies [11] and then, into UNCLOS. [12] At that time, the invocation of the CHM principle in legal and political forums [13] coincided with the maturation of a new doctrine for a 'New International Economic Order' defended by the Non-Aligned Movement and the Group of 77 [14], and officially endorsed by the UNGA with the adoption on 1st May 1974 of the Declaration on the Establishment of a New International Economic Order [15] and the Programme of Action [16] inspiring successive instruments including the Charter of Economic Rights and Duties of States [17] and the Declaration on the Right to Development [18]. It is worth noting that all of them place 'equity' at the core of their objectives [19].

Developed and developing States disagreed when discussing the Area and its resources, which was part of a broader polarisation of the debate during the negotiations of UNCLOS [20]. It was characterised by the critique formulated by the developing States against the so called 'Western economic exploitation' [21], at that time perceived as embodied in the traditional law of the sea [22]. The Non-Aligned Movement and the Group of 77 defended the establishment of an international body entitled to engage by itself in seabed mining but also empowered to control mining by other licensees. In this configuration, the royalties and the profits generated by the activities of this body would be distributed among all States as the CHM [23]. This position was strongly contested by developed States which sought that this international body should be established as a 'super registry' of national claims to seabed mining sites with very limited power to interfere with the exploitation of the resources of the Area by the mining companies [24]. As will be seen below (see Section 2), in a final effort to find a compromise it was agreed to grant this body with strictly defined powers and more importantly, a decision-making system in which the interests of all groups of States would, in principle, be carefully balanced [25].

2.2. Legal regime attached to the CHM principle

The principle of the CHM is at the core of the governing system of the Area. Any appropriation of the seabed located in the Area as well as its resources is prohibited, [26] As is any exercise of sovereignty or of sovereign rights over the Area [27]. In turn, all rights over the resources of the Area are vested in "mankind as a whole" embodied by an intergovernmental organisation, the ISA [28], which is also responsible for ensuring a common management regime of the activities carried out in the Area.

In addition, the use of the Area is allowed exclusively for peaceful purposes [29] and all activities should only be permitted if the necessary measures to ensure effective protection of the marine environment have been taken [30]. Since the adjacent water column remain subject to the freedom of the seas, due regard should also be given to other legitimate uses. [31] Furthermore, the utilisation of the Area and its resources should lead to an equitable sharing of benefits taking into particular consideration the interests and needs of developing States. [32] Associated with this is the idea that such interests should serve not only the current generations but also the interest of future generations. [33] These features of the CHM regime present real innovation [34]. This is reflected in the creation of an "appropriate institutional machinery" [35] by UNCLOS to ensure a common management of activities undertaken beyond national jurisdiction and of the resources that are to be found. In other words, the establishment of a dedicated body mandated to act as a trustee whose responsibility it is to manage the Area and its resources in compliance with international law principles and particularly, those included in UNCLOS [36]. The power granted to the ISA through its mining arm, the Enterprise, to conduct activities in the Area, is in theory and in fact of critical importance.

The second innovation in the CHM regime is to be found in the equitable sharing of benefits, implying distributive justice [37], which is composed of two different aspects dealing respectively with preferential treatment for developing States and the scope of the 'benefits' to be redistributed. If UNCLOS explicitly refers to "financial and economic benefits" [38], it is also argued that this specific provision could be interpreted as encompassing direct and non-direct benefits including the data, information and knowledge gathered about the resources [39]. However so far, no clear guidance has been provided by the ISA as to its interpretation of this formulation.

2.3. Legal status of the CHM principle

Although UNCLOS does not explicitly refer to *jus cogens* [40], which is the legal term designing the relationship existing between a customary norm and international treaties [41], it does clearly stipulate that States Parties agree that there shall be no amendments to the basic principle relating to the CHM set forth in article 136 and that they shall not be party to any agreement in derogation thereof [42]. As a result, commentators diverge whereas the CHM principle should be regarded as reflecting customary law and more importantly, on its exact content [43]. It is true that the United States had vigorously objected to the provisions of Part XI of UNCLOS, notably with respect to the principles of equitable sharing of benefits derived from the use of the resources of the Area. However, they did not raise an objection to the principle of CHM. In fact President Johnson in 1966 and then President Nixon in 1970, expressly recognised the principle as being at the core of the common regime of utilisation for the resources of the seabed. [44] It is also true that State practice shows that the CHM principle has been progressively incorporated in many national DSM legislation enacted both by developed and developing States to regulate and manage activities in the Area. This is notably the case for the legislation enacted by Pacific Island States like Tonga, Tuvalu or Nauru [45].

In relation to the legal meaning of the 'common heritage' in terms of rights and obligations of the Parties to UNCLOS, one commentator has concluded that each State has the responsibility "to ensure that activities subject to the principle are carried out for the benefit of all mankind" and therefore, retains discretion "whether to attempt to achieve this objective by refraining from unilateral, in favour of joint activities, by seeking cooperation on a bilateral or multilateral basis, or by redistributing revenues or information" [46]. However, the Seabed Disputes Chamber of the International Tribunal for the Law of the Sea (ITLOS) in its Advisory Opinion on the *Responsibilities and Obligations of States Sponsoring Persons and Entities with respect to Activities in the Area.*[47]*made it clear 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 by assisting the Authority and by acting on its own with a view to ensuring that entities under its jurisdiction conform to the rules on deep seabed mining.

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