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Sharing benefits of the common heritage of mankind – Is the deep seabed mining regime ready?

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ABSTRACT

The 1982 United Nations Convention on the Law of the Sea declares the seabed beyond national jurisdiction and its mineral resources as the "common heritage of mankind" (CHM). This article examines the operationalisation of the CHM principle in the international seabed mining regime, with focus placed on the sharing of benefits derived from mining. The article begins by providing an overview of the CHM principle, before examining four modalities provided for in the Convention, both institutional and substantial, and their role in giving effect to the CHM principle: (1) financial benefits; (2) the "Enterprise"; (3) the parallel system of reserved areas; and, (4) marine scientific research. Finally, overarching issues are discussed and some suggestions on ways forward are presented. The article considers that the deep seabed mining regime is not yet ready to effectively share the benefits derived from the common heritage of mankind. In particular, the future of the Enterprise is uncertain and changes to the so-called parallel system that affect the CHM have received minimal discussion. Moreover, a lack of publicly available research data related to seabed mining is hindering current benefits for humankind. However, work is underway at the International Seabed Authority to establish rules and policies with respect to the sharing of financial benefits. While the CHM principle remains largely untested, approaches that are transparent, inclusive, accountable, and equitable are more likely to be successful.

1. Introduction

Over the past 50 years, the deep sea has been intermittently considered as a source for minerals and metals. However, deep sea mining (DSM) has proven elusive, with many engineering, financial, and regulatory issues still unresolved. Spurred by historically high metal prices in 2010 and 2011 (which have since declined), DSM once again captured political, scientific, public, and critically, investor interest [1]. Although outside the particular focus of this paper on areas beyond national jurisdiction, DSM laws and regulations are being developed in several national jurisdictions, particularly Pacific Island States [2–5], and in one case mining could conceivably begin in the near future [6].

The foundation of the legal regime for mineral mining on the seabed in areas beyond national jurisdiction, legally known as the Area, is set out in Part XI of the 1982 United Nations Convention on the Law of the Sea (LOSC).[1] Central to the negotiations of the international seabed mining regime were the questions of ownership and reaping the benefits from seabed mineral resources (whether solid, liquid or gaseous). In 1970, UN General Assembly Resolution 2749 declared the Area and its resources to be the "common heritage of mankind" (CHM) [7], a principle that was later enshrined in the LOSC.[2] This characterisation informs every aspect of the international seabed mining regime and establishes a legal distinction between the Area and the water column, which is still governed by the principle of the freedom of the high seas.

The historical development of the LOSC, and in particular the provisions to operationalise the CHM principle, is discussed in detail elsewhere [8–13]. By way of a very brief summary, a central aim, in particular for developing States,[3] was to ensure that the benefits of deep seabed mining would not be solely reaped by the handful of industrialised States that possessed the capacity to make substantial investments to develop seabed mining technology. The concern was that developing States might effectively be

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[1] United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 3.

[2] LOSC, Article 136.

[3] In the context of seabed mining, the term "developing State" is not defined. Singapore and China have successfully applied for exploration contracts for minerals in areas reserved for developing States.

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excluded from enjoying the economic potential of seabed minerals and further, that land-based mineral-exporting developing States could be disadvantaged by a rise in global metal supply [14]. The CHM principle encapsulated the need to share the benefits of this mineral wealth and to establish an international organisation to manage the common heritage on behalf of 'mankind as a whole.'[4] As such, the International Seabed Authority (ISA), established by the LOSC, is the institutional manifestation of the CHM principle.

However, the CHM principle, and in particular the measures through which it would be operationalised, was not uncontroversial. Indeed, during the negotiations of the LOSC, "nothing tested so sorely the ability of diplomats from various corners of the world to reach common ground than the goal of conserving that common heritage and profiting from it at the same time" [15]. After the adoption of the LOSC, some of its provisions, in particular those concerning DSM benefit-sharing, continued to be divisive. Several industrialised States interested in DSM refrained from signing the Convention. Thus, a second set of negotiations began on what would become the Part XI Implementing Agreement (IA).[5] Although in its preamble, the IA reaffirms the Area as the common heritage of mankind, it weakens several of the provisions of the LOSC that dealt with the distribution of benefits. The IA ensured almost universal support for the LOSC. However, it left the details regarding the sharing of benefits to be developed in the future, under the auspices of the ISA.

The ISA now faces the difficult task of determining the precise parameters of the benefit-sharing arrangements. Over the course of the past two decades, the ISA has been developing its Mining Code, a collective term for the regulations and recommendations that set out the detailed rules, regulations, and procedures for seabed mining in the Area [16]. Having agreed upon the regulations concerning the exploration of seabed minerals, the ISA is now developing exploitation regulations. However, significant questions still remain regarding the operationalisation of the CHM principle, and in particular the sharing of benefits.

2. The common heritage of mankind and the International Seabed Authority

The principle of the common heritage of mankind is as fundamental to the international seabed mining regime as it is controversial. Article 136 of the LOSC, declaring the Area and its resources to be the CHM, is "one of the most contentious yet also one of the most symbolic provisions of the Convention" [17]. The CHM principle guides the interpretation and application of Part XI [18] and its fundamental importance is reflected in Article 311 (6) of the LOSC, which specifically prohibits any amendment to the basic CHM principle. Although no definition of the CHM principle is provided in either the LOSC or the IA (or indeed the ISA's Mining Code), the broad scope of the principle is captured in several key provisions of Part XI of the LOSC:

1) Article 137 confirms that "[a]ll rights in the resources of the Area are vested in mankind as a whole" and prohibits any claims of sovereignty or sovereign rights over the Area and its resources.
2) Articles 156–185 set out the common management of the Area through the ISA.
3) Article 141 requires any use of the Area to be exclusively for peaceful purposes.
4) Article 145 requires the ISA to protect the marine environment from harmful effects of seabed mining.
5) Pursuant to Article 143, marine scientific research in the Area is to be carried out exclusively for the benefit mankind as a whole. In order to support developing States, the ISA and its member States must support the research capacity of developing States (Article 143(3)(b)), support the transfer of technology and scientific information relating to seabed mining (Article 144; Section 5 of the Annex to the IA), and provide for the effective participation of developing States in the seabed mining regime (Article 148).
6) Article 139 sets out the responsibility of States parties to ensure that mining activities in the Area are carried out in conformity with the international regulatory framework.
7) For the purposes of this article the most important provisions relate to the benefit-sharing requirements. Article 140(1) requires that seabed mining activities in the Area must be carried out for the benefit of mankind as a whole, taking into particular consideration the interests and needs of developing States. Pursuant to Article 140(2), the ISA shall provide for the "equitable sharing of financial and other economic benefits" derived from activities in the Area.

In sum, the CHM principle requires the ISA to act as a custodian or, as Ambassador Pardo dubbed it, the "trustee" [19], of the Area and to ensure the equitable sharing of any benefits (as well as the preservation of the marine environment) for present and future generations [20–22]. To that end, the ISA is required to further elaborate the parameters of the benefit sharing system. In the next section, this paper explores four modalities, in various stages of development, which could assist in meeting this critical, but challenging, part of the ISA's mandate.

3. Modalities of benefit-sharing

As noted above, the sharing of benefits is an integral element of the common heritage of mankind principle. However, it is yet to be determined which specific measures will be taken by the ISA and its States parties to operationalise this obligation. The following sections provide a brief discussion of four potential, non-exclusive and non-exhaustive, approaches.

3.1. *Sharing of financial benefits*

The mining of deep sea mineral resources can be seen as the conversion of natural capital into financial capital. Therefore, a fiscal mechanism is arguably the most direct approach for sharing the benefits of this conversion. The ISA is specifically required to "provide for the equitable sharing of financial and other economic benefits derived from activities in the Area […]"[6] and to develop rules, regulations, and procedures to this end, through its Finance Committee.[7]

In developing these rules, the ISA must be guided by six principles set out in Section 8 of the Annex to the IA. These require *inter alia* a payment system to be fair, non-discriminatory, simple, and within the range of payments prevailing for land-based mining. In addition, the payment system must ensure a process for monitoring compliance.

Interestingly, Section 8 of the Annex to the IA does not require consideration of the Enterprise, the commercial arm of the ISA discussed below, when developing financial regulations. In

[4] LOSC, Articles 137(2), 153(1).

[5] Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea, (adopted 28 July 1994, entered into force 28 July 1996) 1836 UNTS 3.

[6] LOSC, Article 140(2).

[7] LOSC, Article 160(2)(f), (g), 162(2)(o); IA, Annex Section 9(7).

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