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

The Common 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).

Keywords:

Common heritage of mankind principle, equity, deep sea mining, developing States, United Nations Convention on the Law of the Sea, International Seabed Authority

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

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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 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 utilization 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.

3. ROLE OF THE ISA IN IMPLEMENTING THE CHM PRINCIPLE

A key innovation of the regime established by UNCLOS to regulate and manage the Area and its resources lies in the creation of an intergovernmental body designed to act as a trustee for administering a common good on behalf of 'mankind as a whole'. Although strong powers have been given to the ISA to fulfill its functions, various challenges exist to enable a full and effective implementation of the CHM principle.

3.1. Role and functions of the ISA

The ISA has been established as the body through which all States Party to UNCLOS organise and control all seabed-mining related activities in the Area[48]. The Authority has three principal organs (the Assembly, the Council and the Secretariat) and is served by two specialised bodies (the Legal and Technical Commission[49] and the Finance Committee[50]). The ISA also comprises the Enterprise, which was initially conceived as a separate organ and empowered by UNCLOS to engage in prospecting and mining in the Area as well as the transporting, processing and marketing of minerals recovered from the Area.[51] When UNCLOS was adopted, the main idea was for the Enterprise to buy the mining technology from commercial operators or to enter into joint ventures with them.[52] As such, the profits realised would have to be distributed, as part of the CHM, by the ISA.[53] However, the Enterprise has never been set up. With the adoption of the 1994 Implementing Agreement, its role has been revised to include a series of new tasks such as the monitoring of DSM mining trends and developments and the assessment of the results of the conduct of marine scientific research, prospecting and exploration in the Area,[54] The Secretariat of the ISA currently performs the function of the Enterprise.

The ISA has legislative and enforcement jurisdiction over activities in the Area.[55] As such, the ISA is competent to adopt appropriate rules concerning the protection of human life[56] and of the marine environment,[57] the installations used for carrying out the activities in the

Area,[58] the equitable sharing of benefits derived from the activities undertaken in the Area and the payments and contributions made pursuant to article 82 of UNCLOS. The Convention also confers on the ISA specific powers to ensure compliance in the Area and its provisions.[59]

3.2. Challenges faced by the ISA

The full and effective implementation of the CHM principle by the ISA currently faces three distinct but related challenges. They require the recognition of the pluralistic interests attached to 'mankind', which can go beyond those defended by the classic stakeholders, anticipate a decision-making process through which 'mankind' can be effectively represented and need to lead to the proper distribution of benefits though these benefits are yet to be clearly defined.

As stated above, one of the innovative consequences of the legalisation of the principle of CHM through UNCLOS, was to identify the "world community as the owner of the sea-bed"[60] which was then regarded by some authors as a new subject of international law[61] raising inevitably a series of questions relating to the nature and applicable regime to it. In other words, should 'mankind' represent the interests of all States or the interests actually not represented by States?[62] This brings into light the constraints faced by the current regime to ensure that 'mankind as a whole' is represented, or in legal and political terms, recognised with a right to participate in the debate. The increased role played by intergovernmental and non-governmental organisations is of particular interest. As these bodies are politically independent and represent a wide range of civil society interests, their advocacy and the transparency of a process that allows for open debate and decision-making contributes to a broader representation of 'humankind' in the decision-making process. A number of these organisations have been granted 'observer status' within the ISA and have successfully drawn attention to the importance of ensuring the preservation and protection of the marine environment, the importance of the precautionary principle and other means to protect the interests of future generations and thus, the common heritage of mankind, and the relevance of open and inclusive decision-making. However, they do not have any right to vote and have in the past been excluded from access to a range of relevant meetings, in particular those of the Legal and Technical Committee and of the Finance Committee, thus limiting their impact on the decision-making process.

The third critical challenge faced by the ISA deals with the distributive dimension attached to the principle of CHM. A key function of the Authority is to represent "mankind"[63] while ensuring that the exploitation of the 'common heritage' will benefit all[64]. In this context, beneficiaries are all States, irrespective of their geographical location and/or their economic status[65]. However, a series of questions remain. Firstly, if the concept of the "common heritage of mankind" is legally recognised, controversy exists about the nature of "mankind". For Dupuy,[66] the notion is twofold. It is interspatial as it includes all human beings, and 'intertemporal in scope' as it includes current and future generations.[67] Secondly, UNCLOS does not set any mechanism through which the financial and economic benefits derived from activities in the Area are to be redistributed. The only requirement clearly stipulated is that the sharing should be 'equitable'[68] which, in accordance with the Convention, require to take into consideration the preferential rights of the developing States "which suffer serious adverse effects on their export earnings or economies" resulting from a fall in mineral prices caused by deep seabed mining.[69] There is no shared understanding of the basis that can be used for organising equitable sharing.[70] Developed States have suggested that the term 'equitable' is understood as "proportional to investment made" while developing States argue that the sharing "must be either equal or based on the economic needs of the countries."[71] Either way, the sharing of knowledge, data and expertise gained for instance on the marine environment during exploratory cruises would be part of such equitable sharing. The 1994

Agreement allocated to the Finance Committee the responsibility to make recommendations on rules, regulations and procedures on the equitable sharing of financial and other economic benefits derived from activities in the Area and the related decisions to be made.[72]

4. Advancing equity through the effective implementation of the CHM principle

The successful implementation of the CHM principle in a DSM mining context requires that a mechanism be established to ensure that the common heritage itself is properly protected and that an equitable sharing mechanism of the benefits derived from the exploration and exploitation of the Area for current and future generations is established. By this logic, equitable sharing will only be achieved if there is equitable utilisation of the resources of the Area, understood as requiring a balancing of interests and considerations at stake including for conservation of these resources. The stakeholder consultation processes recently undertaken by the ISA are a useful step in this direction.

Although not clearly defined by international treaties and international courts, the principle of equity has been said to be recognised as a general principle of international law.[73] Generally interpreted as meaning "justice attained through fairness," [74] the equity principle has progressively gained recognition through international environmental law. It has been used to establish State transboundary responsibility in ensuring that no serious injury is caused by transboundary pollution which will inevitably result in causing inequitable or unreasonable injury.[75] It is also at the core of the principle of sustainable development[76] itself, and today the Sustainable Development Goals, which were adopted in June 2015.[77] Thus, equitable utilisation introducesenvironmental factors into the allocation of benefits derived from the activities that may be undertaken in the Area. To this end however, equitable utilisation needs to be supported by appropriate institutions and coordinated policies.[78]

5. Potential impacts of the CHM principle beyond the Area

Whilst the previous sections have outlined a number of challenges for the effective implementation of the CHM principle in its core area of application, which is the Area, the CHM principle has relevance in a number of ways for adjacent spaces, which are: the extended continental shelf of nations between 200 and 350 nautical miles; the seabed areas within national exclusive economic zones (EEZs); the water column above the Area; the living resources of the deep seabed, and in particular their marine genetic resources.

As for the extended continental shelf, article 82(4) of UNCLOS expressly provides that the payments or contributions shall be made through the ISA, which shall distribute them to States Parties to the Convention, on the basis of equitable sharing criteria.

Whilst the exploitation of the seabed within national EEZs is a sovereign right, UNCLOS provides that[79] States shall, directly or through competent international organisations provide appropriate assistance, especially to developing States, concerning the preparation of environmental assessments [80] as the CHM principle is a way to ensure that future generations everywhere will benefit from the resources of the deep sea.

Of particular current interest is the question of applicability of the CHM principle to the water column and to the living resources of the seabed, This is now coming into focus following the adoption in June 2015 by the UNGA of the Resolution 69/292 to develop an international legally binding instrument on conservation and sustainable use. [81] The issue of direct applicability of the CHM principle was raised during the sessions of the *ad hoc* informal working group to study the issues relating to the conservation and sustainable use of marine

biodiversity beyond national jurisdiction (BBNJ)[82] and was not ultimately resolved, with positions ranging from arguing for direct applicability to strictly limiting applicability to the Area. Others have argued that the underlying principles of fairness, equity, precaution and interests of future generations will in practice provide the negotiations of a new Implementing Agreement with sufficient guidance, achieving a *de facto* pragmatic outcome without recurring to a legalistic exchange around the CHM principle. It is also worth noting that the relevance of the CHM principle was raised by the delegates of the G-77 and China at the first Preparatory Committee (PrepCom) for the development of an international legally binding instrument under UNCLOS on the conservation and sustainable use of marine biodiversity of areas beyond national jurisdiction (ABNJ), on 29 March 2016 and that Costa Rica expressly stated that the CHM principle should govern the use and conservation of marine genetic resources in all ABNJ[83]. Whatever course is taken over the following two years of the Prepcom discussions, the separate issue of practical delineation of responsibilities will need to be addressed at some point. Should, for example, the ISA decide in due course on a specific exploitation project, taking fully into account its responsibilities to the marine environment and to the CHM, the agreed project may still impact the biodiversity of the water column, and any institutional arrangements taken in that respect could provide independent and possibly differing assessments of the applicable principles, rules and procedures.

6. CONCLUDING REMARKS AND RECOMMENDATIONS

The Area, which comprises about sixty percent of the whole seabed, and its resources, are the CHM. The international community is now preparing the rules under which exploitation of these resources will be permitted, controlled and monitored. In this context, the question on how to ensure that DSM mining could benefit all mankind is fundamental. However, significant uncertainties remain about the scope of application of the CHM principle, its elements and legal status.

As we have argued, a correct interpretation of the CHM principle and other related concepts of fairness, equity, precaution, ecosystem integrity and future generations provides guidance towards a broad interpretation of the approach. In practice, this means that the CHM principle does not just mandate a fair sharing of the economic and financial benefits of any specific resource exploitation activity. This is certainly a crucial aspect of it, and the financial mechanisms proposed in the future mining regulations will need to fully reflect this. But the CHM principle also applies to the Area as a whole, and hence also to the value of the deep seabed, its ecosystems, habitats, associated biodiversity and living and mineral resources to all future generations and thus, the correct balancing of any intervention in this area to reflect these aspects. We argue that to strike such a balance requires a participatory, open and transparent approach, drawing on a wide range of stakeholders, in particular from civil society, science, regional organisations and other communities, which need to cooperate in an integrated manner. However, in the current legal regime, all relevant decision-making is limited to member States of the ISA.

Access to data, information and knowledge as well as the capacity building and technology transfer opportunities are in themselves vital elements of the CHM principle and can help to deliver procedural fairness and justice *ex ante*, rather than waiting for hoped-for financial distributions *ex post*. It is therefore critical that future discussions on this and notably those expected to occur in relation to the periodic review undertaken by the ISA in accordance with article 154 of UNCLOS, provide an opportunity to ensure that the common interests of the international community comprising not only States, but including all human beings[84] be addressed with the view that the “vital needs for the survival of mankind”[85] be protected. This

will ultimately depend on the ability of the international community to agree on a set of effective mechanisms designed for the protection of such common interests and thus, providing the necessary framework to assess and advance equity in the implementation, governance and management of the Area and its resources.

As a result of the above, consideration could be given to the following recommendations:

(i) Recognition

1- Recognition of pluralistic interests attached to mankind;
2- Recognition of all relevant actors and their diverse interests;
3- Recognition of the importance of “non-financial and economic” benefits;

(ii) Decision-making processes

4- Ability of all relevant actors to participate fully and effectively during decision-making processes of the ISA;
5- Importance of transparency of decision-making processes, including through access to relevant information;

(iii) Equitable sharing of benefits

6- Identification of a set of priority equity issues as principles and desired outcomes to achieve equity in a DSM mining context;
7- Development of guidelines for the distribution of benefits;
8- Acknowledgment in the sharing of benefits of the benefits of contributing to conservation of the marine environment;

(iv) Adaptive/learning process

9- Ensuring the flexibility of the benefit-sharing formula to ensure adaptive implementation of the regime that needs to meet the needs and development priorities of developing States.

7. REFERENCES

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[2] UNCLOS, Preamble, para.5.
[3] Agreement relating to the implementation of Part XI of the United Nations Convention on the Law of the Sea adopted 28 July 1994; 1836 UNTS 3. The 1994 Implementing Agreement is to be interpreted and applied together with Part XI of UNCLOS as a single instrument; 1994 Implementing Agreement, art.2(1). See Brown ED. The 1994 agreement on the implementation of Part XI of the UN convention on the law of the sea: breakthrough to universality? Marine Policy 1995; 19: 5-20; Nelson LDM. The new deep sea-bed mining regime. International Journal of Marine & Coastal Law 1995; 10: 189-203.
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[5] UNCLOS, art.1(1)(1).
[6] UNGA. A/RES/2749 (XXV), 1970, para.1; UNCLOS, art.136.
[7] UNCLOS, art.133(a).
[8] Prof. La Pradelle, when arguing on the risks and threats of legalising the dynamic of sovereignty of the coastal States over the territorial sea, stated that "la mer territoriale est comme la haute mer le patrimoine de l'humanité"; La Pradelle G. Le droit de l'Etat sur la mer territoriale. RGDIP 1898 ; 264-347, at p.309. Few years later, he insisted by defending the concept of *res communis* implying that the territorial sea "(…) doit faire l'objet d'une organisation universelle; puisqu'elle est la chose de tous, elle doit être placée sous la gestion de tous. Il faut, dès lors, qu'il y ait une organisation qui réunisse toutes les nations du monde, maritime ou non maritimes, ayant égal droit aux richesses de la mer; il ne faut surtout pas que ces richesses destinées à l'humanité périssent; il ne faut pas qu'elles soient gaspillées"; La Pradelle G. La mer. Paris : Editions Internationales ; 1934, p.380.
[9] UN. GAOR, 1st Comm. 22d Sess., 1515th mtg., at 1-15, U.N Doc.A/C.1/PV.1515, 1st Novembre 1967; U.N. GAOR, 1st Comm., 22d Sess., 1516th mtg., at 1-3, U.N. Doc.A/C.1/PV.1516, 1st November 1967. Few weeks before, Resolution 15 of the World Peace through Law conference already identified the ocean's resources as the "common heritage of mankind" ; Wolfrum R. The common heritage of mankind. Max Planck Encyclopedia of Public International Law. See also Heim BE. Exploring the last frontiers for mineral resources: a comparison of international law regarding the deep seabed, outer space and Antarctica. Journal of Transnational International Law 1990; 23: 819-850, p.822; Scovazzi T. The seabed beyond the limits of national jurisdiction: general and institutional aspects. Report submitted to the Fourth JWH Verzijl Memorial Symposium – The legal regime of areas beyond national jurisdiction: current principles and frameworks and future directions; Utrecht, 21 November 2008.
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[11] Treaty on principles governing the activities of States in the exploration and use of outer space, including the moon and other celestial bodies adopted in Washington D.C 27 January 1967; United Nations, Treaty Series, 1967, p.205.
[12] UNCLOS was adopted after three conferences (UNCLOS I in 1956, UNCLOS II in 1960 and UNCLOS III from 1973 to 1982). The CHM principle has also been discussed in connection with Antarctica and to other common space resources including geostationary orbit and high seas fisheries ; Kiss A., op. cit., pp.145-64.
[13] Noyes E., op. cit., p.457.
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[15] UNGA. A/RES/3201 S-IV, 1st May 1974.

[16] UNGA. A/RES/3202 S-IV, 1st May 1974.
[17] UNGA. A/RES/3281 (XXIX), 12 December 1974.
[18] UNGA. A/RES/41/128, 4 December 1986, art.3.
[19] See the Declaration on the Establishment of a New International Economic Order, A/RES/3201 S-IV, 1st May 1974, Preamble, para.3; the Programme of Action on the Establishment of a New International Economic Order, A/RES/3202 S-IV, 1st May 1974, Part.VI; including the Charter of Economic Rights and Duties of States, A/RES/3281 (XXIX), 12 December 1974, Preamble, para.4; and the Declaration on the Right to Development, A/RES/41/128, 4 December 1986, Preamble, para.2 (although here the word 'equity' is replaced by "the fair distribution of benefits resulting [from development]".
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[21] Larschan B, Brennan BC., op. cit., pp.306-312.
[22] Noyes E., op. cit., p.459.
[23] Churchill RR, Lowe AV., op. cit., p.228.
[24] Ibid.
[25] Churchill RR, Lowe AV., op. cit., p.229.
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[27] Ibid.
[28] UNCLOS, art.137(2). Christopher Joyner argues however that "vesting all right in all humankind is an element only of a radical form of the CH principle" ; Joyner C., op. cit., pp.192-193.
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[31] UNCLOS, art.147.
[32] UNCLOS, art.140.
[33] Frakes J. The common heritage of mankind principle and the deep seabed, outer space, and antarctica: will developed and developing nations reach a compromise? Wis. Int'l L.J. 2003; 21: 409.
[34] Noyes E., op. cit., p.451.
[35] UNGA. A/RES/2749 (XXV), 1970, para.9.
[36] UNCLOS, art.139 and 138. See also UNCLOS, art.155(2).
[37] Noyes E. Op. cit., p.451.
[38] UNCLOS, art.140(2).
[39] Noyes E., op. cit., p.451.
[40] Informal proposal submitted by Chile in 1980; UN Doc.A/CONF.62, GP9, 5 August 1980. See also Bezpalko I. The deep seabed: customary law codified. Nat. Resources J. 2004; 44: 867-905
[41] Vienna Convention on the Law of the Treaties, adopted in Vienna on 23 May 1969 and entered into force on 27 January 1980; United Nations, Treaty Series, vol. 1155, p. 331; art.53
[42] UNCLOS, art.311(6) and 309.
[43] Rudiger Wolfrum considers that the "the common heritage principle, as far as the use of common spaces is concerned, is a part of customary international law (…) providing general (…) legal obligations with respect to the utilization of areas beyond national jurisdiction Wolfrum R. The common heritage of mankind. Max Planck Encyclopedia of Public International Law, para.25. For a divergent opinion see Joyner C., op. cit., pp.197-199; and comments of Prof. Johnson for whom the "the concept of the common heritage of mankind (…) is not yet a principle of international law, let alone a basic one"; Accord Report of the Committee on Legal Aspects of a New International Economic Order, International Law Association, Report of the Sixty-Second Conference 409, 469 (1987).
[44] See White MV, The common heritage of mankind: an assessment, 14 Case W. Res jour. Int'l. L. 1982; 14: 516.
[45] See for instance Tonga Seabed Minerals Act 2014, s.8(b)(i); Tuvalu Seabed Minerals Act 2014, s.8(b)(i); Nauru International Seabed Minerals Act 2015, s.6(a).
[46] Wolfrum R. The common heritage of mankind. Max Planck Encyclopedia of Public International Law, para.25. See also Scovazzi T. Is the UN convention on the law of the sea the legal framework for all activities in the sea? The case of bioprospecting in Vida D (eds). Law, Technology and Science for oceans in globalisation ; 2010: 313.
[47] *Responsibilities and Obligations of States with respect to activities in the Area*, Advisory Opinion, 1 February 2011, 2011 ITLOS Reports, p.10. For the Seabed Disputes Chamber of ITLOS, 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"; Advisory Opinion, para. 226. On the contribution of the Seabed Dispute Chamber of ITLOS in relation to the obligations, liability and role of sponsoring States see Hinrichs Oyarce X. Sponsoring States in the Area: obligations, liability and the role of developing States. Marine Policy 2016 (this issues).]
[48] UNCLOS, art.156 and 157 ; 1994 Implementing Agreement, Annex, Section 1(1).
[49] UNCLOS, art.163 ; 1994 Implementing Agreement, Annex, Section 1(4).It is worth noting that the Legal and Technical Commission has been given the responsibility of performing the functions initially assigned to the Economic Planning Commission.
[50] 1994 Implementing Agreement, Annex, Section 1(4) and Section 9.

[51] UNCLOS, art.170
[52] Churchill RR, Lowe AV., op. cit., p.244.
[53] UNCLOS, art.170 and Annex IV.
[54] It also includes the assessment of technological developments; evaluation of information and data relating to reserved areas; assessment of approaches to joint-venture operations; collection of information on the availability of trained manpower and study of managerial policy options for the administration of the Enterprise ; 1994 Implementing Agreement, Annex, Section 2.
[55] UNCLOS, Annex III, art.17(1).
[56] UNCLOS, art.146.
[57] UNCLOS, art.145
[58] UNCLOS, art.147 (2)(a).
[59] UNCLOS, art.153.
[60] Wolfrum R, op. cit., 1983, p. 315.
[61] The term "new subject of international law" is to be found in the speech of Ambassador Aldo C.Cocca of Argentina during deliberations of the UN Outer Space Committee dated June 1967 ; U.N Legal Subcomm. Of the U.N Comm. on the Peaceful Uses of Outerspace, 75th mtg. at 7-8, U.N. Doc.A/AC.105/C.2/SR.75, 13 November 1967. See also Fasan E. The meaning of the term of mankind in space legal language. Journal of Space Law 1874; 2 : p.125 ; Gorove S. The concept of "common heritage of mankind": a political, moral or legal innovation? San Diego Law Review 1972; 9: p.393.; Cocca AA. The advances in international law through the law of outer space. Journal of Space Law 1981; 9: p.14. This has been denied by a series of authors including Bueckling A. The statregy of semantics and the "mankind provisions" of the space treaty. Journal of Space Law 1979; 7: p.15.
[62] Wolfrum, R., op. cit., 1983, p.318.
[63] UNCLOS, art.137(2). In line with this, the Seabed Disputes Chamber also recognised that "obligations relating to preservation of the environment (…) in the Area" have an erga omnes character, implying that the obligations are applicable to all humankind ; ITLOS Advisory Opinion, 1 February 2011, para. 180.
[64] Lodge MW. The common heritage of mankind. International Journal of Marine & Coastal Law 2012; 27 :733-742, p.733
[65] UNCLOS, Preamble, para.6 and art.140.
[66] Dupuy RJ and Vignes D. A handbook on the new law of the sea. Dordtrech, Boston, Lancaster: Martinus Nijhoff publishers; 1991, p.579 and s.
[67] Ibid, p.580.
[68] UNCLOS, art.140(2) and 160(2)(g)
[69] UNCLOS, art.151(10); 1994 Implementing Agreement, Annex, Section 7.
[70] See Das R. Compensation as equity in context of common heritage of mankind: a key to sustainability and intergenerational and inter-regional equity. NUJS L. Rev. 2009; 2 : 267-289.
[71] See Grant C. Equity in international relations: a third word perspective. International Affairs 1995 ; 71(3): 567 ; Das R. Compensation as equity in context of common heritage of mankind: a key to sustainability and intergenerational and inter-regional equity. NUJS L. Rev. 2009; 2 : 267-289, p.271
[72] 1994 Implementing Agreement, Annex, section 9, para. 7(f).
[73] See White M. Equity – a general principle of law recognised by civilised nations? Queensland U. Tech. L. and Just. J. 2004-2005; 4: 103.
[74] White M., op. cit., p. 104.
[75] *Trail Smelter Case* (United States, Canada), 16 April 1938 and 11 March 1941, Reports of international Arbitral Awards, vol.III, pp.1905-1982.
[76] See Rio Declaration Principle 8 ; UN. Doc. A/CONF.151/26, 14 June 1992.
[77] UNGA. A/RES/70/1, 25 September 2015.
[78] Birnie P, Boyle A. Redgwell C. International law and the environment. Oxford University Press; 2009, p.553.
[79] UNCLOS art. 202(b).
[80] See also ISA. Environmental Management Needs for Exploration and Exploitation of Deep Sea Minerals. Report of a workshop held by the ISA in collaboration with the Government of Fiji and the SOPAC Division of SPC in Nadi, Fiji, from 29 November to 2 December 2011. ISA Technical study No.10. Kingston, Jamaica: International Seabed Authority; 2012: p.4.
[81] UNGA. A/RES/69/292, 19 June 2015.
[82] UNGA. A/RES/59/24, 17 November 2005.
[83] Earth Negotiations Bulletin Vol.25, No.106 p.7 International Institute for Sustainable Development
[84] Simma B. From bilateralism to community interests in international law. RDC 1994; 250; 229-255, p.234.
[85] Tanaka Y. Protection of community interests in international law: the case of the law of the sea. Max Planck Yearbook of United Nations 2011; 15: 329-375, p.332.