

Deepsea Mining: The Responsibilities of the ISA to Implement the Common Heritage of Mankind

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UNCLOS Preamble

Bearing in mind that the achievement of these goals will contribute to the realization 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, whether coastal or land-locked,

Desiring by this Convention to develop the principles embodied in resolution 2749 (XXV) of 17 December 1970 in which the General Assembly of the United Nations solemnly declared *inter alia* that the area of the seabed and ocean floor and the subsoil thereof, beyond the limits of national jurisdiction, as well as its resources, are the common heritage of mankind, the exploration and exploitation of which shall be carried out for the benefit of mankind as a whole, irrespective of the geographical location of States,

[emphasis added]

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ITLOS – Advisory Opinion

156 . . . It is important to determine the meaning of Article 148 of the Convention . . . A perusal of Part XI shows immediately that there are several provisions designed to ensure the participation of developing States in activities in the Area and to take into particular consideration their interests and needs.

157 (recites the provisions of Part XI)

163 . . . Together with those provisions mentioned in paragraph 157, they require effective implementation with a view to enabling the developing States to participate in deep seabed mining on a equal footing with developed States. Developing States should receive necessary assistance including training.

UNCLOS Articles

Article 136 - Common heritage of mankind

The Area and its resources are the common heritage of mankind.

Article 137 – Legal status of the Area and its Resources

(2) All rights in the resources of the Area are vested in mankind as a whole, on whose behalf the Authority shall act. These resources are not subject to alienation. The minerals recovered from the Area, however, may only be alienated in accordance with this Part and the rules, regulations and procedures of the Authority.

Article 140 - Benefit of mankind

1. Activities in the Area shall, as specifically provided for in this Part, be carried out for the benefit of mankind as a whole, irrespective of the geographical location of States, whether coastal or land-locked, and taking into particular consideration the interests and needs of developing States . . .

Article 311

Relation to other conventions and international agreements

6. States Parties agree that there shall be no amendments to the basic principle relating to the common heritage of mankind set forth in article 136 and that they shall not be party to any agreement in derogation thereof.

The Elements of the Common Heritage of Mankind

1. No private or public appropriation of the commons;
2. Representatives from all nations must manage resources since a commons area is considered to belong to everyone.
3. All nations must actively share in the benefits acquired from exploitation of the resources from the common heritage region.
4. There can be no weaponry or military installations established in commons areas.
5. The commons should be preserved for the benefit of future generations.

These principles are reflected in UNCLOS in Articles 137, 140 and 141.

Articles that address the special interests of developing states

Article 61 – Conservation of the living resources

Article 62 – Utilization of the living resources

Article 82(4) – Distribution of Monies

Article 119 – Conservation of the living resources of the high seas

Article 140(1) – Activities in the Area

Article 143 – Marine Scientific Research in the Area

Article 144 – Transfer of Technology relating to activities in the Area

Article 148 – Participation of developing States in activities in the Area

Article 150 – Policies related to activities in the Area

Article 160 – Powers and functions of the Assembly

Article 161 – Composition, procedure and voting of the Council

Article 164 – The Economic Planning Commission

Article 173 – Expenses of the Authority

Article 202 – Scientific and technical assistance to developing states

Article 207 – Pollution from land-based sources

Part XIV – Development and transfer of marine technology

Section 3 – National regional and marine scientific and technological centers (Article 276)

Agreement relating to the Implementation of Part XI

Preamble

Noting the political and economic changes,
including market-oriented approaches, affecting
the implementation of Part XI,

AG XI: Annex sections

2.1 The Secretariat of the Authority shall perform the functions of the Enterprise until it begins to operate independently of the Secretariat.

2.2 The Enterprise shall conduct its initial deep sea mining operations through joint ventures. Upon the approval of a plan of work for exploitation for an entity other than the Enterprise, or upon receipt by the Council of an application for a joint venture operation with the Enterprise, the Council shall take up the issue of the functioning of the Enterprise independently of the Secretariat of the Authority. If joint venture operations with the Enterprise accord with sound commercial principles, the Council shall issue a directive pursuant to Article 170, paragraph 2 of the Convention providing for such independent functioning.

3.4 Decisions of the Assembly on any matter for which the Council also has competence or on any administrative, budgetary or financial matter shall be based on the recommendations of the Council.

6.1(a) Development of the resources of the Area shall take place in accordance with “sound commercial principles”.

Implementing the Common Heritage of Mankind

- ISA first regulator to be required to put a framework around the meaning of CHM
- Success or failure will depend on implementation of the mining regime
- Special attention needs to be paid to the developed versus developing countries rights and obligations

Existing Rules to Guide Implementation

Article 148: the “effective participation of developing States in activities in the Area” shall be promoted as specifically provided for in this Part having due regard to their special interests and needs . . .

Article 150(g): Policies in the Area shall enhance opportunities for States Parties to participate in resource development and the prevention of monopolization of activities in the Area

Article 152: Exercise of powers and functions by the Authority

1. The Authority shall avoid discrimination in the exercise of its powers and functions, including the granting of opportunities for activities in the Area.
2. Nevertheless, special consideration for developing States, including particular consideration for the land-locked and geographically disadvantaged among them, specifically provided for in this Part shall be permitted.

Existing Rules cont'd

Article 155(2) The Review Conference shall ensure the maintenance of the principle of the common heritage of mankind, the international regime designed to ensure equitable exploitation of the resources of the Area for the benefit of all countries, especially the developing States, and an Authority to organize, conduct and control activities in the Area. It shall also ensure the maintenance of the principles laid down in this Part with regard to the exclusion of claims or exercise of sovereignty over any part of the Area, the rights of States and their general conduct in relation to the Area, and their participation in activities in the Area in conformity with this Convention, the prevention of monopolization of activities in the Area, the use of the Area exclusively for peaceful purposes, economic aspects of activities in the Area, marine scientific research, transfer of technology, protection of the marine environment, protection of human life, rights of coastal States, the legal status of the waters superjacent to the Area and that of the air space above those waters and accommodation between activities in the Area and other activities in the marine environment.

Nodules Regulation 17 – opportunity for contractor to apply for Plan of Work in reserved area on condition that it “offers in good faith to include the Enterprise as a joint venture partner”

Sulphides Regulation 19 – opportunity to offer “equity interest in a joint venture arrangement”, terms and conditions not stated thus far.

Transparency – need to know how rules are being applied.

Annex IV: Article 12, Para. 3

- (a) If the Enterprise does not possess the goods and services required for the operations it may procure them. For that purpose, it shall issue invitations to tender and award contracts to bidders offering the best combination of quality, price and delivery time.
- (b) If there is more than one bid offering such a combination, the contracts shall be awarded in accordance with
 - (ii) guidelines approved by the Council with regard to the preferences to be accorded to goods and services originating in developing States...

Article 154 Review: Recommendations and Comments concerning the Common Heritage of Mankind

- p. 23 (comment) It is questionable whether the Authority has enhanced opportunities for all States parties. It has approved exploration contract applications from some developing States, and it could do more. Some ambiguities were identified by respondents, particularly the term “developing state” (not defined by the Convention) – some countries that rank highly on the Human Development Index and/or Gross Domestic Product rankings still hold this status. This has potential to influence access to sites reserved only for developing States. Several respondents questioned whether the reserved area system is effective in promoting opportunities. In 2010 and 2012, the sulphides regulation and the cobalt-rich ferromanganese crusts regulations were adopted, respectively. In these regulations an alternative to the reserved areas regime was provided by allowing contractors a choice to elect either to provide a reserved area or to offer an equity interest in a future joint venture with the Enterprise. The joint venture route may potentially restrict options available to developing States. Many developing states also find it difficult to participate in the activities of the Authority due to financial and other constraints, and hence encounter problems when developing their own applications. The Enterprise, which was intended to partner with developing States, has not yet been developed by the Authority and some of the reserved Areas that were destined to be developed by the Enterprise have now been approved for individual states to explore.
- p. 24 (comment) Most respondents to the questionnaire agreed that overall the Authority is ensuring that monopolization of activities in the Area is prevented but some concerns were raised about the effective control of the sponsoring State in the emerging reality that only a small number of private and state enterprises are (technically and financially) capable of carrying out activities in the Area. Respondents suggested that the effect of the possible future merger or take-over of companies needs to be anticipated. The discussion in the Counsel was recalled (ISBA/19/c/18, paragraph 14) regarding their being “nothing in the nodules regulations to monitor monopolistic behavior” and a suggestion to align these regulations with those for sulphides and crusts.

Recommendation concerning the proposed strategic plan:

- Recommendation 33:

As part of the proposed strategic plan the Council should seek advisory opinions to address high-level legal issues that the Authority must come to some conclusion about on going forward (developing state definition, monopolization, common heritage, effective control, dominant position).

Working Draft Regulations on Exploitation Mineral Resources Area

Draft Regulation 11: Commission's recommendation for the approval of a Plan of Work

- Paragraph 3: The Commission shall not recommend the approval of a Plan of Work if it determines that:
 - (a) such approval will permit a State party or entities sponsored by it to monopolize the conduct of activities in the Area with regard to the resource category covered by the Plan of Work.

Questions?

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