The principle of equality in public employment- Practical study

Dr. Hesham AlSaleh*

This paper aims to study the concept of equality in public employment in Kuwait, as a general principle of law applicable in this field. It defines such concept and its constitutional and legal basis and concludes that no distinction should be made between those who are applying for public employment on the basis of politics, religion or sex, for this would be incompatible with the constitution and international standards. The paper attempts to assess the reality of employment in ministries and public departments and institutions in Kuwait, and the legislator's effort to set up accurate basis that guarantee the right of individuals for public employment according to the principle of equality.

The importance of this paper resides in the fact that it looks into a major topic related to the area of human resources which is now among the factors of production, because it stimulates other material and financial factors and responds to the needs and desires of citizens and realizes State objectives.

This paper tackles as well the right of public authorities to define the conditions of public employment and to assess the competency of applicants upon the requirements of public sectors in addition to the basis to be followed, such as abiding by the principle of equality, abstaining from committing an apparent error in evaluation, deviation from public utility or an error in assessing the facts or discrimi-

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nating between sexes on the basis of religion, otherwise this would be upon the nature of the job and under judicial supervision.

The criminal (public) case in Kuwait and some other Arab States

Dr. Weam AlMasri*

Abstract

This paper discusses the legal status and the current situation of the criminal (public) case in the criminal procedural system in Kuwait upon the Kuwaiti constitution and applicable laws. It examines the status of the public case in some Arab States (Arab Gulf countries and Egypt). The researcher shows that the main problem for raising a criminal case on behalf of society resides in the fact that the Kuwaiti legislator follows an individual plan, even if the circumstances in Kuwait used to allow it, but this does no longer follow the criminal procedures and the settled rules in comparative law. Therefore this paper suggests some solutions that would contribute to sorting out this legal problem for the disappearance of the reasons, circumstances and considerations that made the constitutional legislator provide such an exception in the first place.

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Research and Studies

GENERAL PRINCIPLES REGARDING THE AREA GOVERNED BY THE COMMON HERITAGE OF MANKIND PRINCIPLE(1)

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"***Kuwait International Law School Journal is pleased to select extracts from some of the Master's thesis that were submitted as part of the Master's programs offered by the School. The chosen topics are vital and reflect the current status of law and jurisprudence in the region and even on the international level. This is a clear evidence of KILAW's will to enhance the academic specialization and shows its constant support to research initiatives and activities whether they were undertaken by faculty members or by students***".

Abstract

Part XI of the convention, extensively dealing with regulating future deep seabed mining, declare that the seabed and ocean floor beyond the limits of national jurisdiction will be termed as the Area and will be considered as the common heritage of mankind. The rush of the coastal states to claim more sea and the urge of industrialized states for unregulated extraction of resources from the seabed were halted by the common heritage of mankind principle. Seabed contained valuable minerals and mining the deep sea minerals were a challenge owing to its depth. The capacity to engage in deep sea mining rested with a hand full of developed countries. The Common Heritage of Mankind (CHM) principle brought the resources under the control of common management to be administered in a way benefitting whole mankind. The CHM principle provided orderly, safe development and rational management of the resources of Area as these resources were non renewable, limited, and had financial and scientific value.

(1) This research is extracted from the Master's thesis on "DEVELOPING COUNTRIES AND THE PRINCIPLE OF 'COMMON HERITAGE OF MANKIND' BASED ON THE UNITED NATIONS LAW OF THE SEA CONVENTION 1982", submitted by Ms. Rahima Ansar Musaliar under the supervision of Prof. Badria Al-Awadhi as part of Kuwait International Law School LLM program 2012-2014.

Art 137 of the UNCLOS states that there shall be no sovereign claim or appropriation over Area or its resources. Prohibiting sovereignty and appropriation reflect the inherent nature of the CHM principle. But prohibiting sovereignty is not enough. The Area to benefit all humankind, all kind of monopolization should be avoided. In retrieving deep seabed nodules, developed states have a distinct advantage over developing states in terms of technology and finance. Developing land-locked states are disadvantaged because of their geographical position. Developing states and geographically disadvantaged states G-77(The Group of 77 was established in 1964 by seventy-seven developing countries. The group enables the countries to promote their collective economic interests within UN) were united as they realized that in the past, benefits were reaped only by the developed countries. The main reason for unity was that they were against monopolization of world resources of the developed world and they demanded New International Economic Order (NIEO).

The UNCLOS provided that there should be equitable sharing of financial and economic benefits. The point of contention was whether the sharing of benefit should be compensation based on equal rights or whether it should be development aid based on preferential treatment. The preferential treatment was accommodated in UNCLOS and it gives special attention to developing States.

UNCLOS reserves the scientific research in the Area only for peaceful purposes, as the utilization of the seabed should be carried out for the benefit of all mankind any military use will only serve national interest, so all aggressive military activities are prohibited as Article 145 established that the International Seabed Authority (ISA) shall adopt measures for the protection

of marine environment. ISA gives high priority to protect marine environment and is following the Environmental Impact Assessment and Precautionary approach to be used for activities in the Area.

Introduction

The UNCLOS (1982) Article (1) defines the Area as the seabed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction. The Convention provides that the Area should be governed by the CHM principle through the ISA. This paper discusses the relevant articles from Part XI of the convention which reflects the principle of the CHM.

Section One: Area governed by the CHM Principle

Part XI sets out the general principles of the International Area stating Area and its resources are the common heritage of mankind(1). The CHM principle is not defined but can be understood by the norms set out in Part XI. These include, the prohibition against State's rights over the Area or its resources (Article 137 (1); the vesting of resources in humankind as a whole, (Article 137 (2); the carrying out of activities in the Area for the benefit of humankind as a whole, taking into particular consideration the interests and needs of developing states, especially those that are land-locked and geographically disadvantaged. (Articles 140 (1), 143(3) (b), 144, 148); the sharing, on an equitable and non-discriminatory basis, of economic benefits derived from activities in the Area (Article 140 (2); the reservation of the Area for peaceful purposes (Article

(1) United Nations Convention on the Law of the Sea, (December 10,1982),1833 U.N.T.S. 397, entered into force 16 November 1994, Art 136.

141); and the protection of the marine environment from the harmful effects arising from activities in the Area (Article 145)[1]

No Derogation from the Common Heritage of Mankind Principle regarding the Area

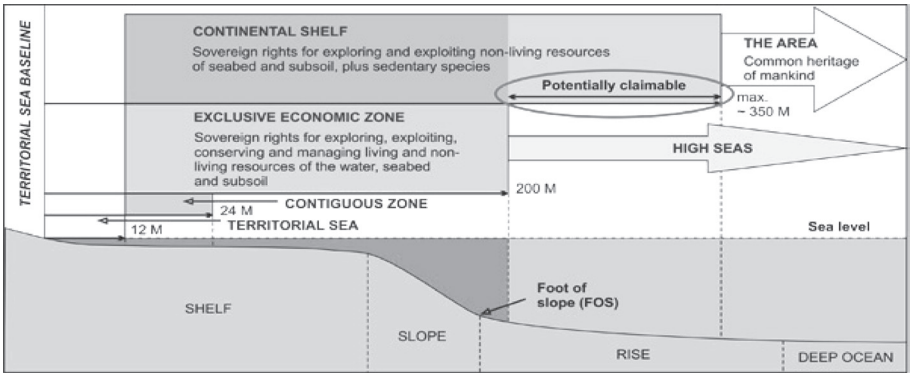
The core provision of Part XI is Article 136 declaring the Area and its resources the common heritage of mankind. The introduction of the term "mankind", combined with the word "heritage", indicates that the interests of future generations have to be respected in making use of the international commons[2]. The States parties to the Convention further agreed that there shall be no amendments to the basic principle set forth in that Article and that they shall not be party to any agreement in derogation thereof[3].

I. Definition of Area

The Area[4] consists of the entire ocean floor which is not subject to sovereign rights of coastal states in an exclusive economic zone or the continental shelf ("the outer shelf")[5].The water surface above the Area is the high seas[6].While the latter is governed by the principle of freedom of the high seas, the Area has been declared the common heritage of mankind[7].

(1) Christopher C. Joyner, Legal Implications of the Concept of the CHM, 35 INTL & COMP.L.Q, 190-199, (1986).
(2) RudigerWolfrum, 1 CHM, in R.Bernhardt (ed)., ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 63 (1992).2
(3) United Nations Convention on the Law ofthe Sea, (December 10,1982),1833 U.N.T.S. 397, entered into force 16 November 1994, Art.311 (6).
(4) Ibid , Art.1 Subpara.1(1), defines Area
(5) Ibid , Art.57, 76, 134,142
(6) Ibid , Art. 135,86
(7) Ibid , Art.136, Preamble

The UNCLOS 1982 establishes two zones beyond national jurisdiction: the 'high seas' (the water column beyond EEZ) and 'the Area' (the seabed beyond national jurisdiction). The Area is the seabed beyond the external limits of the Continental Shelf(including extended Continental Shelf)



II. Reasons for Creating an Area

Historically, States could claim jurisdiction over sea which was adjacent and thus part of their territory. This was known as territorial sea, which was part of the territory of a State. Though part of the territorial sea was enjoyed by other States the other States had restricted rights. With change of time, the law of the sea also changed. Man became more aware of the resources of sea. States wanted to exercise exclusive rights on areas of sea which was beyond their territorial jurisdiction. New zones of functional and resource oriented jurisdiction was recognized. This threatened the traditional principles of governance at sea.

To get a better understanding of the concept of Area, let us look into how sea is divided.

"International law parcels the sea into various zones in which states enjoy a variety of jurisdictional competences. The general rule is that coastal States exercise the greatest degree of jurisdictional competence over those zones that lie closest to them. Logically enough a State exercises full powers of territorial sov-

ereignty with areas of water which are internal. The idea that States are entitled to exercise authority over waters beyond their land territory (internal archipelagic waters) is deeply entrenched in international legal thinking"[1].

Although it was once argued that the competences States enjoyed within waters of their coast, fell short of territorial sovereignty and had to be positively asserted, it is now clear that this authority flows automatically from the sovereignty exercised over land territory and so all coastal States do in fact have a territorial sea[2].The breadth of water over which a state might legitimately exercise sovereign jurisdiction, has been subject of lengthy debate down the ages, but at the dawn of twentieth century the preponderance of known practice fixed that distance at 3 nautical miles(hereinafter NM).

Predictably, a coastal State exercises sovereignty to its fullest extent within its internal waters. The Coastal State jurisdiction automatically extends to the territorial sea. Traditionally, where the territorial sea ended, the high seas began and laws of the coastal State no longer applied. But to make policing maritime zones more efficient, a contiguous zone up to 21 NM was permitted. Improvements in technology made the exploration and exploitation of the seabed and subsoil resources beyond the territorial sea increasingly possible and economically viable. Theoretically these resources could be appropriated by all States as it was part of high sea resources. The coastal States claimed that to effectively and orderly manage these resources the coastal States should have jurisdiction and control over it. The United States through Truman Proclamation (1945) was one of the first

(1) Malcolm Evans, INTERNATIONAL LAW, 654 (Oxford University Press, 2010).

(2) A view expressed by Judge Mc Nair in his Dissenting Opinion in Fisheries Judgment (UK v. Norway), I.C.J. Rep. 116-60 (1951).

countries to declare rights over Continental Shelf. This led to a great rush of developing countries claiming sovereign rights over adjacent waters. In the North Sea cases the ICJ recognized the claim of coastal States as a statement of customary law, stressing that these rights existed 'ipso facto and ab initio'. With ample reason to extend the jurisdiction over the seabed, coastal states wanted exclusive jurisdiction over water column and the natural resources in to exploit and protect them. Coastal states may claim Exclusive Economic Zone upto 200n.miles.

The final zone of resource jurisdiction which has been carved out of the high sea is the most dramatic in both kind and extent. The seabed beyond the limit of national jurisdiction was reserved for the CHM. The rush of coastal States to claim more of the sea was halted by the introduction of the CHM principle which was made applicable to the deep seabed and its resources. The Law of Sea Convention 1982 Part IV crystallizes these divisions of sea into treaty law.

According to Part II Article 3 or the UNCLOS (1982) the territorial breadth of sea is fixed at 12 NM. According to UNCLOS (1982) Article 33 (2)the contiguous zone may not extend beyond 24 NM from the baseline from which the breadth of the territorial sea is measured. The exclusive economic zone which is an area beyond and adjacent to the territorial sea are governed by Part V of the convention. Article 58 fixes the breadth of the convention at 200 NM from the baseline from which the breadth of the territorial sea is measured. The Continental Shelf of a coastal State comprises the seabed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin or to a distance of 200 NMNM from the baselines from which the

breadth of the territorial sea is ensured.(1) UNCLOS declared the high seas open for all states for the purpose of fishing, scientific research, navigation, over flight, laying submarine cables and pipelines, constructing artificial island and other installation permitted under international law. But these freedom should be exercised giving due regard to activities in the Area.(2)

These limits of national jurisdiction are either 200nm from the territorial sea baseline, or further beyond this distance out to the limits of the outer continental shelf established by states in conformity with Art 76 of the UNCLOS (1982). Because of the procedure under Art 76, which requires data for extended continental shelves to be submitted to the Commission in the Limits of the Continental Shelf with the limits to be established by coastal states on the basis of the Commission's recommendation, it will be some considerable time before the extent of the Area can be determined conclusively.(3) In approximate terms, however, the Area constitutes a remarkable 50 percent of the earth's surface.4

III. Mineral Resources of Area

The Area contains a variety of mineral and hydrocarbon resources, but it is metals that have attracted the most interest. The first resource to be identified on the abyssal plains was polymetallic nodules (PN), which were found during the 1827-77 sci-

(1) United Nations Convention on the Law ofthe Sea, (December 10,1982),1833 U.N.T.S. 397, entered into force 16 November 1994, Article 76.

(2) Ibid , Article 87(2).

(3) International Seabed Authority Issues associated with the implementation of Article 82 of the United Nations Convention on the Law of the Sea. (ISA technical study; no.4)

(4) Donald R Rothwell & Tim Stephens, THE INTERNATIONAL LAW OF THE SEA 136 (2010).

entific expedition of HMS Challenger[1]. These are small ball- like rock concretions, between 0.5 and 25 centimeters in diameters, scattered on the deep seabed at depths at about 4,000 to 6,000 meters. Among other materials these nodules contain manganese, nickel, copper, cobalt, aluminum and iron. While PN are distributed widely, only three areas have attracted attention by industrial prospectors: the north central Pacific Ocean, the Peru Basin in the south-east Pacific Ocean and the middle of the north Indian Ocean.

According to the Pacific –ACP States Regional Legislative and Regulatory Framework for Deep Sea Minerals Exploration and Exploitation[2] Deep Sea Minerals (DSM) are minerals that occur in the deeper-water parts of the ocean, deposited on the surface of the seabed or within the subsoil by natural processes. Deeper water parts of the ocean are generally considered as areas below the photic zone, deeper than 400 meters, beyond reefs and traditional fishing grounds, where hydrostatic pressures require specialist equipment. There are different types of DSM deposits, such as iron- manganese (or ferromanganese) nodules and crusts, massive sulphides, phosphates and metalliferous sediments. Three major deposits, identified to have potential for future development are (1) Seafloor Massive Sulphides (SMS); (2) Ferromanganese Nodules and (3) Ferromanganese Cobalt-rich Crusts. These seabed mineral deposits are composed predominantly of metals. The rare-earth elements (REEs) have recently been added to the list of possible target metals contained within

(1) See ISBA, Polymetallic Nodules at 'Use and protection of the Deep Sea- An Introduction, 38 DEEP SEA RESEARCH II 3427 (2001), www.isa.org.jm/files/documents/EN/Brochures/ENG7.pdf; accessed on 25 March 2015

(2) Pacific –ACP States Regional Legislative and Regulatory Framework for Deep Sea Minerals Exploration and Exploitation prepared under the SPC-EU EDF 10 Deep Sea Minerals Project (First edition July 2012) .

some DSM deposits, owing to recent coverage of reports of potentially rich REE resources in the Pacific Ocean, coupled with increasing global demand for these elements(1).

Seafloor Massive Sulphide (SMS) deposits are formed by processes that occur around and beneath active hydrothermal vents. The deposits are formed by tectonic plate movements including volcanic activity and faulting that cause fracturing of the seafloor. Seawater that infiltrates the cracks in the earth's crust is heated from an underlying heat source (the magma) and returns to the seabed through a vent, at a very high temperature, mixing with cold seawater at the bottom of the ocean, and depositing minerals that are rich in metals(2). Active seabed hydrothermal vents ejecting mineral-rich black fluids that have accumulated deep beneath the seabed are also known as "black smokers" (or those ejecting sulphate- rich white fluids: "white smokers"). Hydrothermal vents give rise to interesting benthic communities, with high biomass and endemism (and this biology also gives rise to interest from the pharmaceutical industry). In some places, the vents are inactive, leaving cold SMS deposits on the seafloor, where they start to oxidize. SMS deposits are found predominantly in water depths ranging from 1,000 to 5,000 meters. The target metallic minerals for SMS deposits are copper, gold, silver and zinc. It is most likely that inactive vents only would be targeted for mining(3).

Ferromanganese nodules are metal- oxide rock materials that occur on the seafloor. These are predominantly found, often with

(1) ibid

(2) ibid

(3) Pacific –ACP States Regional Legislative and Regulatory Framework for Deep Sea Minerals Exploration and Exploitation prepared under the SPC-EU EDF 10 Deep Sea Minerals Project (First edition July 2012) .

a wide distribution, in ocean basins at 4,500-6,500 meters deep on abyssal plains, where sedimentation rates are low. Nodules are characterized by concentric millimeter-scale layers that grow in aggregate from <1 to >5 centimeters in diameter around a core (a rock fragment, shell or shark tooth). The growth rates are very slow at only millimeters per million years. Target economic minerals in nodules are nickel, copper, manganese, molybdenum, lithium, rare-earth elements and possibly cobalt(1).

Cobalt-rich crusts are found predominantly on the flanks of submerged volcanic islands and on submarine ridges and seamounts throughout the world's oceans at 400-4,000 meters depths. Cobalt-rich crusts form at the rate of 1-6 millimeters per million years. Crusts-bearing seamounts can be huge-some as large as mountain ranges on land(2). The target economic minerals for these crusts are cobalt, nickel, manganese, tellurium, rare earth elements, niobium and possibly platinum. Only a few of the estimated 50,000 seamounts that occur in the Pacific have been mapped and sampled in detail.

Mining of these deep sea mineral resources gives rise to significant challenges owing to the depths in which these minerals occur.

IV: Rationale for Area under the CHM Principle

The foundation or the reason for proclaiming the area beyond national jurisdiction under the principle of the CHM is that in these area all the states have interest, but some have the capacity to use it while others doesn't. While reserving this area through

(1) ibid
(2) ibid

the CHM principle, the newly found principles of friendly co existence, has been given a strong enhancement. To achieve equal participation and involvement of all states, common machinery is necessary. And hence the Area is brought under the administration of ISA.

The concept of the CHM principle which is represented by the legal regime for the seabed beyond the limits of national jurisdiction can be termed as an innovative principle in modern international law. The principle has put to rest some uncertainties concerning the future of the seabed. The law which existed was based on freedom of the seas, which resulted in a 'first come, first served' rule. This was advantageous only for the industrialized nations. The new principle stood for international co-operation and protection of the interests of developing countries and humankind as a whole. The developing countries advocated the CHM principle as they believed it will help in promoting a redistribution of global wealth and would help their development plans. This principle act as a pillar in the international movement to strengthen the strategic position of developing countries in their effort to stop the exploitation of their resources by other States and foreign companies and to stop them from exploiting the deep seabed resources.

The benefits accruing to developing countries through following the CHM principle and common management system for the seabed activities are not only financial profits collected by the ISA, but also non financial benefits such as participation in decisions affecting the seabed, training of their nationals and obtaining access to Western technology under an international regime[1].

(1) NicoSchrijver, SOVEREIGNTY OVER NATURAL RESOURCES 217, 219 (Cambridge University Press , 1997).

1) Common Interest

Public interest is an essential characteristic of law. Laws as general system of command are designed to take public interest into account. CHM principle also has this characteristic. But the aspect that standout in this principle is 'Common interest' along with the importance such regimes gives for development of science. This combination of the CHM principle enfolding the economic interest which cumulate to economic development and enhance public interest and progress of science make this principle effective in different fields like environmental protection. Of course, it could be dealt by other areas of law, such as the state responsibility, but the latter is mainly based on the protection of sovereign self-interest, and thus perhaps not an appropriate response(1). As a result of the recognition of "common interest,(2) the CHM principle is often subject to some common management mechanism."

'Declaration of Principles Governing the Seabed and the Ocean Floor, and the Subsoil thereof, beyond the Limits of National Jurisdiction' called for a international regime to apply to the Area and its resources and to include an appropriate international machinery to give effect to its provision and this shall be established by an international treaty of universal character. This regime shall, inter alia, provide for the orderly and safe development and rational management of the Area and its resources and

(1) See Prue Taylor, AN ECOLOGICAL APPROACH TO INTERNATIONAL LAW, RESPONDING TO THE CHALLENGES OF CLIMATE CHANGE 278(London & New York: Routledge,1998); Robin Churchill & Vaughan Lowe, THE LAW OF THE SEA 228 (2nd ed., Manchester University Press,1988).

(2) ErkkiHolmila, COMMON HERITAGE OF MANKIND IN THE LAW OF THE SEA152 (2005) ,Youshifumi Tanaka, Protection of Community Interest in International Law: The Case of the Law of the Sea in A.VonBogdandy and R. Wolfrum (eds.), 15 MAX PLANCK YEARBOOK OF UNITED NATIONS LAW 329-37 (2011).

for expanding opportunities in the use thereof and ensure the equitable sharing by nations in the benefits derived from them, taking into consideration the need and interest of developing countries, whether land-locked or coastal(1).

2) Non Renewable Resources

The resources that are brought under the CHM principle are usually non renewable. Non renewable resources should not be open for free exploitation as unregulated exploitation will infringe the right of future generation. Thus one can point out that such resources should not be subject to free exploitation but, rather, there should be an international regime balancing the powers and interests of states. This feature distinguishes the concept of resnullius and the CHM principle. The fishstocks in the oceans are renewable resources. Even though there are recent regulations in their utilization(2) it cannot be compared to the minerals in the moon which are non renewable resources and call for strict supervision. In the same way PN found on the deep seabed are non renewable resource and are exhaustible(3). If one considers that passing of property to future generations constitutes one of the important principles of the CHM, then it makes perfect sense that areas of non-renewable resources should be considered as Common Heritage of Mankind, provided that they also share other important characteristics(4).

(1) General Assembly Resolution 2749 (XXV).

(2) Even though fish is renewable resource, mankind has realized the importance of regulating fishing for the sustainability of fish resources.

(3) As stated by Dyke & Yuen, « the polymetallic nodules are an exhaustible resource; unlike fishing and navigation, which can be done by many nations at once, profitable seabed mining sites are limited; and a claim by one nation will definitely diminish resources available to other", as quoted in LauriHannikainen, PEREMPTORY NORMS (JUS COGENS) IN INTERNATIONAL LAW 562 (Helsinki: LakimiesliitonKustannus, 1988).

(4) Holmila, Common Heritage of Mankind In The Law Of The Sea, 2 Phil. Y.B. Int'l L.152 1969-1973,(2005) at 193, HeinOnline (http:/heinonline.org).

3) Scientific Value and Research

We must understand that areas of the CHM are highly important to the scientific community and therefore to mankind too. They area representation of unique and very specialized domains since the characteristics they exhibit are not those seen in other areas. A few examples that illustrate this are those of the Antarctic and the human genome. The Antarctic is recognized as having great value to the study of climatic change(1). The study of the human genome contains the "past, the present and the future of mankind".(2) Just like the above mentioned examples, the UNCLOS (1982) 1982 has recognized maritime research as an important objective which has to be advanced.(3)

4) Financial Value

We cannot ignore the high financial value of the rest of the marine resources. This goes true for other regimes which are considered to be heritage common to all mankind. It is estimated that the marine resources of the seabed will be worth a trillion USD per year.(4) The same applies for resources on the moon or even the human genome. This is a mere common characteristic of the regimes in question and arguably it does bear a Hobbesian concession relating to the pure nature of mankind.

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(1) For example, see BBC Online, "Antarctic lakes show climate effects", (24.1.2002), news.bbc.co.uk/1/hi/sci/tech/1779619.stm, accessed on 22 March 2015

(2) RyuichiIbidaHuman Genome as CHM-with a Proposal, Bioethics in Asia (26.8.2004) http://www2.unescobkk.org/eubios/asiae/biae59.htm, accessed on 25 March 2015

(3) Holmila, Common Heritage of Mankind In The Law Of The Sea, 2 Phil. Y.B. Int'l L.152 1969-1973,(2005) at 193, HeinOnline (http:/heinonline.org).

(4) OCEANS: THE SOURCE OF LIFE, UNITED NATIONS CONVENTION ON THE LAW OF THE SEA: 20TH ANNIVERSARY (1982-2002) 11- 12 (2004), www.un.org/Dept/los/convention- agreements/convention_20years/oceansourceoflife.pdf, accessed on 15 March 2015

5) Limited Availability

Another important factor regarding the resources in the deep-seabed is that they are not available in plenty. Neither are they easily available. The exploration for resources in the deep sea requires an enormous amount of investment, both in terms of technological competition and financial competition among others. These competitions are not commonly possible to all nations. Only a selective list of nations can boast about the ability to embark a quest to explore the seabed. In addition to this, when we consider other factors like public interest, non-renewability, scientific value to mankind among many more, it is understandable that the common utilization and common exploration of such resources that are common heritage of mankind should not be subject to free competition.(1) One must also not forget that the scare availability is not only due to financial hurdles, like the high cost of exploration but also due to the limited renewability of resources. The point of interest is that the CHM principle often applies in areas that have limited renewability of resources. This is the most important feature of the CHM principle - that it essentially deals with resources.

These characteristics reaffirm its suitability to be applied to the Area.

Section Two: No Sovereign Claim or Appropriation over Area

Article 137 (1)No state shall claim or exercise sovereignty or sovereign rights over any part of the Area or its resources, nor shall any State or natural or juridical person appropriate any part

(1) In practical terms, it seems probable that this might lead to monopolization of many of the world's greatest resources, something that even the countries who do not accept the seabed mining regime of UNCLOS (1982)1982 have warned about.

thereof. No such claim or exercise of sovereignty or sovereign rights nor such appropriation shall be recognized. (Emphasis added)

Art.137 (1) state that the Area will not be subject to sovereign rights of any state nor can it be appropriated by any. Article 136 of the international law of the sea1declared the deep seabed outside the 200-mile limit of national zones to be part of the common heritage of mankind. The deep seabed includes the ocean floor and subsoil and their resources. For any property to be declared common heritage of mankind, it should not be under the control of individual states nor can it be appropriated without supervision. Art. 137 enclose these two principles and thus make the CHM principle effective in this aspect.

I: Traditional Claims of Sovereignty not appropriate over deep seabed

Let us look into the various ways a sovereign laid claim on a territory, to analyze if the 'Area' can be claimed by a sovereign. Traditionally occupation of res nullius, prescription, conquest, accretion and cession are the five recognized ways a state may acquire territory.(2) Prescription, conquest and cession are applicable only when the territory had a previous sovereign. As sovereignty has never existed over the deep seabed, these methods are not applicable to obtain sovereignty over deep seabed. To

(1) United Nations Conference on the Law of the Sea: Final Act, Dec.10 1982, 1833 U.N.T.S. 3, 21 I.L.M. 1245, 91982) (also reproduced as U.N. Doc. A/CONF.62/121).

(2) Tim Hillier, SOURCEBOOK ON PUBLIC INTERNATIONAL LAW227(1998); Peter Malanczuk, AKEHURST'S MODERN INTRODUCTION TO INTERNATIONAL LAW148-54 (7thed, 1997)4; See generally Seokwoo Lee, Continuing Relevance of Traditional Modes of Territorial Acquisition in International Law and a Modest Proposal, 16 CONN. J. INT'L L. 1-22 (2000).

apply Accretion there should be a physical process that would result in it becoming part of state's territory. Hence that method too is not applicable. This leaves occupation the only legal ground for acquiring deep seabed on the basis that it is res nullius.

I: 'Deepsea' ventures claim resnullius over the Area

Res nullius refers to property belonging to no-one and exploitable by those who wish to and are capable of doing so.(1) The territory involved must be res nullius prior to any occupation.(2) Res nullius claims over the deep seabed were tested in 1974. An American corporation, Deepsea Ventures ('Deepsea'), filed a notice of discovery and claim of exclusive mining rights to the Clarion Clipperton Zone in the Pacific Ocean.(3) Edward Guntrip, in his article 'The CHM: An Adequate Regime for Managing the Deep Seabed?, discusses the Deepsea case.(4) 'Deepsea' asserted exclusive rights to develop, evaluate and mine the re-

(1) Rosalyn Higgins, International Law and the Avoidance, Containment and Resolution of Disputes, 230 RECUIEL DES COURS176 (1991); YuwenLi, TRANSFER OF TECHNOLOGY FOR DEEP SEABED MINING 19 (Nijhoff, 1994).

(2) Western Sahara (Advisory Opinion), I.C.J. 12, 79 (1975).

(3) I.U.S.Dep't Interior, Minerals Yearbook, METALS AND MINERALS 574, (1981); Jack Barkenbys, DEEP SEABED RESOURCES: POLITICS AND TECHNOLOGY37 (1979); Gonzalo Biggs, Deep sea's Adventures: Grotius Revisited, 9 INT'L L. 271 (1975); Eduardo Jimenez de Arechaga, International Law in the Past Third of a Century, 159 RECUEIL DES COURS228 (1978) ; Said Mahmoudi, THE LAW OF DEEP SEA-BED MINING: A STUDY OF THE PROGRESSIVE DEVELOPMENT OF INTERNATIONAL LAW CONCERNING THE MANAGEMENT OF THE POLYMETALLIC NODULES- OF THE DEEP SEA-BED 130-98(1987);Markus G. Schmidt, CHM OR COMMON BURDEN? THE UNITED STATES POSITION ON THE DEVELOPMENT OF A REGIME FOR DEEP SEABED MINING IN THE LAW OF THE SEA CONVENTION36 (Oxford University Press, 1990); Kathryn Surace-Smith, United States Activity outside of the Law of the Sea Convention: Deep Seabed Mining and Transit Passage, 84 COLUM.L.REV.1032, 1045 (1984).

(4) Edward Guntrip ,The CHM: An Adequate Regime for managing the deep seabed?, 4 MELB.U.L.REV. (2003), http:/www.law.unimelb.edu.au/files/dmfile/downloadaf021.pdf.

sources in an area of 60000 square kilometers.[1]The company requested diplomatic protection for appearing before an international tribunal if a dispute arose.[2] The claim was lodged with the US Secretary of State, the Secretary- General of the UN, and the Ambassadors of Australia, Belgium, Bulgaria, Canada, Czechoslovakia, France, Hungary, Japan, Poland and the Soviet Union, the UK, West Germany, as well as multinational corporations.[3] Accompanying the claim was a legal brief.[4] The brief established the lack of occupation of the seabed as one of the grounds for the claim.[5] It was argued to be analogous to the seabed claims occurring prior to the Truman Declaration of 1945.6States had previously made exclusive claims to the seabed resources, including pearls, oysters, corals and sponges, which were located outside of their territorial jurisdiction.[7] Occupation gave recognition to these claims.[8] Occupation occurred when there had been 'reasonable diligence' in bringing the resources to the commercial market.[9] Deepsea argued that their investment in the proj-

(1) Jack Barkenbys,supra n. 137 at 37; Eduardo Jimenez de Arechga, International Law in the Past Third of a Century, 159 RECUEIL DES COURS228(1978); Said Mahmoudi, THE LAW OF DEEP SEA-BED MINING: A STUDY OF THE PROGRESSIVE DEVELOPMENT OF INTERNATIONAL LAW CONCERNING THE MANAGEMENT OF THE POLYMETALLIC NODULES- OF THE DEEP SEA-BED 130-98(1987), at 98; See generally Gonzalo Biggs, supra n. 137; Eduardo Jimenez de Arechaga, International Law in the Past Third of a Century, 159 RECUEIL DES COURS228, 271 (1978).

(2) Jack Barkenbys,supra n. 137 at 37; Gonzalo Biggs, supra n. 137 at 271.

(3) Gonzalo Biggs, supra n. 137 at272 (1975).

(4) Jack Barkenbys, supra n. 137 at 37

(5) Gonzalo Biggs, supra n.137at 273-4; Said Mahmoudi, THE LAW OF DEEP SEA-BED MINING: A STUDY OF THE PROGRESSIVE DEVELOPMENT OF INTERNATIONAL LAW CONCERNING THE MANAGEMENT OF THE POLYMETALLIC NODULES- OF THE DEEP SEA-BED 98(1987)

(6) Jack Barkenbys, supra n. 137 at 37

(7) Gonzalo Biggs, supra n. 137at 273.

(8) Jack Barkenbys, supra n. 137 at38).

(9) Ibid

ect demonstrated occupation.[1] The claim was not recognized by Australia, Canada, the UK or the US.[2]

II: Claim of resnullius over deep seabed not recognized

The US State Department responded by saying that it 'does not grant or recognize exclusive mining rights to the mineral resources of an area of the seabed beyond the limits of national jurisdiction.[3] Other states ignored the claim.[4] The rejection of res nullius claims may have occurred for two reasons. First, it may have made to curtail claims over the deep seabed. The main reason of not entertaining the claim was to discourage any further claim over deep seabed. The actions also reflected the dissatisfaction of developed countries over the developing states activities over the deep seabed. The refusal militated against developing states making too much claims over the deep seabed to guarantee that nodule rich areas were not under the authority of developed states. This would also prohibit private corporations from making large claims over the deep seabed. Both these claims would have not permitted developed states from free access to the deep seabed and its resources. Second, developed states may not have wanted to pre-empt the results of the Third Conference. By curbing all dealings on the deep seabed, the

(1) Ibid.

(2) Said Mahmoudi, supra n. 143 at 99-101.

(3) Gonzalo Biggs, supra n. 137at 276; Eduardo Jimenez de Arechga, International Law in the Past Third of a Century, 159 RECUEIL DES COURS228(1978); Kathryn Surace-Smith, United States Activity outside of the Law of the Sea Convention: Deep Seabed Mining and Transit Passage, 84 COLUM.L.REV.1032, 1045 (1984), at 1045; Markus G. Schmidt, CHM OR COMMON BURDEN? THE UNITED STATES POSITION ON THE DEVELOPMENT OF A REGIME FOR DEEP SEABED MINING IN THE LAW OF THE SEA CONVENTION (Oxford University Press, 1990), at 37.

(4) Jack Barkenbys, supra n. 137at 38.

developed states were in a position to exercise more influence over the both the content of the CHM principle and the overall outcome of the Third Conference. Moreover the unknown riches lying on the deep seabed increased the bargaining strength of the CHM principle. The effect of these rejections was to dismiss claims that the deep seabed was res nullius. Since the deep seabed is not res nullius, occupation is not a valid means of acquiring rights over it.(1)

III: High Sea considered as res omnium communis

Hugo Grotius explicated the view that high sea belonged to the res omnium communis category. According to him anything that can be used without loss to anyone else is res omnium communis.(2) if constituted by nature in a way that, in serving one person, it still suffices for the common use by all, it is common property. There is no doubt that the doctrine of the CHM found under the Law of the Sea Convention 1982 is a refinement of Grotius's principle of res communis of the high seas. Grotius argued that the sea is and has always been res communis, noting that its legal status was determined by a law derived from nature, ' the common mother of us all, whose bounty falls on all and whose sway extends over those who rule nations'.(3) Observes that the reformulation of the Grotian res communis principle would thus emphasize that the oceans, as a collective resource of the world

(1) Edward Guntrip, The CHM: An Adequate Regime for managing the deep seabed?, 4 MELB.U.L.REV. 14 (2003), http:/www.law.unimelb.edu.au/files/dmfile/downloadaf021.pdf, accessed on 23 March 2015

(2) James B. Morrell, THE LAW OF THE SEA: A HISTORICAL ANALYSIS OF THE 1982 TREATY AND ITS REJECTION BY THE UNITED STATES 174 (London Jefferson NC,1992).

(3) Ibid.

community, may be used freely for any purpose, provided such use does not impair the interests of others users. Where such impairment occurs, use of the sea must be allocated through regulation express or implied, by the international community. It is this reformulation of Grotius' principle that the Law of the Sea Convention 1982 carries. As an example, Grotius offered, "seas were forever exempt from such private ownership on account of their susceptibility to universal use".(1) Inland seas were very early carved into territorial waters by empires and kingdoms, but even after the formation of nation- states in the seventeenth century, the high seas remained available for universal navigation. Such a principle served well the mercantile desire for freedom to explore to enhance trade and allowed maritime powers to extend their domain. According to the natural law thesis, the universal right of access and the universal obligation for conservation to common property are so important that an individual's welfare should not be grounds for abrogating those rights.

IV: Res omnium communis incorporated into treaty

In 1856 the concept of res omnium communis was accepted by the first International Convention on the Law of the Sea, held in Paris.(2) As this approach was suitable for commercial and military purposes the Hague Conferences of 1899 and 1907 also adopted this natural law approach to the high seas. This served well the interests of the powerful who desired freedom of the seas for trade and for movement of military equipment and personnel. Freedom of the seas meant essentially non-regulation and laisse-faire, which was in the interest of the big maritime

(1) Ibid, at 174.
(2) Ibid, at 182

powers. This lack of law under the freedom of the seas doctrine was often used in the nineteenth century by European powers to threaten small states and obtain concessions from them or simply to subjugate them.(1) The basic notion sustaining the res omnium communis was based on the understanding that ocean resources were inexhaustible. With technological advance this notion changed. By the end of World War I, there was evidence to the contraryof this view and the League of Nations initiated international regulation of high seas fishing in order to avert extinction of the resource base so important for all humans.(2) Access was regulated not to privatize the fisheries, which remained res omnium communis, but to ensure sufficient supplies for all.

V: Emergence of the CHM Principle to protect Deep seabed beyond national jurisdiction.

The apparent first act for enclosure of the seas was by President Harry Truman, who declared in 1945 that the United States had the exclusive right to exploit its territorial waters, defined as on or under the continental shelf.(3) From 1945 to 1957, 41 other enclosure declarations or laws were enacted by various countries.(4) In response, by 1956, land-locked countries started discussions for a United Nations Convention on the Law of the

(1) R.P. Arand, Changing Concepts of Freedom of the Seas: A Historical Perspective, FREEDOM FOR THE SEAS IN THE 21ST CENTURY: OCEAN GOVERNANCE AND ENVIRONMENTAL HARMONY 72-77(Jon Van Dyke et al. eds. 1993).

(2) James B. Morrell, THE LAW OF THE SEA: A HISTORICAL ANALYSIS OF THE 1982 TREATY AND ITS REJECTION BY THE UNITED STATES 174, 176 (London Jefferson NC,1992).

(3) Shigeru Oda, Some Reflections on Recent Developments in the Law of the Sea, 27 YALE J. INT'L L. 217 (2002).

(4) Ibid.

Seas to halt these national territorial claims.(1) During these discussions, the UN General Assembly in 1970 established that the use of the seas was for the benefit of humanity, equitably shared. The seabed, ocean floor, and subsoil were declared the common heritage of mankind. It claimed that 'The exploitation of its resources shall be carried out for the benefit of mankind a whole, irrespective of the geographical location of states, whether landlocked or coastal, and taking into particular consideration the interests and needs of the developing countries'.(2) It also ensured the equitable sharing of its benefits.

The depletion of fishing stock awakened the world to benefits of regulated and sustainable practices. Technological developments made it possible to estimate the wealth of the oceans. Awareness of protecting and equally benefitting from these resources increased. Thus the concept of the CHM gained momentum. To the effectiveness of this principle it was necessary to ensure the deep seabed resources will not be claimed by any sovereign nor appropriated without supervision by any.

VI: The non appropriation concept distinguishes the CHM Principle from Res omnium communis

Article 137(1) prohibits any portion thereof to be subject to state sovereignty or the right to appropriate any part thereof. This concept of non appropriation makes the CHM principle different from res omnium communis. This element is very important to the CHM concept. Unlike the previous element, the element of

(1) Ibid

(2) The resolution passed by 108 to 0 with 14 abstentions. G.A.Res. 2749, U.N.GAOR, 25th Sess., 1,7,9, U.N.Doc. A/RES/2749(XXV) (1970), available at http://www.dal.cwww.law/kindred.intlaw/Res2749.htm, accessed on 24 March 2015

non appropriation effectively separates the CHM from res communis. The latter can be exploited on non-exclusive basis. This is not the case of the CHM. The convention does not prohibit complete appropriation of the deep seabed resources, but it calls for international supervision while appropriating the resources. However, the principle against appropriation is not absolute: it refers only to unilateral appropriation without international supervision. Indeed, to take the law of the sea as an example, it could be said that one objective is to facilitate the exploration of the seabed, subject to international control and according to commonly agreed principles. This element is obviously fundamental and relates to the non-renewability of the resources in question. If one accepts the community values underlying the CHM, then this element seems acceptable. However, if one is in favor of laissez-faire capitalist approach, then non- appropriation seems highly objectionable.

It is already established above that both non appropriation and the absence of national jurisdiction form the very essence of the CHM principle. This is perhaps the most important principle governing the CHM ideology, and from it many other principles can derive.(1) This view is also reinforced by all treaties incorporating the CHM principle.

(1) Most notably the principles of non-appropriation and common ownership/use, which will be considered in turn. Although this principle is generally accepted as a fundamental element of the CHM doctrine, it has not passed without dissent. Professor Taylor argues that, for example, Brazilian rainforests and endangered species are part of the CHM, while acknowledging that these are within a national jurisdiction of a state, see Prue Taylor, supra n.122 at 276.

Section Three: Ensuring deep seabed resources shared by humankind

Effectiveness of Art137(1) is made possible through subsequent Articles which specifically caters to the rights of land-locked states, geographically disadvantaged states, self-governing entities and people who have not attained full independence. Prohibiting sovereignty and appropriation of resources over the Area reflect the inherent nature of the CHM principle. But prohibiting sovereignty is not enough; the Area to benefit all as heritage any kind of monopolization should be avoided. The use of the resources of the seabed was open to all states but practically the deep seabed mining requires financial and technical skills. Not all states have the capacity to participate in the deep seabed mining. The discovery of mineral deposits 'at the sea-bed, or resting on it, as well as those in the subsoil beneath it' has flared intense debate concerning the equity, or inequity, of the distribution of the treasures of the earth. In retrieving deep sea-bed nodules, developed states have a distinct advantage over developing states in terms of technology and finance. Moreover, developing land-locked states are placed in an even more precarious position due to the geographic disadvantage of having no outlet to the oceans directly under their jurisdiction. Consequently, these states, have striven to ensure that they will not be prevented from sharing the bounties recovered from the earth.

Part XI of UNCLOS (1982) declares that the international seabed, and the resources found within it, constitutes the common heritage of humankind.(1) Activities in the Area are to be carried out for the benefit of humankind as a whole 'irrespective of geographical location of States, whether coastal or land-locked'(2)

(1) United Nations Convention on the Law of the Sea, (December 10,1982),1833 U.N.T.S. 397, entered into force 16 November 1994, Art 136.

(2) Ibid , Art 140(1).

In addition, effective participation by developing states in the Area is to be promoted, having regard in particular to the special need of the land-locked and geographically disadvantaged among them to recover obstacles arising from their disadvantaged locations.(1) The convention provides further safeguards of practical importance which are essentially procedural in nature. For instance elections to the Council, the 36 member executive body of ISA are to ensure that 'land-locked and geographically disadvantaged States are represented to a degree which is reasonably proportionate to their representation in the Assembly.(2) More specifically there is to be a 'chamber' within the Council of six members representing developing states with special interest such as having the status of land-locked and geographically disadvantaged countries.(3)

I: Protecting the Rights of Developing/ Land-locked/ Geographically Disadvantaged Countries

Article 140 (1) and 148of the UNCLOS (1982) protects the rights of developing and land-locked and geographically disadvantaged States as it states that the activities in the Area should benefit all of humankind and the needs of developing states should be given particular consideration and the that geographical location should not be a disadvantage for States.

(1) Ibid , Art 148.

(2) Ibid , Art 161 (2)(a).

(3) Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of (December 10, 1982), annex, s 3(15)(d).

Article 140(1) and Article 148 of UNCLOS (1982) provides that:

Article 140 (1) of UNCLOS (1982) provides that: 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 interest and needs of developing States and of peoples who have not attained full independence of other self-governing status recognized by the United Nations in accordance with General Assembly resolution 1514 (XV) and other relevant General Assembly resolutions.(emphasis added)

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, and in particular to the special need of the land-locked and geographically disadvantaged among them to overcome obstacles arising from their disadvantaged location, including remoteness from the Area and difficulty of access to and from it.(emphasis added)

1) History of land-locked countries' fight for equal rights.

History of land-locked countries' fight for equal rights has been discussed extensively in the Bolivia Sea Access (BOLSEA Case) report.(1) The interest in the deep seabed resources started with

(1) For detailed information see Case Number: 320 , Bolivia Sea Access, (June, 1995) ; http://www1.american.edu/ted/bolsea.htm, accessed on 30 March 2015 ; See also Bowen, Robert E., The Land-locked and Geographically Disadvantaged States and the Law of the Sea, 5 (1) POL. GEOGRAPHY Q. 63-69 (1986); see also Robin Churchill & Vaughan Lowe,THE LAW OF THE SEA 228, 316-329(2nd ed., Manchester University Press,1988); see also Dibb, Tracey, Exploitation of the Deep Seabed: Do Land-locked States and the Third World Get a Look In?, 6 SEA CHANGES 50-79=

the expedition of Challenger in 1872-76 when it discovered potato-sized conglomerations of ferromanganese and iron-manganese deposits from the ocean floor. These deposits were found lying on the abyssal plain under the deep ocean. The deep seabed contained many minerals including manganese, iron, nickel, copper and cobalt. The finding of the deep seabed resources outside states jurisdiction generated interest in accumulating knowledge regarding these mineral wealth and about technological knowledge needed for retrieving these resources. The manganese nodules that were discovered were dark metal balls which ranged from 2.5 to 7 centimeter in radius and are precious as the metal content in them are rich as they contain gold, iron, copper and zinc. There mineral reserve in Pacific Ocean alone is expected to be around 1.5 trillion tons of theses minerals which include cobalt, manganese and copper.

There was no technological capacity for the nations at that time to extract these minerals. The timeframe which the world ex-

=(1987); See also Douglas M. Johnston, The New Equity in the Law of the Sea, 13 INT'L. J. 79-99 (1976); V.N. Kulebyakin, The Rights of Land-locked and Geographically Disadvantaged States, in THE INTERNATIONAL LAW OF THE SEA 139-145 (Igor PaulovichBlishchenko, ed.Moscow: Progress, 1988), Ch. 6; SaadollahGhaussy, Land-locked and Geographically Disadvantaged States vis a vis Deep sea Mining, in THE DEEP SEABED AND ITS MINERAL RESOURCES (Proceedings of The International Ocean Symposium, Nov.15-17, 1978) ; See also Tokyo, TOKYO: OCEAN ASSOCIATION OF JAPAN115-117 (Mar. 1979); Martin Ira Glassner, Developing Land-locked States and the Resources of the Sea-bed,. 11 (3) SAN DIEGO L. REV. 633-55 (1974); V.C.Govindaraj, Land-locked States - Their Right to the Resources of the Sea-bed and the Ocean Floor, 14 (3-4) INDIAN J. OF INT'L L.409-424 (1974); JanuszSymonIdes, Geographically Disadvantaged States- Under the 1982 Convention on the Law of the Sea, in Hague Academy of International Law, 208 RECUIL DES COURS287-406 (Dordrecht: MartinusNijhoff, 1988); Lakshman Kumar Upadhyaya, Representation of Land-locked and Geographically Disadvantaged Countries in the Council of International Sea-bed Authority, 10 (1) NEPAL L. REV. 1-4 (1986); Ibrahim J. Wani, An Evaluation of the Convention on the Law of the Sea from the Perspective of the Land-locked States, 22(4) VIRGINIA J. OF INT'L L.627-665 (1982).

pected technology to master the art of deep seabed mining was ten to fifteen years. Nations did not have an idea of how to divide these great mass of wealth which were outside their jurisdiction. Moreover at the time of negotiating the 1958 Convention on the High Sea, the world was doubtful of the probability of profitably mining the minerals from deep sea-bed.

During this period, developing counties were becoming stronger in the international affairs and wanted to shed their colonial legacy. As more nations got independence, their demands for being treated equitably in all spheres also gained momentum. They strived for equal benefit sharing and transfer of technology. The NIEO embodied in UN General Assembly Resolution 3021 in 1974 was asserted as an instrument to alleviate and decrease global poverty and provide developing countries with increased bargaining power in the international arena. The NIEO extended its application in governing the global commons as they did not want the developed countries to monopolize the resources that belonged to these domains which included the deep seabed.(1)

The Developing World united as group of 77 realized that in the past it was the developed world that reaped the benefits and exploited the resources of the less developed countries and the rest of the earth. They wanted to change this and set their own precedent. Their aim was ensure that earth's resources and its exploitation should benefit the whole world. They resolved to implement this notion through United Nations treaty. With this aim in all eleven sessions of the Law of Sea Conference, the topic of discussion which dominated was how to exploit the minerals in the deep sea. The discussion concentrated on whether the min-

(1) Bolivia Sea Access,320 , (June, 1995) ; http://www1.american.edu/ted/bolsea.htm, accessed on 20 March 2015

erals of the deep seabed should be considered as belonging to no one and can be appropriated on a first come, first serve basis based on the principle of resnullius or res communis principle that these minerals belong to the whole world irrespective of who exploit it first. Resnullius principle was preferred by the industrialized nations while res communis principle was chosen by the underdeveloped countries.

2) Group- 77 v. Western States

The United Nations General Assembly, supported heavily by the Group of 77, declared in 1970 that the mineral assets of the deep seabed which was outside the outer limit of the continental shelf of a state as explained in Article 76 of the Convention will be common heritage of mankind. During the period of 1967-75, the discussion regarding Part XI of the convention, which mainly dealt with deep seabed resources, centered around five specific topics. First, how to terminate the idea of first come first serve basis. Second, how to establish a centre mechanism that would stand for states that did not have the capability to engage in a competition with private enterprises and industrialized States. Third, an International Agency which will represent all States and all States will have equal power contrary to the existing way of control limited to a small number of powerful states. Fourth, the focus of discussion was regarding the market conditions and how to manage the sharing of technology and finally the chances of terminating within a period of twenty years the rights of states to exploit the deep seabed.(1)

Northern industrialized states were not in favor of these demands. They declined to sign the UNCLOS (1982) final draft. The United States, United Kingdom, Italy and many other coun-

(1) Ibid.

tries were united in refusing to sign the treaty. Some of these countries had earlier made an agreement between themselves to respect each other's mining rights and to make sure that the mining areas would not overlap with each other. They wanted to carry forward with this provisional understanding of the deep seabed mining.(1)

3) The United States Objections

The United States made their objections clear and explained what was precluding the country from signing the treaty. Their objection was mainly concerning Part XI of the 1982 Law of the Sea which dealt with the deep seabed mining. They did not want any type of central administration that would hinder the development of extracting the deep sea minerals as they considered it necessary to meet the national and world demand. Further, they wanted assurance that the United States should have access to these minerals to boost and ensure its assurance of supply always and the international regime which was to be established should not monopolize the deep seabed minerals and it should encourage the economic advancement of the resources. The US demanded a decisive part in the new regime through which it would be able to protect the economic and other rights of states which partake in activities of deep sea mining and demanded a guarantee that amendments to the proposed treaty will not be possible without the consent of participating states. The US wanted a major role in the new regime for the deep seabed and expected the regime to be under the guidance and sanction of the US Senate and demanded that the new regime did not set unwanted pattern for international organizations. US also insisted that the Convention should not contain provisions for the mandatory transfer of pri-

(1) Ibid.

vate technology and participation by, and funding for, national liberation movements.(1)The US believed that it was not proper to hand over the management of ocean resources to an inexperienced international new bureaucracy.

Clearly, the objectives of the Group of 77 and the objectives of the US were opposing to one another. For US cooperation meant mutual obligation of participating states and according to US, under NIEO the developing states were demanding many rights but were not in a position to handle reciprocal duties or commitments. The stance taken by the North and the South were clear demonstrations of the ongoing discussion regarding the prevailing international economic situation and the responsibilities of developed and developing states. Clearly, the res nullius principle stood for developed world being the major receiver of the deep seabed mining benefits. If the res nullius situation was allowed to continue, the countries which lacked technology would not have any role to play in it nor would the benefit of the resources reach them.(2)

On the other hand the res communis principle promoted the distribution of the mineral resources of the deep seabed as the CHM to all, and supported the idea of developed states helping the underdeveloped states to help themselves. Developing countries wanted the industrialized states to share the technology with them. In this way underdeveloped countries can progress. If only economic benefits are shared the developing countries will always be dependent and can never sever their dependency from developed countries. One of the vital purpose of the Group of 77 in demanding to make such an international organization was

(1) Statement by the President, 18 WEEKLY COMP. PRES. Dec: 94 (Jan. 29,1982).

(2) Bolivia Sea Access, 320 , (June, 1995) ; http://www1.american.edu/ted/bolsea.htm, accessed on 20 March 2015

to create a world economy based on organized and systematic management of the ocean deep seabed minerals, reducing the impact of seabed mining on developing states whose economy is based on land-based mining, increasing the options for utilizing the resources, and making sure that the benefits are shared equally among states, particularly the developing countries.(1)

As the deep seabed mining was a field which required extremely sophisticated technology developed at significant cost and could be done only with high risk because of its unprecedented application and unknown environmental risk involved, only few commercial firms who could cope in such circumstance could even hope to extract the minerals. Companies with such portfolio were not interested in uplifting the developing countries or in creating a NIEO and, of course, did not want to commit to the mandatory technology transfer requirements of the initial drafts. The companies which were equipped with high technology such as Deep Sea Ventures and AFERNOD were making rapid progress in the field of deep sea mining and locating and extracting nodules from the seabed seemed a real possibility. The strategy of these companies to avoid competition that might result from obligatory technology transfer was twofold; firstly to monopolize the seabed mining by forming an association and to create risk for prospective rivals and secondly, by influencing their respective governments and ensuring that their governments will support their rights over seabed areas.

Though these strategies did not influence the Convention, the free market approach inculcated by such firms was applauded and embraced by Western leaders such as Reagan with the aforementioned results. Even though Third world countries stood

(1) Ibid.

together and showed solidarity and these companies suffered a setback, they still had an upper hand and monopoly in future the seabed mining due to their technological development. Land-based producers had mining technology for land-mining, but these techniques were not appropriate for the deep seabed mining. Moreover, conventional dredge techniques were not cost-effective methods of obtaining nodules. Thus even though every states had right to the sea, the glass wall of technology prevented the developing States from having their share and the most affected ones were the developing land-locked States. As a result of the vast differences between a few powerful states and rest of the weak states, the Law of the Sea remained in indeterminate state for nearly twelve years.

4) The problems within Group -77

The solidarity which third world countries exhibited in front of the world was not quite true. There existed vast difference of opinion among countries. The divergent interest of these countries was one of the causes of their sharp disagreement. The final drafting of the Law of the Sea was filled with not only by sharp difference of opinion between the developed and developing countries but also filled with the disparity among the Third world countries. The main reason for unity and solidarity amongst the Group of 77 was that they were united in their approach against the monopolization of world resources of the developed world and their united demand for the NIEO rather than any difference of interest among Third World States. The coastal States among the Third world States were in much better position than the land-locked States. Even though they were united in some demands their needs were different. Due to geographical disadvantage the land-locked States were denied many advantages which were

not looked into by coastal States. The coastal states had exclusive economic rights guaranteed to them under Art.76 of the Convention and this assured them access to part of the deep sea minerals which the land-locked countries were denied due to their geographic condition(1).

Looked from this viewpoint, land-locked States were guaranteed nothing. They did not have the technology to develop minerals from the deep seabed, and even if they develop the required technology they did not have a reserved exclusive economic zone that can be utilized for their needs. The coastal States were concentrated on acquiring whatever rights they could and wanted to ensure they got something, but this approach jeopardized the unity and weakened the solidarity of the South as a whole against the North. As a result, land-locked and geographically disadvantaged States, considered the extensive resource jurisdiction given to the coastal State as an aftermath of selfishness and a sectarian nationalism that undermined the Conference's promise of a more equitable Law of the Sea which would take into account the interests of humanity as a whole.(2)

Though the land-locked or geographically disadvantaged States, united with the Group-77, it was not an act done earnestly. They challenged both developing and developed countries advanced suggestion as it did not match with the existing North/South paradigm. In fact, many Northern land-locked countries were also concerned about their rights to the sea. A new proposal was submitted by the land-locked and geographically disadvantaged countries in 1971. This proposal was put forward jointly by developed and underdeveloped countries that shared the

(1) Ibid.
(2) Ibid.

geographical disadvantage of being land-locked. They presented their proposal to the Committee dealing with seabed exploitation. Afghanistan and other countries including the Netherlands, Hungary, Nepal, Austria, Belgium and Singapore suggested an intermediate solution between the standpoint taken by the Coastal Developed states and Coastal Developing states. The land-locked countries recommendation was that the newly established Authority should grant the Assembly of the Authority the power to set up a mechanism which will have the prerogative to carry out the direct exploration and to conduct exploitation and marketing of the deep sea-bed resource while at the same time permitting the private State interests to carry out their own claims.(1)

5) Suggestions of land-locked countries

In effect land-locked countries put forward a system that allowed for licensing directly both private and public ventures along with joint enterprise and service contracts. This suggestion helped both the developed and developing land-locked states as it helped the developed states to pursue their interest and at the same time made sure that the underdeveloped countries interests were also protected. It was presented as a draft proposal in the UN but was not adopted by the General Assembly. Later it was accepted by all countries as UNCLOS (1982)and contained a system of parallel exploitation similar to the one suggested by the land-locked countries.(2)

The claim of land-locked countries for equal part in ocean resources was based on the CHM principle. States were arguing that the resources of the deep seabed should be treated as common heritage of mankind and all the mankind should benefit from

(1) Ibid.
(2) Ibid.

it. If land-locked countries are kept away due to their geographical disadvantage then the concept of whole mankind benefitting would not come true. Moreover, for many countries their geographical position was the creation of colonization followed by the developed countries.

Politically coastal states like India supported the reasoning of land-locked states, so as to avoid the industrialized states creating any precedent of creating exceptions and using it as a disguise to avoid sharing the mineral resources of the deep seabed. It was the need of the hour for all developing countries to stand united and successfully implement the NIEO. Another notable point was that a majority of states that formed the Group 77 belonged to the category of land-locked and geographically disadvantaged states. Hence it was not possible to avoid their demands or to ignore their situation.(1)

The land-locked countries had made a deep influence over the laws governing the division of resources from the deep seabed. It was the support of these countries which made the NIEO advocated by the Third World a success. It was true that the developing land-locked and geographically disadvantaged countries as well as the developing coastal states understood that a united facade was needed if they were to successfully win over the objections of developed States. For these reasons, at UNCLOS (1982), the Group of 77 made considerable offers to the Group of land-locked and geographically disadvantaged countries. The final outcome of these maneuverings were incorporated in the final draft of the Law of the Sea, stating that the exploration and exploitation of the oceans would be for the benefit of mankind as a whole, irrespective of the geographical location of States,

(1) Ibid.

whether land-locked or coastal, and taking into particular consideration the interests and needs of the developing countries.

The Law of the Sea was to enter force one year after it has received ratifications from sixty countries. By 1989, it received over forty ratifications. Even though there was good support from the countries, even in the year of 1990 the Law of the Sea did not collect the required ratifications needed for entry into force. With this view in 1990, informal consultations began between the UN Secretary- General Perez de Cuellar and representatives of the industrialized states.

The negotiations were carried on by the Secretary General Boutros- Boutros Ghali. The culmination of these negotiation resulted in the draft of the "Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982" in 1994.

The Agreement was adopted by the UN General Assembly on July 28, 1994. The UNCLOS (1982) went into force on November 16, 1994, with the approval of nearly all states, developed as well as developing ensuring that all states have equal to resources in the deep sea.

II. Equitable sharing of financial and economic benefits

Article 140 of UNCLOS (1982) provides that:

1. The Authority shall provide for the equitable sharing of financial and other economic benefits derived from activities in the Area through any appropriate mechanism, on a non-discriminatory basis, in accordance with article 160, paragraph 2(f)(i)

The convention acts as a framework and ensures that the pro-

ceeds from the Area are shared equally among all mankind. To utilize the resources of the Area, appropriate technology is required. To have equality over the sea, it was suggested that those states which possessed the technology for the deep seabed mining should share the knowledge for the benefit of all mankind. But technologically advanced nations did not support this view. US were in forefront in objecting to the mandatory transfer of technology. In earlier drafts, it was required that those who have the technological capacity to mine the high sea would share that knowledge for the benefit of all.(1) It was this provision that delayed the U.S. signing from 1982 to 1994, until that requirement was removed.(2) To effectively consider high sea and the deep seabed and the resources as common heritage of mankind it is necessary that all these should be accessible to all and the key for that is equal technological knowledge. The nations at large agreed to the fact that sharing the technology would assure access to all and, thereby, benefit all. Access to technology would enable the world community to monitor conservation of the high sea resources and also to actively take part in research activities and enhance knowledge. But states who already possessed did not agree with the sharing as they had researched and invested heavily in acquiring the technology considered high sea as a commodity and they wanted to sustain a competitive edge. The fact that countries were prohibited from privatizing any resources beyond 200- mile limit did not hinder them from viewing high seas as a product.

(1) United Nations Convention on the Law of the Sea, (December 10,1982),1833 U.N.T.S. 397, entered into force 16 November 1994.

(2) Antonio Cassese, INTERNATIONAL LAW IN A DIVIDED WORLD 379-384, 387 (Oxford Clarendon Press1994).

With the amendment of Part XI, the United States won in its refusal to accept the "objectionable mandatory transfer of technology provisions.1Developing countries, regarded not sharing the technology as another form of enclosure, effectively limiting access for the poor to about 46 percent of the globe's surface.2 These two antithetical and contested points of view both still prevail, "since the sharing the resources is a matter of equity and politics, and thus, not subject to judicial determination. There exists, as yet, no regime that can control or manage these elements."(3) One principle has held that all states, including landlocked states, retain a right to conduct marine scientific research 'exclusively for peaceful purposes. Coastal states have a right to regulate, authorize, and conduct marine scientific research in their EEZs, but should "in normal circumstances" grant consent to conduct research to others.(4) Parties benefit therefrom.

Art. 160(2) (f) (i) of UNCLOS laid down the provision relating to the distribution of the benefits of the deep seabed activities. The principles are now specified in section 7 of the annex to the 1994 Agreement. The applicability of this principle will test the limit of these principles on a case-by-case basis once the distribution of the benefits from the deep sea resources commences.

(1) Fact Sheet: U.S. Oceans Policy and the Law of the Sea Convention, BUREAU OF OCEANS & INT'L ENVTL. & SCI. AFF., U.S.DEPT OF STATE, (May 28, 1998), at Http://www.state.gov/www/global/oes/oceans/fs-oceans-los.html [hereinafter fact sheet: U.S. Oceans policy], accessed on 25 March 2015

(2) Jose Luis Vallarta, Law of the Sea: Secrets of the deep, 36 (No.4) U.N. CHRONICLE 6, 7 (1999); See also Carol B. Thompson, International Law of the Sea/Seed: Public Domain versus Private Commodity , 44 NATURAL RESOURCES J. , 855 (Summer 2004).

(3) Oda, Reprinted in Chapter 14 of ODA: FIFTY YEARS OF THE LAW OF THE SEA 220, 333-418 (MartinusNijhoff Publishers, 2003)a; Carol B. Thompson, International Law of the Sea/Seed: Public Domain versus Private Commodity , 44 NATURAL RESOURCES J. , 855 (Summer 2004).

(4) United Nations Convention on the Law ofthe Sea, (December 10,1982),1833 U.N.T.S. 397, entered into force 16 November 1994, arts.143, 145.

The criteria applicable will vary depending on the extent to which the distribution of benefits is to assist developing states: it may be limited to direct economic consequences, or could extend to programs that have resulted from cutbacks due to the economic shortfall. The internal procedure of the ISA governs the distribution of benefits, and litigation over distribution is therefore unlikely to occur. The amount of funding, however, will be a contentious issue that can only be determined when commercial deep seabed activities commence. Until then, the principles provide a useful framework.

1) Sharing Of Revenues: Compensation Based On Equal Right or Development Aid Based On Preferential Treatment

Rudiger Wolfrum(1) in his article 'The Principle of the CHM' discusses the different concept underlying the sharing of revenues. Though it was decided that the deep seabed mining should benefit all mankind, the world was divided as to how to attain this.(2) Art.140 of the Convention on the Law of the Sea made it clear that the activities in the seabed area should be carried out for the benefit of mankind as a whole taking into particular consideration the interests and needs of developing States. There were mainly two outlooks on how to attain this objective. It was very clear from the outset that even though in principle the high sea and its resources belonged to all States, it was not possible for all States to participate in the deep seabed mining as they lacked the financial and technical capacity. How to share the proceeds from the deep seabed activities was controversy. One school of thought

(1) RudigerWolfrum, The Principle Of The CHM in MAX PLANCK ENCYCLOPEDIA of PUB.INT'L L, 322 (1983), http://www.zaoerv.de, accessed on 15 March 2015.

(2) SeeWolfgang Graf Vitzthum, International Seabed Area in MAX PLANCK ENCYCLOPEDIA of PUB.INT'L L.(Heidelberg and Oxford University Press, 2009).www.mpepil.com, accessed on 22 March 2015

stood for the revenues to be shared with those states that did not directly involve in the deep seabed activities. These funds can be used for economic development of the states. The receipt of these revenues will be considered as a form of participation by the receiving states in the deep seabed activities.

The reasons given for the deep seabed mining states to give contributions to the states not involved with it stood on two grounds. The first argument was that the analysis of the different statements and approaches made during the negotiations made it clear that resources of the seabed was open to all States and the activities in it should be carried out for the benefit of all mankind and hence receiving or receipt of revenues should be considered equal to direct participation in the deep seabed activities. Thus, the receipt of revenues was to be regarded as a form of indirect participation in deep sea-bed mining or, in other words, a sort of compensation which- as all States enjoyed equal rights with respect to the sea-bed-constituted a right of the respective non-mining States.(1) The second argument supporting the duty to share revenue was seen as part of the requirement that resources from the sea-bed should be used to advance the economic development of the developing countries. This idea was part of the original preferential treatment aspect.

The main difference between the two schools of thoughts mentioned above is focused on whether the dominant element of the deep sea-bed regime based on the CHM principle can be seen in the compensation method, or in the preferential treatment method. The industrialized countries- principally the United States

(1) See for example the Report of the Committee on the Peaceful Uses of the Sea-Bed and the Ocean Floor beyond the Limits of National jurisdiction, U.N.GAOR, 24th sess., Suppl.22 (Doc.A/7622) Part III, at 52 para 33, as well as the preliminary note by the Secretariat, U.N.GAOR, 25th Sess., Suppl.21 (Doc.A/8021) Annex IV.

of America- concentrated on the preferential treatment aspect. They accepted the idea that royalties should be levied upon deep sea-bed activities and revenues as being part of development aid and denied any respective right of developing countries there to.(1) According to their belief, the benefit of mankind was best served by a liberal deep sea-bed mining regime which provided for a loose framework and contained only those restrictions necessary to incorporate deep sea-bed mining into the traditional freedoms of the high sea. They apparently argued on the basis of Art.2 of the Geneva High Seas Convention.

The developing countries took a counter position. In their opinion the development of a regime to govern deep sea-bed activities was not a case of fixing the conditions under which deep sea-bed mining could be regarded as a reasonable use of the sea. For them the structure of the regime to be elaborated was to be dominated by the element of distribution. They wanted to make sure that all States had actual and direct equal benefit from the use of the sea-bed which was the common heritage of mankind. Consequently they rejected the application of the freedom of the high sea principle, which in their opinion had a negative distributive effect as it only secured the access of those- States equipped with the relevant technology.(2) Thus, the demand that deep sea-bed mining should be carried out for the benefit of mankind as a whole, as endorsed by the developing countries, can analytically be split into two different aspects, the one deal-

(1) Doc.A/AC.138/25.

(2) See among others the statements made by the representatives of Chile Doc.A/AC.138/SR.30,p.13, the United Arab Republic Doc.A/C.1/PV.1676, para.150, Trinidad and Tobago Doc.A/C.1/PV.1677, para 25 and the Report of the Committee on the Peaceful Uses of the Sea-bed and the Ocean Floor beyond the Limits of National jurisdiction, U.N.GAOR, 25thDoc.A/AC.138/SR.40,at40, Opposing USA Doc.A/AC.138/SR.40, at 147, France Doc.A/AC.138/SR.40,at 147.

ing with equal participation in sea-be activities[1] and the other dealing with preferential rights.

2) The demand for equal participation in particular

All States irrespective of technological capabilities and geographical disadvantage demanded equal participation in the deep seabed mining activities in the Area. Developing and disadvantaged States were not willing to give up their right to participate in deep seabed mining activities in exchange of receiving share of revenues. Regarding the equal participation of States the following lead of arguments prevail. As all States exercise equal rights concerning the use of the sea-bed and as it cannot be regarded as appropriate to limit some countries to the mere receipt of revenues, the latter have the right to be represented on a level with industrialized countries capable of conducting deep sea-bed activities. Rudiger Wolfrum, sums up the discussion in this regard thus, "Speaking in general terms this approach has two results: a negative one, limiting the activities of industrialized countries so as to create room for all countries to participate in deep sea-bed activities, and a positive one, attributing to all countries the right to be given effective equal opportunities with respect to the utilization of the sea-bed. A consequence of the former is the demand for the ban of any monopoly of sea-bed activities; a consequence of the latter- among others- is the demand for the transfer of technology. To sum up, the envisaged compensatory effect by which States are represented on the same footing with respect to deep sea-bed mining is achieved by restricting activities of the deep sea-be mining States on the one hand, and by endorsing activities of the other State on the other.

(1)RudigerWolfrum,supra n.10.

That this approach would result in unequal treatment was soon recognized."[1]

For example, the representative of Belgium pointed out in the discussions of the Sea-Bed Committee that the principle of the freedom of the sea was based on the concept of formal equality among States which resulted in a de facto discrimination of the developing countries, whereas the CHM concept was based on the demand for a de facto equality among States which resulted in a formal discrimination.[2] From this participation aspect the demand for preferential treatment has to be theoretically distinguished. As the preferential treatment idea was primarily connected with the distribution of the benefits derived from seabed activities, it lost its emphasis in the course of the negotiations, though in the inaugural speech delivered by Ambassador Pardo the demand for revenue sharing benefitting preferentially developing countries was one of the key elements of his idea. Both aspects- de facto equal participation and preferential treatment are rooted, dogmatically speaking, in a different background. Whereas the former derives from the CHM concept, placing all States with respect to the use of the sea-bed on the same footing and accordingly benefitting all States, the latter favors only developing countries and has its roots in the development aid philosophy.[3] It is quite obvious that the two aspects may conflict. The criticism of Part XI of the Convention can be based mainly upon the fact that the demand for equal participation was limited so as to accommodate the preferential treatment idea.[4]

(1) Ibid.

(2) The representatives of Belgium Doc.A/AC.138/SR..5 at 37, Jamaica Doc.A/C.1/PV.1782, para.137, Guatemala Doc.A/C.1/PV.1676, para.32 and the United Arab Republic Doc.A/C.1/PV.1676, para.138 were stressing this view.

(3) Wolfgang Graf Vitzthum, supra no. 39

(4) RudigerWolfrum ,supra n.10 at 322.

3) Developing Countries Given Special Attention

For a just and equitable economic order, the needs of developing countries were given special attention. The fifth preambular paragraph of the UNCLOS (1982) states that the achievement of the goals set out in the earlier preambular paragraphs will contribute to the realization of a just and equitable international economic order which takes into account the interest and needs of mankind as a whole and in particular, the special interests and needs of developing countries, whether coastal or land-locked. Art. 140(1) states that particular consideration should be given to the interests and needs of developing States. Art. 148 also call for the effective participation of developing states in the Area.

A review 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.

The approach of the Convention to this is particularly evident in the provisions granting a preference to developing States that wish to engage in mining in areas of the deep seabed reserved for the ISA. This is reflected in (Annex III, articles 8 and 9, of the Convention) and in the obligation of States to promote international cooperation in marine scientific research in the Area in order to ensure that programs are developed “for the benefit of developing States” (article 143, paragraph 3, of the Convention). The obligation of the ISA and of States Parties to promote the transfer of technology to developing States (article 144, paragraph 1, of the Convention and section 5 of the Annex to the 1994 Agreement), and to provide training opportunities for personnel from developing States (article 144, paragraph 2, of the Convention and section 5 of the Annex to the 1994 Agreement)

are in lieu with this obligation of protecting developing States. The permission granted to the ISA in the exercise of its powers and functions to give special consideration to developing States, notwithstanding the rule against discrimination (article 152 of the Convention); and in the obligation of the Council to take "into particular consideration the interests and needs of developing States" in recommending, and approving, respectively, rules regulations and procedures on the equitable sharing of financial and other benefits derived from activities in the Area (articles 160, paragraph 2(f)(i), and 162, paragraph 2(o)(i), of the Convention) are also proof of the Convention giving preference to developing States.Art.2031states that preferential treatment will be given for developing States for protecting environment and developing States will be provided with funding and technical assistance to achieve this.

The UNCLOS 1982 by taking into consideration the geographically disadvantaged and land-locked States and giving attention to the interests and needs of developing countries and non-self governing peoples ensures that the benefit from the deep seabed resources are shared in a manner benefitting whole mankind.

III. Scientific Research in Area only for Peaceful Purpose

The UNCLOS (1982) started during the peak of Cold War and the security connotation of the law of the sea was acute. During the negotiation, it was made clear that even though the convention would inevitably have implications for maritime security, it would not directly impact upon military operations. Instead the

(1) United Nations Convention on the Law of the Sea, (December 10,1982),1833 U.N.T.S. 397, entered into force 16 November 1994 , art. 203.

convention focused upon the peaceful purposes of the ocean.1 This is reflected not only in Art 301, but is restated in numerous provisions throughout the convention including that the high seas are reserved for peaceful purposes2and that the use of Area is exclusively for peaceful purposes3 and that marine scientific research is to be carried out exclusively for peaceful purposes.

Article 138 of UNCLOS (1982) provides that:

'The general conduct of States in relation to the Area shall be in accordance with the provisions of this Part, the principles embodied in the Charter of the United Nations and other rules of international law in the interests of maintaining peace and security and promoting international cooperation and mutual understanding.'

Article 141 provides for the Use of the Seabed for Peaceful Purposes.

'The Area shall be open to use exclusively for peaceful purposes by all States, whether coastal or land-locked, without discrimination and without prejudice to the other provisions of this Part'.

Article 143(1) of UNCLOS (1982) provides regarding the Marine Scientific research that:

'Marine Scientific research in the Area shall be carried out exclusively for peaceful purposes and for the benefit of mankind as a whole, in accordance with Part XIII.'

(1) Dale G Stephens, The impact of the Law of the Sea Convention on the conduct of Peacetime Naval/Military Operations, 29 CAL.W.INT'L. J. 283, (1988-99).

(2) United Nations Convention on the Law of the Sea, (December 10,1982),1833 U.N.T.S. 397, entered into force 16 November 1994 , Art.88.

(3) ibid , Art.141.

These provisions reflect one of the main purposes of the original proposal for the deep seabed. But, its practical application has resulted in ambiguity. The history of these articles can be traced back to Pardo's speech in the UN General Assembly in 1967,the extract of which is given below.

"The known resources of the sea-bed and of the ocean floor are far greater than the resources known to exist on dry land. The sea-be and the ocean floor are also vital and increasing strategic importance. Present and clearly foreseeable technology also permits their effective exploitation for military or economic purposes. Some countries may therefore be tempted to use their technical competence to achieve near unbreakable world dominance through predominant control over the sea-be and the ocean floor. This, even more than the search for wealth, will impel countries with the requisite technical competence competitively to extend their jurisdiction over selected areas if the ocean floor. The process has already started and will lead to a competitive scramble for sovereign rights over the land underlying the world's seas and oceans, surpassing in magnitude and in its implication last century's colonial scramble for territory in Asia and Africa. The consequences will be very grave; at the very least a dramatic escalation of the arms race and sharply increasing world tensions, caused also by the intolerable injustice that would reserve the plurality of the world's resources for the exclusive benefit of less than a handful of nations. The strong would get stronger, the rich richer, and among the rich themselves there would arise an increasing and insuperable differentiation between two or three and the remainder. Between the very few dominant powers, suspicions and tensions would reach unprecedented levels. Traditional activities on the high seas would be curtailed and at the same time, the world would face the growing

danger of permanent damage to the marine environment through radio-active and other pollution: this is a virtually inevitable consequence of the present situation."

This electrifying speech of Pardo before the General Assembly calling for international regulations to ensure peace at sea, to prevent further pollution and to protect ocean resources was an thrust to international community to ensure these objectives through a legal framework.

1) Definitions of Peaceful Purposes

The UNCLOS 1982 did not clearly define the term 'Peaceful Purposes.' Military aspects of the seabed utilization have not been elaborated in the Convention. The reason for this was the pressure from the industrialized power full states and the world's preoccupation with the economic use of the seabed. Substantive discussions were held regarding this term in Seabed Arms Control Treaty of 1971.(1)

Edward Guntrip in his article 'The CHM: An Adequate Regime for Managing the Deep Seabed?',(2) discusses the definition of peaceful purposes. He notes that ambiguities arose in the debate of the Eighteen Nation Disarmament Committee.(3) The pur-

1()Treaty on the Prohibition of the Emplacement of Nuclear Weapons and Other Weapons of Mass Destruction on the Sea-Bed and the Ocean Floor and in the Subsoil Thereof, opened for signature (February 11, 1971), 955 U.N.T.S. 115, entered into force 18 May 1972,[Emplacement Treaty],http://www.atomicarchive.com/Treaties/Treaty7fulltext.shtmlat, accessed on 20 March 2015

2 Edward Guntrip ,The CHM: An Adequate Regime for managing the deep seabed?, 4 MELB.U.L.REV. (2003), http:/www.law.unimelb.edu.au/files/dmfile/downloadaf021.pdf., accessed on 20 March 2015

(3)The Committee was later known as the Conference on the Committee on Disarmament. A commentary on the Committee's work and the events leading to the conclusion of the Treaty on the Prohibition of the Emplacement of Nuclear Weapons and Other Weapons of Mass Destruction on the Sea-Bed and the Ocean Floor and in the Subsoil Thereof, 'Emplacement Treaty', supra note 201.

pose of the Committee was to discuss the deep seabed related military and arms control.(1) The views of the developed and developing states were different. The developed States preferred the approach of the US which sought an international agreement prohibiting the emplacement of weapons of mass destruction on the seabed and ocean floor, beyond a three nautical mile band.2 The US thought that complete demilitarization was not verifiable(3) The developing states favored the view of the Soviet Union, which proposed a complete demilitarization of the seabed, beyond the 12 nautical mile limit.(4)

The compromise agreed became Art 1(1) of the Emplacement Treaty,(5) which provides that: 'The States parties to this Treaty undertake not to implant or emplace on the seabed and the ocean floor and in the subsoil thereof beyond the outer limit of the seabed zone, any nuclear weapons or any other types of weapons of mass destruction as well as structures, launching installations or any other facilities specifically designed for storing, testing or using such weapons.'(6) This limited the effectiveness of this provision. There is no further definition or explanation about what peaceful purposes are. 'Non-peaceful' weapons are restricted to nuclear weapons and 'other weapons of mass destruction'. The actions include only the emplacement of devices or facilities designed for the storage, testing or use of such weapons.

It is unclear whether restrictions also apply to other military weapons, and whether other activities may be undertaken for

(1) Ibid.
(2) Ibid.
(3) Ibid.
(4) Ibid.
(5) Ibid.
(6) Ibid.

military purposes. Such other activities could include intelligence gathering and the use of tracking devices. This is significant given that intelligence gathering activities on the deep seabed could increase with the 'revolution in military affairs' and the fight against terrorism. The Emplacement Treaty does not specify whether the actions have to be for a solely military purpose or whether an incidental military purpose would be sufficient to bring them within the prohibition.

Hence one may conclude that the Emplacement Treaty insufficiently defines 'peaceful purposes'. Its application is limited to a constricted range of activities and it is only of limited assistance.

2) Definition of Peaceful Purposes in Analogous Treaties

'Peaceful Purposes' clauses are also contained in the Antarctic Treaty and the Moon Treaty. However, the extent to which these provisions can clarify the scope of 'peaceful purposes' in UNCLOS (1982) is limited. Article 1 of the Antarctic Treaty state that 'Antarctica should be used only for peaceful purposes.' It then prohibits '[i]nter alia, any measures of a military nature, such as the establishment of military bases and fortifications, the carrying out of military maneuvers, as well as the testing of any type of weapons'.

Article 3 of the Moon Treaty states that:

(2) Any threat or use of force or any other hostile act or threat of hostile act on the moon is prohibited. It is likewise prohibited to use the moon in order to commit any such act or engage in any such threat in relation to the earth, the moon, spacecraft, and the personnel of spacecraft or man-made space objects.

(3) States Parties shall not place in orbit around or trajectory to or around the moon objects carrying nuclear weapons or any

other kinds of weapons of mass destruction or place or use such weapons on or in the moon. (4) The establishment of military bases, installations, fortifications, the testing of any weapons and the conduct of military maneuvers on the moon shall be forbidden. The use of military personnel for scientific research or any other purposes shall not be prohibited. The use of any equipment or facility necessary for peaceful exploration and the use of the moon shall also be prohibited.

The Antarctic Treaty and the Moon Treaty expand the meaning of peaceful purposes to stop the establishment of military fortifications. The interpretation is wider than the extent of the provision in the Emplacement Treaty.

According to Edward Guntrip,(1) one reason for this extension of the meaning of peaceful purpose may be that the high seas adjacent to the deep seabed can be utilized for military activities. While military fortifications are incidental to the use of the high seas for military activities, the storage and testing of weapons on the deep seabed would go beyond what states would consider as incidental to that use. Consequently, states prohibited the storage and testing of weapons. In contrast, neither the Antarctica Treaty nor the Moon Treaty allows military activities in adjacent areas. Furthermore, the Moon Treaty prohibits transportation of nuclear weapons, and the Antarctic Treaty prohibits any military activity on the continent. Therefore, the establishment of a military fortification would automatically contravene the 'peaceful purposes' provisions in these contexts. Consequently, it might be implied from the fact that military activities are allowed adjacent to the deep seabed that the establishment of military

(1) Edward Guntrip ,The CHM: An Adequate Regime for managing the deep seabed?, 4 MELB.U.L.REV. (2003), http:/www.law.unimelb.edu.au/files/dmfile/downloadaf021.pdf, accessed on 20 March 2015

fortifications may come within 'peaceful purposes' for the deep-seabed.

The Antarctic Treaty and the Moon Treaty also prohibit military maneuvers. This is less likely to be applicable to the deep seabed, as military maneuvers are currently subject to the freedoms of the high seas. Therefore, this provision gives little guidance as to what 'peaceful purposes' could mean in the maritime context.

The Moon Treaty contains the element of the use of force or threat or use of force. This appears to reflect art 2(4) of the UN Charter, which would bind states as a separate obligation. However, in the context of outer space it may also reflect potential attacks on space craft and astronauts. Due to the current technology relating to the deep seabed, art 2(4) of the UN Charter appears to be a satisfactory means of preventing similar attacks. The prohibition on carrying nuclear weapons of mass destruction, similar to that in the Moon Treaty, would be inapplicable. Nuclear marine craft can navigate the high seas above the seabed in accordance with Art.90of UNCLOS (1982).(1)

3) Peaceful Purposes and the Deep Seabed

Article 1(1) of the Emplacement Treaty defines peaceful purposes. However, this provision has a limited scope. When provisions from the Antarctic Treaty and the Moon Treaty are studied, they provide further examples of what may, in some circumstance, constitute peaceful purposes. Yet, upon closer examination, these provisions either do not apply to the seabed or provide only minimal assistance in interpreting Art 1(1) of the Emplacement Treaty. This creates difficulties for states wishing

(1) Warships are also immune from the jurisdiction of any State other than that of the flag State: United Nations Convention on the Law ofthe Sea, (December 10,1982),1833 U.N.T.S. 397, entered into force 16 November 1994 , art. 95.

to undertake activities that could be interpreted as military in nature. However, until further debate occurs, the narrow definition of peaceful purposes in the Emplacement Treaty reduces the effectiveness of the CHM principle as a legal standard, especially in relation to intelligence gathering devices. This is perhaps not an inherently obvious principle. It is not beyond imagination that for example, nuclear testing could take place in outer space or in the deep seabed. However, a quick tour d'horizon reveals that all regimes where the CHM applies have been limited for peaceful use. Such is the case for the deep seabed,(1) the moon and celestial bodies,(2) the human genome(3) and the Antarctic(4).

Exclusivity for peaceful use seems empirically part and parcel of the CHM principle. Another question, then, is that whether this is a precondition for the concept. In other words, could a regime be considered to be common heritage of mankind while at the same time being used as a military training, research or testing ground? If one adopts a broad view of the CHM principle as Professor Taylor does, then it is hard to argue that exclusive peaceful use is an essential element. An example could be the

(1) United Nations Convention on the Law of the Sea, (December 10,1982),1833 U.N.T.S. 397, entered into force 16 November 1994 , Article 1441: "The Area shall be open to use exclusively for peaceful purposes by all States".

(2) The Moon Agreement, Article 3(1): "The moon shall be used by all States Parties exclusively for peaceful purposes". One has to be careful to distinguish outer space from the moon and celestial bodies. It has been argued, (that there is no obligation to use outer space for only peaceful purposes. Article IV of the Outer Space Agreement only prohibits the placing of weapons of mass destruction in the outer space, whereas a complete demilitarization is prohibited for the moon and celestial bodies), see Alexandre Kiss, The CHM: Utopia or Reality?, 40 INT'L J. 423, 430 (1985).

(3) Universal Declaration on the Human Genome and Human Rights (11.11.1997), www.ohchr.or/english/law/genome.htm (3.4.2006), Article 15: "[The parties] should seek to ensure that research results are not used for non-peaceful purposes".

(4) Antarctic Treaty preamble and Article I: "Antarctica shall be used for peaceful purposes only".

rainforests, and other areas that are within national jurisdiction. It is beyond doubt that a state is entitled to use its territory for a great variety of actions, including military and other non-peaceful ones, subject (of course) to other rues of international law.

One has to look back only some two decades, when President Reagan announced his "Star Wars" plan to destroy Soviet ballistic missiles from space.(1) Although it is relatively clear that outer space is not common heritage of mankind, but rather res communis, one could envisage similar plans for other areas. Would that disqualify a regime from being common heritage of mankind? In the lack of authority, one can only maintain that all existing regimes are in fact reserved exclusively for peaceful purposes, and that it is highly unlikely that any potential future areas of common heritage of mankind would be treated differently.

Accordingly, it seems likely that a reservation for peaceful purposes is a natural element of common heritage of mankind, a consideration that is backed by extensive treaty practice, and thus de legelata. The demand that the sea-bed should be used for peaceful purposes only was based on two grounds: First, it was argued that as the utilization of the sea-bed should be carried out for the benefit of all mankind and that since any military use, from its very nature, only served national interests, all military activities should be prohibited. Secondly, it was pointed out that the military use of sea-bed might interfere with deep sea-bed mining. Discussions arose only with respect to whether aggressive activities only were to be prohibited. Most of the developing countries and the Soviet Union favored the former solution.(2)The rep-

(1) It may or may not sound like science fiction, but according to the National Center for Policy Analysis, the US spent nearly 50 billion USD on the project between 1983 and 1993, (30.4.2006), www.ncpa.org/bothsIbide/krt/krt061799b.html, accessed on 20 March 2015

(2) For further details see Rudiger Wolfrum, Restricting the use of the Sea to Peaceful Purposes: Demilitarization in Being, 24 GERMAN Y. B. OF INT'L L. 200 (1981).

resentative of Sri Lanka even asked for respective restrictions with regard to the use of minerals derived from the sea-bed and called for the establishment of an inspection system similar to that of the International Atomic Energy Agency. The Soviet Union and the United States, however, challenged the authority of Sea-Bed Committee to deal with military questions and referred those to the Disarmament Conference. There they succeeded in agreeing upon the Treaty on the prohibition of the Emplacement of Nuclear Weapons and other Weapons of Mass Destruction on the Seabed and the Ocean Floor and the Subsoil thereof. Hence this treaty has to be regarded as one of the primary results of the Malta initiative of 1967. Like the provisions of the Outer Space Treaty with respect to outer space, the Sea- Bed Arms Control Treaty prohibits only specified uses of certain weapons in a specified environment. Since the military aspect of the utilization of the sea-bed has been regulated separately by the Convention on the Law of the Sea, its Part XI in particular is more or less silent on this issue. The phrase "for peaceful purposes" is to be found only three times. The problem as how to interpret this clause has been solved through the insertion of Art.301 into the Convention on the Law of the Sea which states that only aggressive activities in the sense of Art.2 (4) of the UN Charter are prohibited.

The wider demand for a complete demilitarization of the sea-bed as raised during the negotiations cannot be based on the principle that the utilization of the sea-bed should benefit mankind as a whole. This would render Art.301 meaningless and would not take into due account the system of Part XI of the Convention on the Law of the Sea. Also undisputed was the demand that sea-bed activities should be carried out with due regard for the protection of the marine environment.(1) As can be seen from the Art.145 of the Convention on the Law of the Sea it will be one of the main functions of the ISA to take care of this objective.

(1) U.N.DocA/AC.138/SR.34, at 52.

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