Sharing is Caring: Prominent Issues and Considerations Regarding the Equitable Distribution of Deep-sea Mining Proceeds

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Introduction

Against the backdrop of the anticipated switch to renewable energy, deep-sea mining has become an increasingly popular option to supply the base metals required for this transition, as large quantities of manganese, nickel, copper and cobalt are spread across the bottom of the ocean.[1] These mineral resources can be found within zones under national jurisdiction of certain coastal States, but are particularly abundant in the seabed and subsoil beyond national jurisdiction, known as "the Area."[2] When developing an appropriate international regime, it was clear that the significant value and conflicting interests attached to the Area and its resources necessitated a sophisticated solution, which was eventually achieved by the overarching concept of the common heritage of mankind.[3] Encompassing various intertwined principles and objectives, it includes a general premise to carry out activities in the Area for the benefit of mankind as a whole.[4] In order to ensure responsible management of the Area and its resources, the International Seabed Authority (ISA) was established.[5] The legal framework governing the Area is comprehensive, but fragmented: the main principles are laid down in the 1982 United Nations Convention on the Law of the Sea (UNCLOS)[6] and the 1994 Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law

1 J.R. Hein et al., "Deep-ocean polymetallic nodules as a resource for critical material," *Nature Reviews Earth & Environment* 1 (2020): 158–169, p. 163.
2 United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994), 1833 *United Nations Treaty Series* 397, Article 1(1).
3 Id., Article 136.
4 Id., Article 140(1).
5 Id., Articles 156–157.
6 Id., Part XI and Annexes III–IV.

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of the Sea (1994 Implementation Agreement),[7] while more detailed rules and provisions are developed by the ISA in the so-called "Mining Code," comprising an extensive set of regulations, standards, guidelines and procedures. Specific regulations for the first two phases of deep-sea mining activities (prospecting and exploration) have already been adopted.[8] Commercial recovery of mineral resources remains on hold, however, as exploitation regulations and related standards and guidelines are still under development.[9]

As a basic tenet, the mineral resources of the Area are not susceptible to unilateral appropriation and can only be prospected, explored and exploited according to the rules laid down by UNCLOS, as amended by the 1994 Implementation Agreement, and the Mining Code.[10] States and other entities wishing to pursue exploration or exploitation activities in the Area must submit an application to the ISA, which, if approved, results in a contract between the ISA and the successful applicant.[11] As an important measure to ensure that activities in the Area are carried out for the benefit of mankind as a whole, UNCLOS stipulates that the ISA "shall provide for the equitable sharing of financial and other economic benefits derived from activities in the Area through any appropriate mechanism."[12] During the exploitation phase, contractors will have to pay a fee to the ISA for the mined resources,[13] and the ISA is charged to subsequently distribute these proceeds on an equitable basis. However, specific payment and distribution systems for deep-sea mining proceeds are yet to be adopted. Although inherently connected, these two components of the financial regime are being developed separately. This article specifically focuses on the benefit-sharing mechanism to be set up by the ISA by exploring its origins, analyzing the applicable principles and processes, discussing several prominent issues and evaluating available options.

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7 Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea (adopted 28 July 1994, entered into force 28 July 1996), 1836 *United Nations Treaty Series* 42.

8 Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area (22 July 2013), ISA Doc ISBA/19/C/17 (2013); Regulations on Prospecting and Exploration for Polymetallic Sulphides in the Area (15 November 2010), ISA Doc ISBA/16/A/12/Rev.1 (2010); Regulations on Prospecting and Exploration for Cobalt-rich Ferromanganese Crusts in the Area (22 October 2012), ISA Doc ISBA/18/A/11 (2012).

9 Draft Regulations on Exploitation of Mineral Resources in the Area (25 March 2019), ISA Doc ISBA/25/C/WP.1 (2019).

10 UNCLOS, n. 2 above, Article 137.

11 Id., Article 153(2)–(3), Annex III, Article 3; 1994 Implementation Agreement, n. 7 above, Annex, Section 1(6).

12 UNCLOS, n. 2 above, Article 140(2).

13 Cf. Draft Exploitation Regulations, n. 9 above, Regulations 64–73, Appendix IV.

The Common Heritage of Mankind

Notwithstanding the extensive nature of the legal framework governing the Area, spread across Part XI and Annexes III and IV of UNCLOS, the 1994 Implementation Agreement and the ISA Mining Code, the overarching concept of the common heritage of mankind ties everything together and constitutes the cornerstone of this international regime.[14] Although the conceptual basis was conceived earlier,[15] the principle of the common heritage of mankind is often associated with Maltese ambassador Arvid Pardo, who introduced it to the United Nations General Assembly in 1967.[16] Three years later, it was included in a 1970 UN General Assembly resolution (Declaration of Principles Governing the Seabed and the Ocean Floor, and the Subsoil Thereof, beyond the Limits of National Jurisdiction),[17] and in 1982 in UNCLOS, which explicitly confirmed the legal status of the Area and its mineral resources as the common heritage of mankind.[18]

This innovative approach perfectly embodies the delicate and difficult task that was the initial development of the international deep seabed regime. The principle of the common heritage of mankind reconciled the interests of developed and developing States, preventing a free-for-all, first-come first-serve race to the bottom of the ocean that would exclude most developing States from these economic opportunities.[19] It also harmonized the conflicting

14 UNCLOS, n. 2 above, Article 136.

15 See, for example, G. De La Pradelle, "Le droit de l'Etat sur la mer territorial," *Revue Générale de droit International Public* 5 (1898): 264–347, p. 309; Report of the 6th Session of the Legal Sub-Committee of the Committee on the Peaceful Uses of Outer Space (19 June 1967), UN Doc A/AC.105/C.2/SR.75 (1967).

16 Report of the 22nd Session of the First Commission (1 November 1967), UN Doc A/C.1/PV.1515-A/C.1/PV.1516 (1967).

17 Resolution 2749 (XXV) of the General Assembly (17 December 1970), UN Doc A/RES/2749(XXV) (1970).

18 UNCLOS, n. 2 above, Article 136.

19 R. Wolfrum, "The principle of the common heritage of mankind," *Heidelberg Journal of International Law* 43 (1983): 312–337, p. 317; J. Frakes, "The common heritage of mankind principle and the deep seabed, outer space, and Antarctica: Will developed and developing nations reach a compromise?," *Wisconsin International Law Journal* 21 (2003): 409–434, p. 433; E. Guntrip, "The common heritage of mankind: An adequate regime for managing the deep seabed," *Melbourne Journal of International Law* 4 (2003): 376–405, pp. 380–381; J. Dingwall, "Commercial mining activities in the deep seabed beyond national jurisdiction: The international legal framework," in: *The Law of the Seabed: Access, Uses, and Protection of Seabed Resources*, ed., C. Banet (Leiden: Brill, 2020), chap. 7, p. 142; J.E. Noyes, "The common heritage of mankind: Past, present, and future," *Denver Journal of International Law and Policy* 40 (2012): 447–471, pp. 459–460.

ambitions of exploitation and conservation, avoiding a tragedy of the commons scenario and unbridled mining activities by implying the establishment of an accountable international authority and a management regime.[20] In order to stress the vital importance of the principle of the common heritage of mankind, it is excluded from potential revisions and State parties are not allowed to deviate from it through an amendment or by way of an agreement in derogation thereof.[21] Furthermore, various objectives associated with this wide-ranging concept were embedded in UNCLOS, including a principal ban on appropriation,[22] exclusive use for peaceful purposes,[23] protection of the marine environment,[24] international cooperation and knowledge dissemination,[25] and effective participation of developing States.[26] One of the main premises is the general intention to carry out activities in the Area for the benefit of mankind as a whole, taking into particular consideration the interests and needs of developing States,[27] and arguably the most direct way to achieve that ambition is by establishing a payment regime and subsequent distribution mechanism to share the proceeds of deep-sea mining among States on an equitable basis.[28]

Equitable Sharing Mechanism

Since equitable sharing of deep-sea mining benefits is not achieved by merely collecting payments made by contractors but also entails fair distribution of this revenue among States, it requires both a payment system for contractors, as well as a subsequent distribution mechanism. However, despite both

20 S.J. Shackelford, "The tragedy of the common heritage of mankind," *Stanford Environmental Law Journal* 28 (2009): 109–169, pp. 109–110; E. Franckx, "The International Seabed Authority and the common heritage of mankind: The need for States to establish the outer limits of their continental shelf," *International Journal of Marine and Coastal Law* 25, no. 4 (2010): 543–567, p. 566; G. Hardin, "The tragedy of the commons," *Science* 162 (1968): 1243–1248.

21 UNCLOS, n. 2 above, Articles 155(2), 311(6).

22 Id., Article 137.

23 Id., Article 141.

24 Id., Article 145.

25 Id., Articles 143–144.

26 Id., Article 148.

27 Id., Article 140(1).

28 A. Jaeckel et al., "Sharing benefits of the common heritage of mankind: Is the deep seabed mining regime ready?," *Marine Policy* 70 (2016): 198–204, pp. 199–201; Frakes, n. 19 above, pp. 417–418.

components arguably having equally important roles within the envisioned financial regime, a prioritization of the development of a suitable payment system became apparent. An open-ended informal working group with a well-defined mandate to help advance discussions on the development of the best possible payment mechanism was established,[29] while the elaboration of an equitable distribution system was left in the hands of the ISA Finance Committee.[30] The same primary focus seems to be reflected in UNCLOS and the 1994 Implementation Agreement, as nearly all principles and guidelines on the envisioned financial regime pertain to the payment mechanism. Optimum revenues for the ISA must be ensured, the system should attract investments and technology, equality of financial treatment for contractors should be upheld, payments have to be fair to both the ISA and the contractor, the tariffs must be within the range of those prevailing in respect of land-based mining, the system should not be complicated or impose major administrative costs, and there must be adequate means of determining compliance by the contractor.[31] Moreover, it should be noted that UNCLOS initially included provisions setting out a specific payment system, which were later annulled by the 1994 Implementation Agreement.[32] Nevertheless, clear preferences regarding the payment system were already expressed,[33] and the current draft of the exploitation regulations also contains numerous provisions on issues related to the payment regime.[34] In contrast to these elaborated thoughts and proposed precepts and modalities regarding the payment system, however, noticeably less attention was paid to the equitable sharing mechanism.

29 Report of the Chair on the outcome of the first meeting of an open-ended working group of the Council in respect of the development and negotiation of the financial terms of a contract under Article 13, paragraph 1, of annex III to the United Nations Convention on the Law of the Sea and Section 8 of the annex to the Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982 (25 February 2019), ISA Doc ISBA/25/C/15 (2019), paras 1–5.

30 Report of the Finance Committee (7 August 2017), ISA Doc ISBA/23/C/10 (2017), para. 31.

31 UNCLOS, n. 2 above, Annex III, Article 13(1); 1994 Implementation Agreement, n. 7 above, Annex, Section 8(1).

32 UNCLOS, n. 2 above, Annex III, former Article 13(3)–(10); 1994 Implementation Agreement, n. 7 above, Annex, Section 8(2).

33 1994 Implementation Agreement, n. 7 above, Annex, Section 8(1)(c).

34 Among other things, the current draft exploitation regulations determine how and when fees shall be paid and what happens in case of an error or a mistake, which information needs to be submitted and how the books and records must be kept and can be inspected, which adjustments can be made in case of irregularities, which interests and penalties can be imposed, how the payment system and the applicable rates can be revised, and how financial transparency will be ensured (Draft Exploitation Regulations, n. 9 above, Part VII).

The legal basis of equitable sharing of deep-sea mining proceeds can be found in Article 140 of UNCLOS, which instructs the ISA to provide for the equitable sharing of financial and other economic benefits derived from activities in the Area through any appropriate mechanism and on a non-discriminatory basis.[35] In view of Article 140, the establishment of an equitable sharing mechanism is a crucial component of the general ambition to carry out activities for the benefit of humankind as a whole, irrespective of the geographical location of States and taking into particular consideration the interests and needs of developing States and peoples who have not attained full independence or other self-governing status.[36] Contrary to the payment mechanism, though, little guidance on the implementation of this provision is provided and the ISA thus enjoys ample discretion to decide. The Assembly considers and approves rules and procedures on equitable sharing upon recommendations of the Council,[37] which are in turn informed by recommendations of the Financial Committee.[38] In case of non-approval, recommendations are returned to the Council for reconsideration in light of the views expressed by the Assembly.[39] It should also be noted that, unlike the payment regime, the equitable distribution system, which determines what the ISA will do with the received royalties, will not be adopted in the form of provisions in the exploitation regulations or its appendices,[40] as it is not aimed directly at contractors.

One important document that does provide an indication of the potential ways to implement the equitable sharing objective of Article 140 is a 1971 report by the UN Secretary-General, predating UNCLOS.[41] Commissioned by the Committee on the Peaceful Uses of the Seabed and the Ocean Floor beyond the Limits of National Jurisdiction, it lists a number of anticipated benefits for the international community and outlines the conceptual basis for possible approaches. In terms of benefits, it is important to note that not only financial benefits are taken into account, as non-financial gains such as expansion and orderly development of global mineral resources, enhanced knowledge and skills regarding the marine environment and seabed area, and

35 UNCLOS, n. 2 above, Article 140(2).
36 Id., Article 140(1).
37 Id., Article 162(2)(o).
38 1994 Implementation Agreement, n. 7 above, Annex Section 9(7)(f).
39 UNCLOS, n. 2 above, Article 160(2)(f).
40 Cf. Draft Exploitation Regulations, n. 9 above, Part VII and Appendix IV.
41 Possible methods and criteria for the sharing by the international community of proceeds and other benefits derived from the exploitation of the resources of the Area beyond the limits of national jurisdiction (15 June 1971), UN Doc A/AC.138/38 (1971).

potential preferential access to raw material for less developed countries are also considered.[42]

Further, the report identifies two main approaches for the sharing of financial benefits, in case a balance remains after deduction of expenditures related to the international regime (e.g., administrative, personnel, training, research and supervisory costs): 1) direct distribution to States, or 2) allocation to specific international programs of particular interest to developing States.[43] With regard to direct distribution, the report suggested various criteria and formulae that were all based to some extent on the population of States as a percentage of the world's total, with adjustments to favor developing countries in accordance with per capita income.[44] In terms of allocation to international programs of particular interest to developing States, multiple options were also put forward and developing States could be offered a decisive say in the planning and management of these programs.[45] Furthermore, it was emphasized that such programs would constitute an implementation of the concept of the common heritage of mankind and thus should not be regarded as a substitute for foreign aid.[46] Both approaches (direct distribution and allocation to international programs) allowed for additional focus on least developed countries[47] and the report stated that the magnitude of the proceeds available for distribution could prove a crucial factor. In case the total volume does not reach a certain minimum, which is likely in the early years of commercial production, direct distribution would result in high fragmentation and relatively insignificant benefits for receiving States, arguably rendering centralization of the funds in international programs more efficient and impactful.[48]

Prominent Issues and Considerations

Overview

Although the development of an equitable distribution system long seemed to stand in the shadow of the elaboration of the payment regime, clear progress has been made over the last few years. Following several reports and discussions on the issue, the Finance Committee in 2021 submitted its preliminary

42 Id., paras 17–38.
43 Id., paras 45–46.
44 Id., paras 48–71.
45 Id., paras 72–77.
46 Id., para. 47.
47 Id., paras 71, 73–75.
48 Id., paras 47, 72.

findings and considerations to the ISA Council and Assembly and requested policy guidance in order to proceed.[49] In terms of direct distribution of benefits from deep-sea mining activities in the Area, three distinct formulae, all based on a calculation of each State's population as a percentage of the world's total, adjusted through a social distribution weight to favor developing countries, have been developed and will need to be further assessed in accordance with complex models and projections.[50] In order to avoid a duplication of effort, the elaboration of an equitable distribution system for benefits derived from activities in the Area will be undertaken in parallel with further development of the sharing mechanism embedded in Article 82 of UNCLOS, pertaining to exploitation of mineral resources on the extended continental shelf.[51] Nevertheless, apparent differences in the relevant legal provisions call for separate sets of criteria.

Similar to the 1971 UN Report, an alternative approach to equitable sharing has also been suggested. Through the establishment of a seabed sustainability fund, deep-sea mining proceeds could be invested in global public goods, benefitting mankind as a whole.[52] This seabed sustainability fund seems to form a prominent component of the current proposals on equitable sharing. It would, among other benefits, promote scientific knowledge of the deep sea, support capacity-building for the sustainable development of deep-sea mining and stimulate research and development of new technology in order to minimize environmental impact. Upon its establishment, the modalities of the seabed sustainability fund could be easily customized: by means of specific priority criteria, projects could be selected on an equitable, fair, impartial and consistent basis.[53] Moreover, the flows of benefits could be adapted to fluctuating revenues and intergenerational equity could be addressed by facilitating the fair sharing of current deep-sea mining benefits among future generations,

49 Development of rules, regulations and procedures on the equitable sharing of financial and other economic benefits derived from activities in the Area pursuant to Section 9, paragraph 7 (f), of the annex to the Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982 (6 July 2021), ISA Doc ISBA/26/C/39 (2021).

50 Id., paras 25–32.

51 Report of the Finance Committee (13 July 2018), ISA Doc ISBA/24/C/19 (2018), para. 27; Decision of the Assembly of the International Seabed Authority relating to the strategic plan of the Authority for the period 2019–2023 (27 July 2018), ISA Doc ISBA/24/A/10 (2018), para. 21.

52 ISBA/26/C/39, n. 49 above, paras 33–43; Summary on options for a seabed sustainability fund (25 March 2021), ISA Doc ISBA/26/FC/8 (2021).

53 ISBA/26/C/39, n. 49 above, para. 34.

creating inter-temporal trade-offs in accordance with projections regarding income and wealth.[54]

In summary, various ideas and concepts have been explored and the equitable sharing component is gradually taking shape. In order to provide a comprehensive overview of the current state of play, the available options and their underlying theories and reasoning, the ISA published a new technical study on the equitable sharing of financial and other economic benefits from deep-sea mining in the Area,[55] as well as a web-based model to visualize and compare the impact of each formula under different scenarios.[56] However, despite the progress that has been made, some of the suggested options and modalities are still surrounded by questions and concerns that need to be resolved. In the following sections, the most prominent issues and considerations pertaining to direct distribution, on the one hand, and the seabed sustainability fund, on the other, are discussed.

Direct Distribution

Arguably one of the most important challenges in terms of direct distribution lies in determining the beneficiaries. After all, regardless of detailed formulae and specific criteria, this issue is at the very basis of the distribution mechanism. In the current models, States Parties are considered as the only beneficiaries,[57] but this appears questionable in light of the wording of UNCLOS and the overarching rule to carry out activities in the Area "for the benefit of mankind as a whole," which clearly do not discern between non-Parties and Parties to the Convention.[58] Article 140 refers to the term "States" and thus suggests a different scope compared to Article 82 of UNCLOS, which contains the legal basis for a similar benefit sharing mechanism within the context of mineral exploitation on the extended continental shelf (beyond

54 This could be achieved through the application of a social discount rate. For example, if projections indicate that future generations are likely to be wealthier, greater weight can be assigned to consumption by current generations. The opposite scenario, in turn, would prioritize investments leading to higher consumption by future generations. Id., para. 35.

55 ISA, *Equitable Sharing of Financial and other Economic Benefits from Deep-Seabed Mining*, ISA Technical Study No. 31 (2021), available online: <https://isa.org.jm/files/files/documents/ISA-Technical-Study-31.pdf>.

56 Model of Equitable Sharing of Financial Payouts from Deep-Seabed Mining Royalty Fund, ISA, available online: <https://equitablesharing.isa.org.jm/>; ISA Technical Study No. 31, n. 55 above, Appendix 10.

57 ISA Technical Study No. 31, n. 55 above, pp. 40–48.

58 UNCLOS, n. 2 above, Article 140(1).

the regular 200 nautical mile limit as measured from the baselines) and refers to "States Parties."[59]

The Finance Committee only very briefly touched upon this issue in its reports. While indicating that the inclusion of non-States Parties would be more in line with the status of the Area and its mineral resources as the common heritage of mankind, it also noted the risk of free riding and stated that it would not be fair if non-States Parties benefit in the same way, given the States Parties' contributions to the ISA budget over the years.[60] However, this concern does not seem fully warranted, since assessed contributions by ISA Member States cannot be used for equitable sharing (which relies on royalties paid by contractors) and the administrative costs of the ISA would in time also be covered by contractor's payments, thus removing this burden from the Member States.[61] In the meantime, Member States admittedly supported the functioning of the ISA, thereby enabling the development of an equitable benefit-sharing mechanism, but it should not be overlooked that they are rewarded for their contributions by the simple fact of their membership and consequent ability to influence and take part in the law- and decision-making processes, including the very design of the distribution system.

In order to eliminate any concerns of free riding and to take into account the services rendered by the ISA, it seems appropriate to apply an overhead charge to shares allocated to non-States Parties. However, given the language of UNCLOS, the all-important principle of the common heritage of mankind and the instruction to provide for equitable sharing "on a non-discriminatory basis,"[62] outright excluding non-States Parties does not seem proportionate or correct. While it is true that involving non-States Parties would lead to a notable inconsistency between the beneficiaries of Article 140 and Article 82, this can simply be explained by the terminological difference in the respective articles and the status of the Area and its mineral resources as the common heritage of mankind.

Other fundamental questions related to direct distribution pertain to the prioritization of certain groups. In accordance with UNCLOS, the equitable sharing of benefits must take into particular consideration "the interests and needs of developing States and of peoples who have not attained full

59 Id., Article 82(4).

60 ISBA/26/C/39, n. 49 above, para. 27.

61 UNCLOS, n. 2 above, Article 173(2); Future Financing of the International Seabed Authority (30 March 2021), ISA Doc ISBA/26/FC/7 (2021).

62 UNCLOS, n. 2 above, Article 140(2).

independence or other self-governing status recognized by the United Nations in accordance with General Assembly resolution 1514 (XV) and other relevant General Assembly resolutions."[63] While it is true that not all qualifications as developing State are well-aligned with the current status and capacities of the countries concerned, the concept as such is clear and this prioritization can thus be implemented without any additional issues in this regard. However, the same cannot be said about the second category, as the political situation has obviously changed since the adoption of UNCLOS and membership of the ISA is limited to States Parties, without any option for non-independent territories or Indigenous peoples to participate directly.[64] Consequently, it is hard to find a way to favor these preferential beneficiaries in the distribution mechanism, as they cannot be targeted directly. Notwithstanding these difficulties, though, neglecting this category cannot be reconciled with the text of UNCLOS, so appropriate solutions will need to be found. Within the context of direct distribution, one option would be to favor States that comprise non-self-governing territories or Indigenous peoples, but the ISA cannot ensure that these benefits are directed to the ultimate beneficiaries. Finally, the weight of the redistributive component of the envisioned distribution mechanism as such can also be questioned, since the impact of population share in the currently considered formulae would be several orders of magnitude greater than that of the social distribution weight, meaning that highly populated States will be allocated large shares regardless of the formula that is ultimately chosen.[65]

Seabed Sustainability Fund

While the exclusion of non-States parties within the context of direct distribution raises a lot of questions and concerns, the concept of a seabed sustainability fund seems to be inherently in line with the joint ownership rationale for equitable sharing, expressed by the principle of the common heritage of mankind and the general duty to carry out activities in the Area for the benefit of mankind as a whole. Indeed, the enhancement of scientific knowledge and the development of human and physical capital related to the deep sea would certainly facilitate sustainable management and conservation of the Area, thereby serving the interests of all mankind and duly respecting the precautionary approach.[66] However, apart from potential issues concerning its

63 UNCLOS, n. 2 above, Article 140(1).
64 ISBA/26/C/39, n. 49 above, para. 28.
65 Id., para. 32.
66 ISBA/26/FC/8, n. 52 above, para. 7.

operationalization, which could largely be dealt with by using existing bodies in accordance with the principle of cost-effectiveness[67] and the evolutionary approach,[68] the alignment of the seabed sustainability fund with the income redistribution rationale is less evident.

The underlying idea to centralize funds in order to allow for substantial, meaningful changes might well be a good one, but it remains to be seen whether this can be reconciled with the prescribed particular consideration for the interests and needs of the preferential beneficiaries. After all, at first glance, it seems that all States would benefit equally from the initiatives of the seabed sustainability fund.[69] Suggestions to pursue a regional approach in this regard and to prioritize projects involving developing States, non-independent territories or Indigenous peoples might mitigate some of these concerns,[70] though it remains difficult to assess whether the seabed sustainability fund will achieve the desired level of redistribution. Indeed, if the equitable sharing objective of Article 140 of UNCLOS is implemented solely through the seabed sustainability fund, issues regarding the inappropriate exclusion of non-States Parties could be solved, but problems pertaining to the redistribution aspect inevitably emerge.

Consequently, it seems more appropriate to regard the seabed sustainability fund as part of a dual approach. Next to direct distribution of benefits through an equitable formula, the amounts to be allocated to the seabed sustainability fund could be determined on an annual basis. This balanced combination would provide for the necessary flexibility and appears to be most in line with the relevant principles embedded in UNCLOS. Indeed, although direct distribution appears to be the most straightforward option to achieve the targeted objectives, it has been emphasized that almost no funding is allocated to areas beyond national jurisdiction and the Area (dubbed as "orphan domains"). As a result, by providing services that no existing institution supplies, the seabed sustainability fund could fill a prominent gap and direct meaningful financial and intellectual efforts towards the Area,[71] acting as an important complement to direct distribution of deep-sea mining proceeds from the Area. Nevertheless, shaping this fund and the way in which it is managed will not be self-evident, so there is a definite need to identify best practices and draw

67 1994 Implementation Agreement, n. 7 above, Annex, Section 1(2).

68 Id., Annex, Section 1(3).

69 If any group of countries appears to be favored, it would arguably be the coastal States, given their higher dependence on the ocean for essential ecosystem services.

70 This would be true to the extent that the supported projects and their objectives do not coincide with existing efforts in terms of training and capacity-building.

71 ISBA/26/FC/8, n. 52 above, para. 13.

lessons learned from other organizations (e.g., the United Nations Environment Programme, the Global Environment Facility, the Consultative Group on International Agricultural Research, and the World Health Organization), particularly in terms of performance evaluation, transparent decision-making, capacity-building and blended finance.[72]

Conclusion

As part of the overarching status of the Area and its mineral resources as the common heritage of mankind, activities in the Area must be carried out for the benefit of mankind as a whole. In order to implement this vital objective, UNCLOS tasked the ISA with the development of an appropriate mechanism for the equitable sharing of benefits derived from deep-sea mining. Various options presented themselves and following complex assessments and discussions within the Finance Committee, two avenues are still open: 1) the adoption of a direct distribution system and 2) the establishment of a seabed sustainability fund. Both seem to have their pros and cons. The current distribution models are arguably at odds with the joint ownership rationale due to the exclusion of non-States Parties, but do offer very concrete routes to achieve income redistribution. The seabed sustainability fund, in turn, might not meet the imaginary threshold in terms of income redistribution, but certainly leads to collective benefits for mankind as a whole. As can be seen, both options seem to complement each other and might compensate potential flaws of their counterpart. Therefore, taking into account the legal provisions underpinning the concept of equitable sharing of benefits derived from deep-sea mining activities in the Area, a dual approach appears to be the best fit, combining direct distribution of deep-sea mining proceeds through an equitable formula with the establishment of a seabed sustainability fund. As a result, non-States Parties would in any case be co-beneficiaries through the seabed sustainability fund, and developing States could enjoy proper prioritization through the direct distribution scheme. However, it is still up for debate and would depend on its exact implementation whether this compromise strikes the right balance. In any case, it seems crucial to duly take into account the opinions and suggestions of the preferential beneficiaries when moving forward, as well as learn from the practices and experiences of other international organizations where possible.

72 Report of the Finance Committee (25 September 2020), ISA Doc ISBA/26/C/21 (2020), para. 22; ISBA/26/FC/8, n. 52 above, para. 14.