



Common Heritage of Mankind Principles Applied to Marine Genetic Resources in Areas beyond National Jurisdiction

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ABSTRACT

The current political tension among developed states and developing nations regarding the exploration, exploitation, benefit-sharing, and conservation of marine genetic resources (MRGs) in ungoverned areas beyond national jurisdiction (ABNJ) requires a new marine, regulative regime, which is considered as the premise for the creation of the international consensus of promulgating

the 'Common Heritage of Mankind' principle (CHM). This study employed desk research methods to synthesize, compare, and analyze UNCLOS (1982), Nagoya Protocol (2014), ongoing ILBI sessions, and other recent studies to figure out the regulatory gap within the Law of the Sea under UNCLOS. By carefully generalizing and scrutinizing the documentation, the study strongly emphasizes the necessity to implement the CHM principle in ABNJ instead of promoting the concept of 'first come, first served' basis for the sake of the equitable sharing of benefits, and the conservation of MGRs in ABNJ for the current and future generations. The study also provides the connotations of CHM principle, which serves theoretical basis for some marine management approaches. Consequently, these perspectives stem from a representative developing state with a long coastal line – Vietnam. The general, theoretical, and practical viewpoints would significantly contribute to current and future international law-making process with respect to the formulation of a new legal marine regime for regulating the exploitation, equitable access, and conservation of MGRs in ABNJ according to the ideal concept of CHM principle thereof.

The keywords: *common heritage of mankind, conservation, marine generic resources, areas beyond national jurisdiction, international legally binding instrument.*

Introduction

Historically, when formulating the draft of the UN convention on the law of sea (UNCLOS) in the 1980s, lawmakers might have been unable to foresee the importance of understanding the biological and economical values of MGRs due to the lack of the technological capacity and scientific knowledge (Ogley, 1981). Suppositionally, legislators involving in the construction of UNCLOS draft in 1980s basically concentrated on the utilization of minerals in the seabed as the single purpose of exploiting the feasibility as the only economically profitable resources in ABNJ. The world's scientific ignorance during the process of constructing the treaty resulted in the regulatory gap concerning the exploitation of MGRs in ABNJ. As Part XI, point (a), article 133 according to the provisions of the UNCLOS, 1982¹ declares that “Resources

¹ U.N. Oceans & Law of the Sea. (1982). *United Nations Convention on the Law of the Sea* https://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf

means all solid, liquid or gaseous mineral resources *in situ*¹ access in the Area at or beneath the seabed, including polymetallic nodules” (p. 69). Thus, it defines only the economical values of mineral resources in the seabed without covering the novel values of MGRs. Similarly, the management and exploitation of MGRs in ABNJ are apparently ignored. Reaching significant milestones in space science and technology, humans have recently invested enormous efforts to make scientific advancements in the exploration of biotechnology and marine biology (Bourrel et al., 2018). Recognizing the increasing necessity of the central management regime among nations relating to ABNJ to exploit MGRs together, almost States together with the principal role of the United Nations (UN) have urged to initiate a new international legally binding instrument (ILBI) in order to collaboratively regulate MGRs in ABNJ (Scovazzi, 2020). Gloomily, the fact has shown that high stakes have yielded many challenges and obstacles for the past time to reach a consensus on the mutual benefits among nations in terms of MGRs in ABNJ (Lucia, 2018). Although the core values of the sustainability of the ocean and its resources are conserved for the sake of practically benefiting all the present and future generations, an appeal for the world solidarity towards the values of MGRs in ABNJ has not been properly paid attention. It is necessary that all states have to join hands to negotiate and make concessions to promulgate an agreeable decree on the comprehensive protection of ocean species and habitats. In other words, the principle of ‘Common Heritage of Mankind’ possibly plays a decisive role in resolving the aforementioned issue, which would be referred as a new treaty under UNLOS, 1982. As a result,

¹ In terms of regulating access to MGRs, a distinction is generally made between *in situ*, *ex situ*, *in silico*, and *in vitro* access. *In situ* refers to samples of MGRs collected in their natural setting, while *ex situ* refers to samples previously collected in ABNJ and subsequently stored in “biorepositories”. *In silico* refers to access to any knowledge associated with the MGRs, such as observational or experimental data and other findings. *In vitro* refers to MGRs that are generated in a laboratory using *in silico* data.

the principles governing ABNJ are clearly set out in Art. 136 ‘The Area and its resources are the common heritage of mankind’¹ (p. 70). However, the artificial division of the ocean into maritime zone in the UNLOS, which is laid out in Article 2 stating that ‘The legal status of the territorial sea, of the airspace over the territorial sea, and of its bed and subsoil’² (p. 27), seems irrelevant at present because the recent development of techno-sciences and the advancements in international law prove that ocean waters in ABNJ cannot be separately divided, conversely it must constitute a single ecosystem which is supposed to be governed altogether, not speculatively split into many discrete jurisdictional zones (Lucia, 2020). To explain the necessity of having a widely acceptable treaty to regulate biodiversity beyond national jurisdiction (BBNJ), countries are supposed to comply with the principle of CHM to avoid the current situation of exploiting MGRs on a ‘first-come, first-served’ basis, resulting in global inequalities (Leary, 2018).

Although there are tremendous values in regard to the application of MGRs, no single official provisions of international law have been enacted to directly regulate issues relating to access, and sharing MGRs at ABNJ currently. Considering the legacy of Convention on Biological Diversity (CBD) and the Nagoya Protocol on accessing to genetic resources, and fairly equitably sharing of benefits from the use of genetic resources under CBD (Nagoya Protocol), these legal enforcements have somewhat legislated the accessibility and sharing of genetic resources; however, the scope of both the CBD Convention and the Nagoya Protocol is only restricted within areas under national jurisdiction (see Article 4, CBD³, and Article 3 Nagoya letter⁴). In other words, the CBD and Nagoya regulations on accessing and

¹ See UNCLOS, *supra* note 1.

² See UNCLOS, *supra* note 1.

³ See CBD 2005, *supra* note 5.

⁴ See CBD 2020, *supra* note 7.

sharing of MGRs are just limited to ABNJ, not applied in BBNJ, including the High seas and the Area. Actually, the notion of UNCLOS is regarded as “a constitution of the oceans”¹; however, it does not have any provision for reaching and sharing the benefits derived from the use of marine genetic resources in the high seas. Meanwhile, in the Area, although the obligation to mutually share economic benefits is recognized as a provision in Part XI, article 133 of UNCLOS regulations recognizing ‘resources, when recovered from the Area, are referred to as “minerals”’² (p. 69). Therefore, regulations on benefit sharing cannot be applied directly to marine genetic resources found in the Area. From the release of UNCLOS to date, the MGRs concept and the regulatory mechanism for the use of MGRs have not seriously legislated for the international law.

It is noteworthy that while ILBI is on the way to settle the jurisdictional dispute, no such final consensus among nations with an economic stake in the outcome of MGRs access and benefit-sharing regulation has been reached over the ILBI sessions³. This disagreement leaves the gaps in the present regulatory framework, which presumably springs from economic conflicts among developed and developing nations for the sake of the status of the genetic information derived from MGRs. Currently, there exist two contradictory concepts regarding to the MGRs when nations such as the United States, Canada, and Japan are inclined to acknowledge a ‘first-come, first-served’ basis by accepting that the first nation to discover and appropriate the genetic resources

¹ Remarks by Tommy T. B. Koh, of Singapore President of the Third United Nations Conference on the Law of the Sea. ‘*A constitution for the Ocean*’. *Final session of the Conference at Montego Bay*, (p. xxxiii). https://www.un.org/depts/los/convention_agreements/texts/koh_english.pdf

² See UNCLOS, *supra* note 1.

³ U.N. Seventy-sixth session A/76/L.46 (2022). *Intergovernmental conference on an international legally binding instrument under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction*. https://www.un.org/bbnj/fifth_substantive_session

retains ownership of the resulting information. On the contrary, developing nations argue that MGRs belong to CHM, so their genetic information and benefits should be open to the entire world (Schoenberg, 2009). As a result, this paper would highlight how MGRs should be regulated by synthesizing, analyzing, and proposing some implications to contribute to the controversial issues relating to MGRs in relation to CHM compared with UNCLOS (1982), Nagoya Protocol (2014)¹, ILBI², and other recent studies to have a voice from a developing country with a long coastal line – Vietnam. Thus, the following questions should be addressed through this study:

1. What is the necessity of the principle of common heritage of mankind relative to MGRs in ABNJ for developing countries, specifically Vietnam?
2. What should be done to deal with the conflict among developed and developing nations in terms of appropriating MGRs in ABNJ?

Methodology

The study employed a qualitative approach to theoretically synthesize, analyse, and characterize the secondary sources based on a recent model suggested by Long-Sutehall et al. (2010) relating to the process of conducting a secondary analysis of primary qualitative datasets. The theoretical analysis of secondary sources pivoted two primary datasets, particularly (i) official documents which trigger debatable discussion stemming from the regulatory gap of MGRs within the ABNJ left in UNCLOS, Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization of the CBD (2014),

¹ U.N. Convention on Biological Diversity (2014). *Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity*. <https://www.cbd.int/abs/>

² See U.N. A/76/L.46, *supra* note 17.

and ILBI, and (ii) other recent studies regarding the pitfalls of UNCLOS' adoption of the zonal approach to regulate the access and benefit-sharing of MGRs beyond national jurisdictions. With a comprehensive knowledge about this subject matter, researchers would come up with some implications from the perspective of a developing country to contribute to a lacking view of a defective picture which the international community has expressed different viewpoints on this issue for the past decades.

1. Unsettled Controversy about Common Heritage of Mankind with Regard to UNCLOS

With respect to the understanding of the core elements of CHM principles, it is worth dating back to its origin of the legal concern. It is widely acknowledged that the earliest influential recognition of official documentation belongs to the Declaration of Principles, adopted by the U.N. General Assembly in 1970¹, in which Paragraph 1 declares that “The sea-bed and ocean floor, and the subsoil thereof, beyond the limits of national jurisdiction (hereinafter referred to as the area), as well as the resources of the area, are the common heritage of mankind”². Following this time, Article 11, the Moon treaty, also acknowledges that ‘The Moon and its natural resources are the common heritage of mankind’³ (p. 79). Chronologically, Article 136, UNCLOS defines CHM comprises of the Area and its recourses. Typically, Nagoya Protocol⁴ emphasizes the importance of ‘the fair and equitable sharing of the benefits arising from the utilization of genetic resources, including

¹ U.N. General Assembly A/Res/25/2749. (1970). *Declaration of Principles Governing the Sea-Bed and the Ocean Floor, and the Subsoil Thereof, beyond the Limits of National Jurisdiction*. <http://www.un-documents.net/a25r2749.htm>

² Ibid.

³ U.N. Office for Outer Space Affairs (1979). Resolution adopted by the general assembly 34/68. Agreement Governing the Activities of States on the Moon and Other Celestial Bodies. https://www.unoosa.org/pdf/gares/ARES_34_68E.pdf

⁴ See U.N. Convention on Biological Diversity. *supra* note 19.

by appropriate access to genetic resources and by appropriate transfer of relevant technologies' (p. 4) in order to preserve 'biological diversity and the sustainable use of its components' (p. 4)¹. In its essence, Nagoya Protocol are supposed to apply to genetic resources within the scope of CHM. Recently, successive intergovernmental conference on an international legally binding instrument has demonstrated that insoluble, contemporary debates on the legalistic status of MGRs under the governance of CHM have been the focal global attention to urge the necessity of official legal regimes to govern natural resources and the benefit-sharing equity for all.

It is, hence, worth taking core elements of CHM into account. Actually, zonal divisions are not relevant because none of states or anyone appropriate the common heritage spaces or resources. In other words, CHM refutes the concept of a first-come, first-served basis. Consequently, all states are allowed to exploit and simultaneously conserve MGRs at ABNJ as a result of treating the sea bed resources as a single biodiversity in commonly referred areas of BBNJ. This requires the vesting of right to natural resources in accordance with a system of cooperative management for the sake of all humankind. Besides, CHM is expected to reserve the area for peaceful purposes without the intervention of military uses to preserve natural environment so as for the present and future generations to enjoy substantially unimpaired condition. Finally, CHM refers to the activities of equitable sharing of benefits together with the exploitation of natural resources, and to the attentive concentration on the interests and needs of developing states. For these aforementioned primary elements of CHM, they encompass both juridical status of the area and the utilization of the area as well as resources. Generally, the nature of CHM is reserved for the sake of all humankind in terms of MGRs in BBNJ (e.g., Aseeva, 2019; Tillera et al., 2018; Vadrot

¹ See U.N. Convention on Biological Diversity. *supra* note 19.

et al., 2021). However, the current situation indicates that getting a global consensus on the legal promulgation of CHM in effect requires a time-consuming process and more efforts. Currently, addressing the official recognition of CHM generates a polarizing dilemma between developing and developed states (Schoenberg, 2009). The polarizing dilemma causing contemporary unsolvable debates stems from the legislative lacunae from UNCLOS provisions. Actually, the flaw UNCLOS failed to include is that UNCLOS provisions do not encompass BBNJ as part of the resources of the Area (Nurbintoro & Nugroho, 2016). Although paragraph 1, Article 137 UNCLOS states that ‘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 thereof. No such claim or exercise of sovereignty or sovereign rights nor such appropriation shall be recognized’¹, there are no more regulations governing the living resources of the Area. Similarly, Article 135 UNCLOS stipulates the legal status of the superjacent waters and air space, it brings about controversial issues whether the legal status of waters belongs to the legislative regime of either CHM or the freedom of high seas (Wang, 2021; Elferink, 2012).

Recognizing the lack of legal binding agreement for the governance of BBNJ in order to bring back equitable sharing of financial and other economic benefits derived from activities in the Area through any appropriate mechanism, on a non-discriminatory basis, Resolution 15 of the World Peace through Law Conference in July 1967 proposed that the governance of seabed beyond national jurisdiction be subject to the jurisdiction and control of the United Nations (Wolfrum, 2012). Similarly, Pardo (1967, as cited in Hannigan, 2016) officially urged the United Nations General Assembly to spare part of deductible revenues from mineral resources with an aim to ‘close the gap between rich and

¹ See UNCLOS, *supra* note 1.

poor nations' under the principle of CHM. His proposal was then reckoned as remarkable influence on developing states, especially landlocked countries and nations which were unable to spend the financial resources for the purpose of deep-sea operations. Since then, a long and winding road towards a new agreement on the governance of high seas has concentrated on a serious bone of contention regarding the principle of CHM during the UNCLOS negotiations (Wright et al., 2015; Anisimov & Guliaeva, 2022). In reality, the principle of CHM basically involves three distinct entities; firstly, Organization for Economic Co-operation and Development (OECD)¹ countries and conventional maritime powers referring mainly from the Global North², these countries represent one group strongly refuting the inclusion of the principle of CHM regulating BBNJ in UNCLOS. Many developed states; for example, the US, Belgium, Germany, France, Italy, Japan, the Netherlands, the UK, and Russia have not acknowledged the legal presence of the principle of CHM, they tend to refuse the interpretation that the seabed, its natural habitats, and resources are encompassed by CHM. More seriously, they cherish an idea that 'Some of them attempted to formulate an alternative seabed treaty or create alternative arrangements to avoid disputes over mining sites on the deep ocean floor' (Friedheim 1987, p. 21, as cited in Vadrot et al., 2021). Frankly, President Ronald Reagan (1983, as cited in Hanigan, 2016, p. 60) stated that 'Several major problems in the Convention's deep seabed mining provisions are contrary to the interests and principles of industrialized nations and would not help attain the aspirations of developing countries'. Unfortunately, the US eventually refused to ratify the UNCLOS for the reason that they 'were horrified by the

¹ Member of Organisation for Economic Co-operation and Development (OECD). <https://www.oecd.org>

² The Global North/South Divide. <https://www.rgs.org/CMSPages/GetFile.aspx?node-guid=9c1ce781-9117-4741-af0a-a6a8b75f32b4&lang=en-GB>

prospect of control over the world's ocean being assigned to an international authority' (Hannigan, 2016, p. 61). However, both the US and Russia addressed military questions in ABNJ and finally '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 Subsoil thereof' (p. 320). Thus, all seabed activities should be done with due regard for the protection of the marine environment for the sake of peaceful purposes. Secondly, the group of 77 (G-77)¹ hold opposite standpoints by calling for the amendment to approve the principle of CHM to conserve the MGRs before the situation becomes worse. The members of G-77 are composed of small island developing countries and the group of African states. This group might deliberately delay the whole negotiation in case CHM is intentionally ignored. Obviously, their expectations simply deter the movement of a first-come and first-served basis by protesting against the privatization, hinder the run on the exploitation activities relating to ocean floor and seabed resources. These states strongly demand that it is time to have a central, powerful, autonomous, international organization regulating the influence and powerful of public and private mining entities, along with their exploitation being carried out for the beneficial purposes for all humankind. As such, Bourrel et al. (2018) repeat the defending standpoint of the Group of 77 that 'the establishment of an international body entitled to engage by itself in seabed mining but also empowered to control mining by other licenses' (Bourrel et al., 2018, p. 2). Nevertheless, during the successive negotiations, the developing coastal countries are in support of 'an extension of the national continental shelf to the detriment of the Area' (Vadrot et al., 2021, p. 5). Thirdly, landlocked and geographically disadvantaged states (LLGS, led by Austria, including fifty developing and developed countries such as Paraguay, Singapore,

¹ The Member States of the Group of 77. <https://www.g77.org>

Belgium, and the Netherlands)¹ keep their neutral stances, and they really want to geographically restrict the national maritime zones in favour of international part (Vadrot et al., 2021). In its essence, the LLGS do not show their strong influences to enforce any specific provision, in turn, they might exercise their deliberate vetoes on the rejection of CHM by any states' declaration (Franckx, 2010). Taking their viewpoints into a close consideration, it is objectively commented that LLGS actually wish to share the same rights in the High seas equally among coastal and landlocked states, they do not really promote the campaign for establishing an overly bureaucratic access and benefit-sharing regime, which is a core spirit of CHM.

2. Vietnamese Continuum of International Engagement in Addressing Gap-filling Regulations in BBNJ under UNCLOS

For the past timeline, Vietnam has asserted structures in the Spratly Islands and Paracel Islands In a number of official documents, so that there is no exclusive economic zone and 200 nautical miles continental shelf (*see* Fig. 2). The reasons cement Vietnamese standpoint are as follows:

Firstly, the Report defines the limit of the continental shelf beyond 200 nautical miles in the North East Sea region and a joint report with Malaysia on the limit of the continental shelf beyond 200 nautical miles in the South East Sea was submitted to the Commission on the Limits of the Continental Shelf in 2009 which only showed the extended continental shelf from the territories of the two countries, excluding the islands in Spratly Islands and Paracel Islands. Thus, the fact that Vietnam claim a continental shelf beyond 200 nautical miles means that Vietnam has implicitly asserted that Spratly Islands and Paracel Islands do not have their own continental shelf.

Secondly, in the Declaration dated December 5, 2014 of the Ministry of Foreign Affairs of Vietnam sent to the Arbitral Tribunal

¹ Landlocked Countries. <https://www.geographyrealm.com/landlocked-countries/>

to establish, under Annex VII of UNCLOS in the Philippines-China case, Vietnam has affirmed that: “Accordingly, Vietnam’s position is that none of the entities mentioned by the Philippines in the case have their own exclusive economic zone and continental shelf or general maritime rights to an extent exceeding 12 nautical miles since they are considered as shoals that are both floating and sinking or rocky islands that unsuitable for human habitation or have an economic life of its own as in Article 121 (3) of the Convention”.¹ Along with Vietnam, some countries in the region (Dirhamsyah, 2021; Nurbintoro & Nugroho, 2016) have also expressed their views on not admitting entities in Spratly Islands that can meet all the conditions to own exclusive economic zone and continental shelf. For example, Indonesia, in its note to the United Nations in response to Vietnam’s submission to extend the continental shelf – Malaysia has expressed the view that: “remoted or tiny structures in the East Sea are unfit for exclusive economic zone and their own continental shelves”.² Next, in two notes dated May 26, 2020 and June 12, 2020, Indonesia supported the 2016 Arbitral Tribunal’s Award that not a single maritime feature in Spratly Islands to have access to Exclusive economic Zone and continental shelf and map – Nine-dash line was lack of international legal basis and completely contrary to UNCLOS.³ In the submission of Brunei’s continental shelf expansion to Commission on the Limits of the Continental Shelf, the country

¹ Socialist Republic of Vietnam, ‘Statement of the Ministry of Foreign Affairs of Socialist Republic of Vietnam transmitted to the Arbitral Tribunal in the Proceedings between The Philippines and the People’s Republic of China’ (Dec. 14, 2014, para. 4), reproduced in Supplemental Written Submission of the Philippines, vol. VIII, Annex. 468. <https://iuscogen.files.wordpress.com/2018/03/statement-of-mofa-of-vietnam-to-the-tribunal.pdf>

² See: ‘Note Verbale from the Republic of Indonesia to the Secretary – General of the United Nations, No.480/POL-703/VII/10 (8 July 2010)’. https://www.un.org/depts/los/cles_new/submissions_files/mysvnm33_09/idn_2010re_mys_vnm_e.pdf

³ See: ‘The Permanent Mission of the Republic of Indonesia to the United Nations (2020)’. https://www.un.org/Depts/los/cles_new/submissions_files/mys_12_12_2019/2020_06_12_IDN_NV_UN_002_ENG.pdf.

had demonstrated an extended continental shelf based on the natural elongation of the continental shelf that is not from Spratly Islands¹. In judgement of the Arbitration Court formed under Annex VII of the UNCLOS 1982 during the Philippines-China case in 2016, the Court declares that: “*None of the high-tide features in the Spratly Islands is capable of sustaining human habitation or an economic life of their own, the effect of Article 121(3) is that such features shall have no exclusive economic zone or continental shelf*”² (Para 626). Vietnam’s stance, consistent with the Court’s decision reconfirm that there is an existence of marine’s area – sea areas beyond national jurisdiction – in the middle of the East Sea. As a result, the Court’s ruling and the views of the countries concerned show that there is a possibility for the high sea to be recognized in the middle of the East Sea, which means that accessibility issues and benefit sharing from marine genetic resources at ABNJ directly relate to East Sea coastal countries, including Vietnam. The East Sea is considered as one of the ten centers of marine biodiversity and one of sixty four important marine ecosystems in the world with three major ecosystems including: (i) coral reefs, accounting for 20% out of 34% of the coral reef area of Southeast Asia compared with the total area of coral reefs in the world (Vo, 2019); (ii) mangroves account for 12% of the world’s total mangrove area and 30% of Asia’s total mangrove area (Ye & Cochrane, 2011) with 41 out of 51 known species in the world and (iii) seafood resources with more than 2,000 species of fish, more than 90 species of shrimp and 70 species of molluscs (Ye & Cochrane, 2011)³. Unfortunately, Vietnam is currently not yet eligible for financial and technical

¹ See: ‘Brunei Darussalam’s Preliminary Submission concerning the Outer Limits of its Continental Shelf’, (12/5/2009). http://www.un.org/depts/los/clcs_new/submissions_files/preliminary/brn2009preliminaryinformation.pdf.

² The South China Sea Arbitration Case. <https://www.pcacases.com/pcadocs/PH-CN%20-%2020160712%20-%20Award.pdf>

³ Ibid.

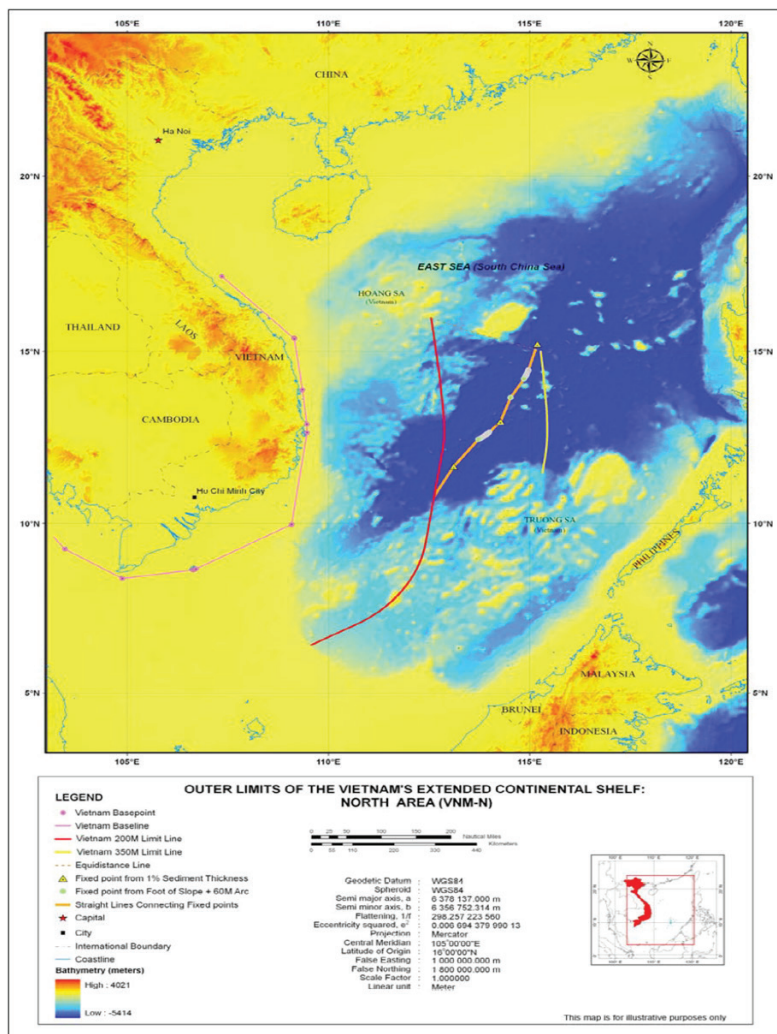


Figure 1. *The continental shelf beyond 200 nautical miles in the northern area of the East Sea as reported by Vietnam¹*

¹ Commission on the Limits of the Continental Shelf, *Executive Summary of the Submission to the Commission on the Limits of the Continental Shelf pursuant to Article 76, paragraph 8 of the United Nations Convention on the Law of the Sea 1982 in Respect of the Northern Part of the South China Sea* (May 2009): 5, http://www.un.org/depts/los/clcs_new/submissions_files/vnm37_09/vnm2009n_executivesummary.pdf

science condition to research, explore and exploit marine resources, especially marine resources in ABNJ, including marine biodiversity resources in BBNJ (Nguyen, 2017), such seaweed sources as an example.

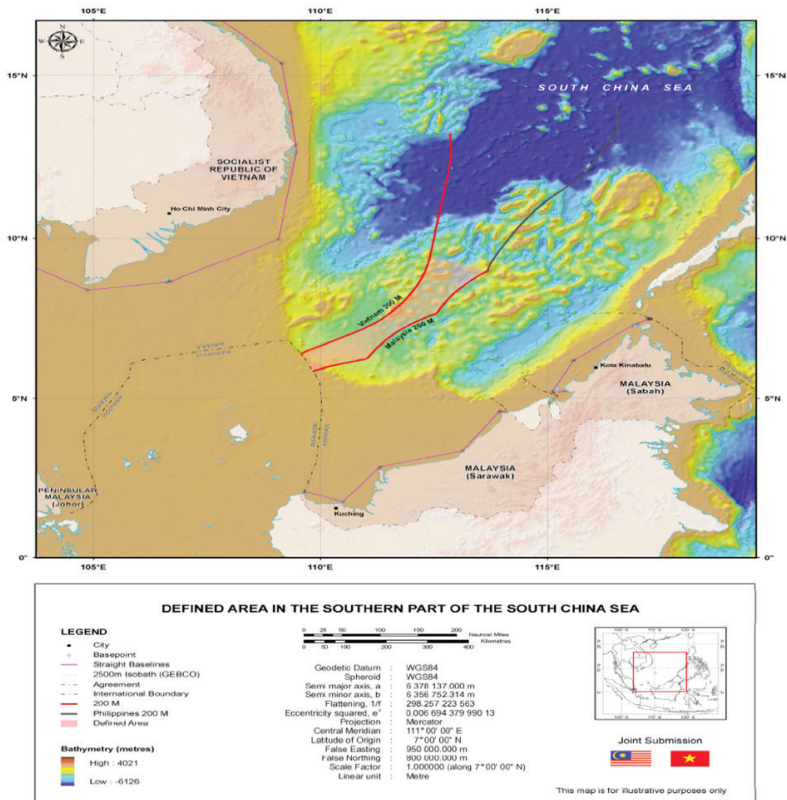


Figure 2. Outer continental shelf 200 nautical miles – Southern area according to Vietnam – Malaysia Joint Report¹

¹ Commission on the Limits of the Continental Shelf, *Executive Summary of the Joint Submission to the Commission on the Limits of the Continental Shelf pursuant to Article 76, paragraph 8 of the United Nations Convention on the Law of the Sea 1982 in Respect of the Southern Part of the South China Sea* (May 2009): 5, http://www.un.org/depts/los/clcs_new/submissions_files/mysvnm33_09/mys_vnm2009excutivesummary.pdf

In such case, if the principle of freedom of the seas is applied, all nations shall have freedom of access to take advantages of these natural resources. However, the financial advantages, technology, and engineering will create prominent opportunities for developed countries in the process of research, production to benefit from MGRs in the South China Sea. On the contrary, there will be less opportunity to enjoy the economic and social values for other developing countries along the East Sea like Vietnam. Consequently, the application of principle of CHM for MGRs at ABNJ proves its importance for these developing countries (Nurbintoro & Nugroho, 2016). This principle creates favorable conditions for Vietnam and other developing countries along the East Sea share the access and opportunity to enjoy benefits from marine genetic resources at ABNJ. Especially non – monetary benefits such as sharing of research and development results, transfer to the provider of the genetic resources of knowledge and technology, strengthening capacities for technology transfer. This not only contributes to Vietnam's economic development but also contribute to improve Vietnam's capacity in marine scientific research on marine genetic resources at ABNJ. In addition, since international and coastal state waters bond a special interaction relationship, mutual influence especially the movement without boundaries of fishes and other sea creatures, If MGRs activities at ABNJ are accessibly free following the freedom of the sea principles, such action may cause damages to marine biodiversity under the jurisdiction of the coastal State. Therefore, an international mechanism of management to access to MGRs at ABNJ in accordance with the principle of the common heritage of mankind will contribute to the protection of biodiversity in the East Sea. That can protect Vietnam's rights in accordance with the provisions of UNCLOS. Besides, the great benefits of MGRs are increasingly attracting special attention from countries, especially countries with advanced science and technology that create

disputes over the activities of accessing, exploiting and using MGRs and affect relations between countries. The East Sea area can be at risk since the increasingly complicated developments in the East Sea have been witnessed. By creating an international mechanism in managing MGRs activities at ABNJ and a fair legal regime in sharing the benefits from MGRs, principles of the common heritage of mankind to promote marine cooperation between countries, thereby, maintaining a peaceful and stable environment in the region.

3. A New Regime for Biodiversity in Areas beyond National Jurisdiction

Realizing the importance of dominant governance in the High sea under the circumstance of the absence of the lacune-filling regulatory measures, the current lack of consensus of opinions among UN member states in addressing dilemma of promulgating a harmonious CHM in ABNJ might possibly prolong the current practice of following ‘rule of capture’ or ‘first-come and first-served’ basis (Jaeckel et al., 2017; Tladi, 2019; Berry, 2021, and this deadlock is probable of giving favourable conditions for developed states to continue dominating their geographical seabed extension of MGRs acquisition and research in ABNJ (Wang & Chang, 2020; Harris et al., 2019; Mickelson, 2019) even though there have been growing concerns since the recent mark of Nagoya Protocol¹ about the acknowledgement of the application of CHM in BBNJ, which is a central agenda in the past five Substantive Session BBNJ (*see* Fig. 3).

It can be stated that the most promising and solvable solution to the issue of MGRs access and benefit-sharing in ABNJ can be settled down by the principle of CHM in effect (Molenaar & Oude, 2009; Johnston, 2019). In other words, there is a must to implement some justifications for the legal of CHM of MGRs

¹ See U.N. Convention on Biological Diversity. *supra* note 29

in ABNJ through an institutional basis for the law of the sea so that it possibly regulates the legal attribute of CHM of MGRs in ABNJ equitably among the developing and developed states. The necessity of institutionalizing CHM of MGRs in ABNJ generates a new legal conformity in the field of the international law of the sea (Warner, 2014). In addition, the recognition of CHM, to a certain extent, has a great influence on international legal relations and economic order (Mossop & Schofield, 2021). The ideological trend of the law of the sea should illustrate the overall, global willingness to replace the long-cherished principles of the high seas in ABNJ, which is favourable by the developed states. Currently, there is a growing longing for restricting the principle of freedom of the high sea, which imposes great impacts on the international law-making body to legislate legal and regulatory gap-filling measures. Specially, the modern law of the sea

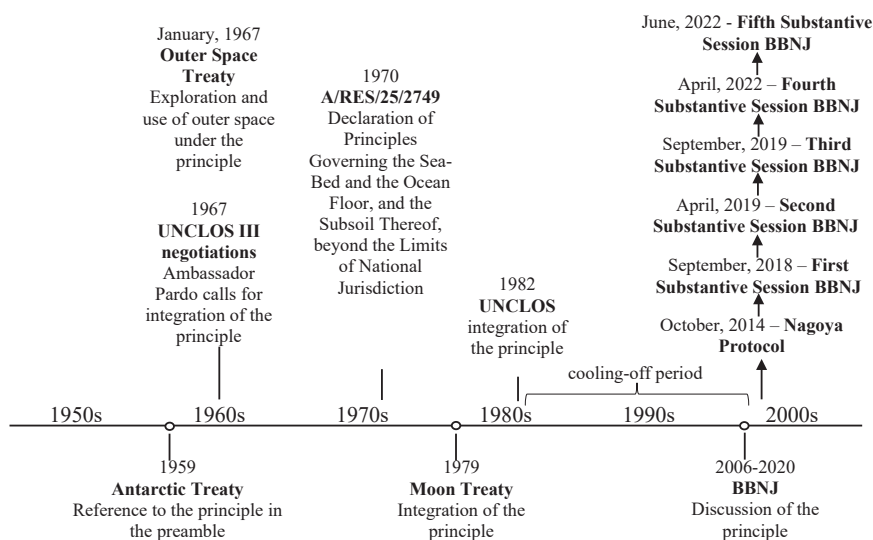


Figure 3. *Development of CHM principle in international law*
(Source: own data)

or commonly referred as ILBI requires to transfer from absolute freedom to reasonable restriction to regulate the sharing-benefit of MGRs in ABNJ. Moreover, the modern law of the sea relating to the distribution of marine rights and interest denies the ‘first-come, first-served’ basis by calling for the equity of unified management and shared-benefit with regard to the access of MGRs in ABNJ. Thus, these marine activities shall bring back better and fairer profitability for all humankind. By overviewing the process of the evolution of vague and general connotation of UNCLOS in terms of regulating MGRs in ABNJ, the necessity and maturity of the legislative formulation of CHM has come to existence for the sake of humankind. Currently, the legal connotation of the principle of CHM has been ongoing discussions of acknowledgment in regard to BBNJ through United Nations Convention on the law of the sea involving 168 states or regions which have ratified or acceded to UNCLOS¹. By reviewing the development of the law of the sea, it can be confirmed that basing on the institutional basis of UNCLOS, the global community has gradually accepted and recognized the principle of CHM which has distinctive features of international impacts on refusing the notion of ‘first come, first-served’ basis relative to MGRs in ABNJ, and on advocating peaceful and cooperative development in BBNJ (Schoenberg, 2009, p. 7). As such, the primary nature of the principle of CHM in ABNJ demonstrates that rationality and legitimacy to formulate the core of the new ABNJ system and promoting the establishment of the new regimes to regulate the equitable profit-sharing and MGRs access. Obviously, the bottleneck of establishing new international legal regimes requires a time-consuming process and cooperative global efforts to achieve the product of comprise

¹ United Nations (2019). *United Nations convention on the law of the sea. Multilateral Treaties Deposited with the Secretary-General, chap. XXI in “Status of Treaties Deposited with the Secretary-General”*. https://www.un.org/Depts/los/reference_files/UNCLOS%20Status%20table_ENG.pdf

in complex international relations through long-term historical accumulation and international negotiation conventions (Wang, 2021). Presently, the unsettled, disputable negotiations of ILBI characterizes a winding, deadlocked, and difficult process among the developed and developing states concerning their respective interests in negotiating the ILBI. The fact has shown that the strong focus of the international community has paid attention to the interest and benefits of the marine biodiversity of ABNJ rather than seabed mineral resources. The heated controversy relating to ABNJ marine genetic resources experiences a controversial and theoretical issue during the ILBI negotiation. In general, there are temporary four propositions in regard to the deadlocked, lengthy issue; that is, developed states insist on the application of the principle of high sea freedom in ABNJ with the promotion of 'first come, first served' basis basing on their probability of privatising the governance in exploitation of MRGs in ABNJ while developing states refute the idea of privatising possession and uphold the practice of applying the principle of CHM in ABNJ for the sake of the equality for all humankind. an intellectual property approach to MGRs would might hamper scientific advances by privatizing knowledge and resources. Many scientists emphasize the need for open access and point to existing data-sharing mechanisms and databases (Rabone et al., 2019). There seems to be a fundamental discrepancy between public and private scientific research because the public scientific research really wants to enjoy data sharing and public knowledge; whereas the private scientific research advocates patents, closed data, and economic benefits. Besides, some states such as South Africa highly support the application of the principle of high seas freedom on the high seas and the principle of CHM on the Area; whereas, other states and international organisations represented by the European Union advocating the ILBI negotiations do not depend on determining

the legal status of ABNJ marine genetic resources¹. Overall, the complex legal and regulatory status of new regime as a result of ILBI could provide a feasible method for regulating MGR access and benefit sharing when technological advances are probable to increase commercial demand and interest in MGRs and their byproducts which stem from ABNJ.

Conclusions

Currently, not much consensus has been reached among States with respect to the institutional aspect of the CHM principle. As closely examined, the starting point for discussion of access and benefit sharing in the ABNJ context has demonstrated that MGRs do not totally fall within the boundary of the Nagoya Protocol, and the general view among States points out that this issue should be resolved according to the principle of CHM under the auspices of UNCLOS, rather than the CBD. During the process of ILBI negotiations, developed and developing States should develop a mechanism that can reconcile the standpoints of those who support the application of the CHM principle and those who want to apply the freedom of the High Seas principle. The core agenda of the ILBI negotiations needs to cover three main issues: (i) access to the resources; (ii) fair and equitable sharing of benefits; and (iii) compliance in order to arrive at a new method of marine management with regards to MGRs in ABNJ including (i) criteria used to identify potential areas for protection; (ii) proposal and adoption of CHM principle; (iii) implementation of management measures; and (iv) enforcement. By examining relevant international legal documents in the context of the international law of the sea, the subject under the governance

¹ *Summary of the First Session of the Intergovernmental Conference on an International Legally Binding Instrument under the UN Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine Biodiversity of Areas Beyond National Jurisdiction*: 4–17 September 2018, Earth Negotiations Bulletin, 25(179), 3. <http://enb.iisd.org/download/pdf/enb25179e.pdf>

of the CHM principle shall be closely aggregated by all States. By the application of CHM principle, MGRs in ABNJ enjoy the characteristics of extraterritoriality, sharing and legality. In its essence, the principle of CHM is constructed to assure the role of four main elements; that is, no State is possibly unilateral to claim or exercise sovereignty or sovereign rights over marine resources, and no State, or natural or juridical person might declare to appropriate any part thereof. The next element shall be the practical application utilized for the consideration of the interests and needs of developing States. The third element advocates the peaceful purposes where there is no disputable intervention of military uses in ABNJ. Finally, it is very important to achieve the principle of the intergenerational equity required for the protection of the marine environment and the conservation of marine resources. Generally, the acknowledgement of CHM in ABNJ plays a crucial part in preventing the privatization of marine biodiversity thereof, and strengthening the preservation of marine ecosystems for the present and future generations. In simple terms, a new legal marine regime, when globally ratified, encompasses the obligation of the equitable sharing of benefits derived from MGRs in ABNJ amongst states, and ascertains the capacity of accumulating and transferring marine technologies among developed states and least developed or developing countries. Take Vietnam – a developing country – for example, Vietnam expresses its viewpoints in the negotiation of ILBI by favoring MGRs regulation in the water column above extended continental shelves facilitating access by coastal states and respecting their sovereign rights, the new marine regime in effect shall close the gap among states with regards to the equitable access to the exploitation and conservation of MGRs in ABNJ.

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Фам Х. Х., Ван Ву Т. Принципи загальної спадщини людства, що застосовуються до морських генетичних ресурсів у районах за межами національної юрисдикції. – Стаття.

Поточна політична напруга між розвиненими державами та державами, що розвиваються, стосовно розвідки, експлуатації, розподілу та збереження морських генетичних ресурсів (МГР) у неконтрольованих районах за межами національної юрисдикції (РМНЮ) вимагає нового морського регулятивного режиму, який вважається передумовою міжнародного консенсусу щодо проголошення принципу загальної спадщини людства (ЗСЛ). У цій роботі використовувалися кабінетні методи дослідження для синтезу, порівняння та аналізу UNCLOS'82, Нагойського протоколу (2014), поточних сесій Конференції з міжнародного юридично обов'язкового документа та інших нещодавніх досліджень для з'ясування нормативних прогалин у морському праві згідно з UNCLOS'82. Шляхом ретельного узагальнення та аналізу документації у дослідженні рішуче наголошується на необхідності впровадження принципу ЗСЛ в РМНЮ замість просування концепції принципу “першим прийшов, першим обслужений” заради справедливого розподілу та збереження МГР в РМНЮ для теперішнього та майбутніх поколінь. Дослідження також містить конотації принципу ЗСЛ, який є теоретичною основою для деяких підходів до управління морським середовищем. Ці перспективи походять від репрезентативної держави, що розвивається, з довгою береговою лінією – В'єтнаму. Загальна, теоретична та практична точки зору суттєво сприятимуть поточному та майбутньому процесу міжнародного нормотворення щодо формулювання нового правового морського режиму для регулювання експлуатації, справедливого доступу та збереження МГР в РМНЮ відповідно до ідеальної концепції принципу ЗСЛ.

Ключові слова: загальна спадщина людства, збереження, морські генетичні ресурси, території за межами національної юрисдикції, міжнародний юридично обов'язковий документ.

