



## What are “new uses of the sea-bed”?

- term refers to ocean uses which have been addressed only recently by relevant international law of the sea actors and instruments
- amongst these “new uses” are
  - sustainable management and conservation of the marine genetic resources located within and beyond areas of national jurisdiction
  - iron fertilization of the water column above the sea-bed
  - CO<sub>2</sub> sequestration

## Who is a positivist?

- “positivism” refers to a concept of law according to which attention is to be turned to a survey and interpretation of the *existing* legal rules (lex lata), with interpretation being based on a strict application of the traditional methods of interpretation (primarily wording, context, object and purpose)
  - while this approach has dominated the realm of public international law for decades due to its incorporation in the Vienna Convention on the Law of Treaties, it seems that legal scholarship has been subject to a paradigm shift from positivism to more justice-oriented approaches (e.g. “international community” as an actor under public international law, ius cogens, common heritage of mankind) in recent years

- assumption: with regard to many “new” law of the sea issues, the shift in academic writings from realistic, State practice-oriented to idealistic approaches has not helped to implement viable solutions
- on the contrary, discussion in science and policy should refocus on strengthening and effectively implementing the accepted existing concepts of law
  - before “filling legal gaps”, it should be analyzed in detail whether these gaps do actually exist
  - concepts which are unlikely to find acceptance on the international plane due to their innovative character should – at least not primarily – not be further pursued



## Example: Marine Genetic Resources (MGR) in ABNJ

- What regime is applicable/suitable?
  - some delegations participating in the ad hoc open-ended informal Working Group to study issues relating to the conservation and sustainable use of marine biodiversity beyond areas of national jurisdiction established by UN GA argue that MGR are or should be subject to the common heritage principle (Art. 136 UNCLOS: “The Area and its resources are the common heritage of mankind.”)
  - (1) analyze first if it is applicable! → no legal gap!
  - (2) Why “should” it be applicable? → access and benefit sharing (A&BS)

- (3) Does that make sense with regard to MRG? arguably no!
  - A&BS regimes do not work and block discussions as to alternative measures
  - missing comparability (distribution of resources v. access to information) → problem of intellectual property rights
- (4) Calls for preservation of MRG? → clarify first whether and to what extent there is a factual need for preservation!
- (5) Consider application of existing bodies (e.g. RFOs) and principles!