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# Common Heritage of Mankind as a Limit to Exploitation of the Global Commons

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## Abstract

*This contribution to the symposium on the economic exploitation of the commons focuses on the question of whether and to what extent the principle of the common heritage of mankind (CHM) imposes environmental limits on economic exploitation of the global commons. Focusing on the need to go beyond a unidimensional assessment of the principle, it considers how CHM was originally envisaged, the form it took in the deep seabed regime, in particular, how its role in that regime has developed over time and how it has been utilized as a basis for advocacy. It concludes with an assessment of CHM's limitations and strategic advantages.*

## 1 Introduction

The origins of the legal debates regarding the global commons are usually traced to the 1960s. Just as the international community was adjusting to a new political and legal landscape resulting from decolonization, scientific developments were leading to increasing interest in the exploration and exploitation of outer space and the deep seabed. There appears to have been little question that international law should play a role in providing a framework for these newly accessible regions, but deep-seated differences of opinion as to the nature and effect of the applicable rules were apparent from the outset.

In 1967, Maltese Ambassador Arvid Pardo proposed to the United Nations General Assembly (UNGA) that the deep seabed and ocean floor beyond the limits of national jurisdiction should be subject to a new international regime known as the 'common heritage of mankind' (CHM).<sup>1</sup> The CHM principle was presented as a response to the

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<sup>1</sup> United Nations General Assembly (UNGA), Agenda Item 92, Examination of the Question of the Reservation Exclusively for Peaceful Purposes of the Sea-Bed and the Ocean Floor, and the Subsoil Thereof, Underlying the High Seas beyond the Limits of Present National Jurisdiction, and the Use of Their Resources in the Interests of Mankind (General Debate), 22nd Session, First Committee, 1515th

limitations of the prevailing legal framework and as an innovative and equitable foundation for dealing with areas beyond national jurisdiction. The principle went on to be incorporated into soft law instruments and treaties dealing not only with the deep seabed but also with outer space.<sup>2</sup>

Since that time, debates about the status, content and scope of CHM have abounded, while the exploitation of the deep seabed and outer space remained a distant prospect. As attention has again turned to these areas in recent years, it is worth considering whether CHM lives up to the promise of providing an appropriate foundation for the governance of the global commons. In an attempt to shed light on that broader inquiry, this article will focus on a more specific question: does the CHM principle impose meaningful environmental limits on the exploitation of the resources of the global commons? Some might find this an easy question to answer in the negative. Writing in the mid-1990s, Lakshman Guruswamy asserted unequivocally that CHM was aimed at maximizing, rather than limiting, exploitation:

At its core the CHM involves inclusive enjoyment and sharing of the products of the common heritage, and its thrust remains redistribution not conservation. The essential feature of CHM ... is the entitlement of the entire international community to exploit the sea bed and share the fruits of exploitation. CHM is not a conservationist principle because it is directed to maximizing resource exploitation and economic returns. Moreover, it is so suffused in traditional nonconservationist resource economics as to render it constitutionally incapable of nurturing a regime of sustainable development.<sup>3</sup>

Other scholars and commentators have sought to extrapolate CHM far beyond its original form in order to make it more useful from an environmental perspective.<sup>4</sup> While such efforts might not entirely dovetail with Guruswamy's scathing evaluation of CHM, they leave the impression that the principle in its current form leaves much to be desired. Between these two extremes, there are scholars who emphasize

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Meeting, UN Doc. A/C.1/PV.1515, 1 November 1967. While the concept of the common heritage of mankind (CHM) did not originate with the Maltese proposal and Ambassador Pardo's later statement, these represent significant landmarks in its development and are frequently referred to in the scholarly literature. For general background to CHM, see Wolfrum, 'The Principle of the Common Heritage of Mankind', 43 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (1983) 312; K. Baslar, *The Concept of the Common Heritage of Mankind in International Law* (1998). For a critical assessment of Pardo's contributions, see Ranganathan, 'Global Commons', 27 *European Journal of International Law* (2016) 693.

<sup>2</sup> It also appears in Art. 22 of the African Charter on Human and Peoples' Rights 1981, 1520 UNTS 217 and is alluded to in the preamble to the Convention for the Protection of the Mediterranean Sea against Pollution 1976, 1102 UNTS 27 (amended and renamed Convention for the Protection of the Marine Environment and the Coastal Region of the Mediterranean, 10 June 1995). Some argue that, with regard to outer space, CHM's legal status remains far from certain. For a recent assessment of the current state of the law, see Su, 'Legality of Unilateral Exploitation of Space Resources under International Law', 66 *International and Comparative Law Quarterly* (2017) 991; see also Craven, "'Other Spaces': Constructing the Legal Architecture of a Cold War Commons and the Scientific-Technical Imaginary of Outer Space', in this issue, 547.

<sup>3</sup> Guruswamy, 'International Environmental Law: Boundaries, Landmarks, and Realities', 10 *Natural Resources and Environment* (1995) 43, at 48 (emphasis added).

<sup>4</sup> See, e.g., P. Taylor, *An Ecological Approach to International Law* (1998).

the environmental aspects of CHM, but this does not appear to have persuaded the sceptics.<sup>5</sup>

This article seeks to go beyond an abstract assessment of the principle and, instead, to examine the specific ways in which CHM has been interpreted over time and in particular contexts. Of necessity, the focus will be on the deep seabed regime set up under the United Nations Convention on the Law of the Sea (UNCLOS), the only operational version of CHM to date.<sup>6</sup> The article will consider the environmental aspects of CHM in the deep seabed regime in a number of different contexts: the early proposals and debates regarding CHM; the operationalization of CHM under UNCLOS (from its original form to the present time); its interpretation by the Seabed Disputes Chamber of the International Tribunal for the Law of the Sea (ITLOS) and advocacy utilizing CHM in current debates regarding deep seabed mining. This analysis, in turn, serves as the basis for some concluding thoughts on both the limitations and strategic advantages of CHM as a principle for regulating the global commons more generally.

## 2 Environmental Dimensions of the CHM in the Early Proposals and Debates

In order to understand the origins of the contemporary deep seabed regime, it is worth beginning with the Maltese proposals to the UNGA in 1967, which placed CHM firmly on the international agenda. Against the backdrop of emerging concerns about a race to appropriate seabed resources, alongside long-standing fears of military confrontation between the USA and the Soviet Union, Malta proposed that the 22nd session of the UNGA include an agenda item entitled 'Declaration and treaty concerning the reservation exclusively for peaceful purposes of the seabed and the ocean floor, underlying the seas beyond the limits of present national jurisdiction, and the use of their resources in the interests of mankind'.<sup>7</sup> The proposal included a brief memorandum that set out the bare bones of what such a declaration and treaty should address, in which there was no mention of conservation or environmental considerations.

In contrast, the environment played a significant role in Ambassador Pardo's lengthy statement presenting the Maltese initiative to the First Committee of the UNGA in November 1967.<sup>8</sup> The statement emphasized the need to avoid militarization of the deep seabed, and the specific environmental issue discussed in most detail

<sup>5</sup> See, e.g., Wolfrum, *supra* note 1, who notes that the use of the terms 'mankind' and 'heritage' implies the need to take into account the interests of future generations and goes on to say: 'More substantively, it requires that deep sea-bed activities should avoid undue waste of resources and provides for the protection of the environment' (at 318–319).

<sup>6</sup> United Nations Convention on the Law of the Sea (UNCLOS) 1982, 1833 UNTS 3.

<sup>7</sup> Malta, 'Request for the Inclusion of a Supplementary Item in the Agenda of the Twenty-Second Session', UN Doc. A/6695, 18 August 1967.

<sup>8</sup> UNGA, *supra* note 1. In a book on the early seabed discussions published in 1977, Shigeru Oda states that Pardo elaborated on the memorandum and 'further noted, in particular, the necessity for the control of marine pollution due to the release of radioactive waste and other wastes into the sea'. S. Oda, *The Law of the Sea in Our Time II: The United Nations Seabed Committee, 1968–1973* (1977), at 5.

was the potential use of the ocean floor as a dumping ground for radioactive waste. However, Pardo argued that this was ‘but one aspect of the wider problem of marine pollution’, pointing out that ‘[u]ncontrolled dumping of detergents, pesticides and heavy metal and petrochemical wastes into the sea can be almost as hazardous to health and food supplies as the dumping of radioactive waste’.<sup>9</sup> While acknowledging the range of international institutions and initiatives that were attempting to respond to the protection of the marine environment at the time, Pardo deplored the efforts as insufficient, concluding that ‘[p]lurality of jurisdiction, fragmentation of competence, a general lack of urgency, have unfortunately not resulted in effective international action to contain the massive problem of marine pollution’.<sup>10</sup>

Thus, environmental concerns were given considerable weight in Pardo’s analysis of the dangers posed by the prevailing state of both the international law of the sea and the institutional framework.<sup>11</sup> What is perhaps less apparent is that Pardo’s proposal for a new regime for the deep seabed was intended in part to respond to those concerns, which provided a prominent justification for change to the status quo:

[T]here can be no doubt that an effective international régime over the sea-bed and the ocean floor beyond a clearly defined national jurisdiction is the only alternative by which we can hope to avoid the escalating tensions that will be inevitable if the present situation is allowed to continue. *It is the only alternative by which we can hope to escape the immense hazards of a permanent impairment of the marine environment.* It is, finally, the only alternative that gives assurance that the immense resources on and under the ocean floor will be exploited *with harm to none and benefit to all.*<sup>12</sup>

Pardo proposed that a new treaty be negotiated that would set out the details of the new regime, and listed a number of fundamental principles to be incorporated into the treaty, the last of which highlighted the environment:

The exploration and exploitation of the sea-bed and ocean floor shall be conducted in a manner consistent with the principles and purposes of the United Nations Charter and in a manner not causing unnecessary obstruction of the high seas or serious impairment of the marine environment.<sup>13</sup>

Characterizing a comprehensive treaty regime as a long-term objective, Pardo proposed that the UNGA adopt a resolution that would include a recognition that the ‘seabed and the ocean floor are the common heritage of mankind and should be used and exploited for peaceful purposes and for the exclusive benefit of mankind as a whole’, but would also preclude extended jurisdictional claims, and would set up a new body to consider the problems of the deep seabed in a holistic fashion that would necessarily include environmental protection.<sup>14</sup> In the Maltese proposal, CHM

<sup>9</sup> *Ibid.*, para. 87.

<sup>10</sup> *Ibid.*

<sup>11</sup> As noted in Mickelson, ‘The Maps of International Law: Perceptions of Nature in the Classification of Territory’, 27 *Leiden Journal of International Law* (2014) 621, at 634; see also Oda, *supra* note 8, para. 103.

<sup>12</sup> UNGA, Agenda Item 92, General Debate (continued), 22nd Session, First Committee, 1516th Meeting, UN Doc. A/C.1/PV.1516, 1 November 1967, para. 3 (emphasis added).

<sup>13</sup> *Ibid.*, para. 10.

<sup>14</sup> *Ibid.*, para. 13.

constituted the conceptual core of a broader vision of international cooperation regarding the deep seabed.<sup>15</sup>

From the outset, then, there were aspects of the CHM principle that included an acknowledgement of environmental limits on the exploitation of the deep seabed. These aspects went on to become part of the discussions that led to the UNGA resolutions on a moratorium on deep seabed mining in 1969<sup>16</sup> and the subsequent proclamation of the deep seabed as the 'common heritage of mankind' in 1970.<sup>17</sup> Following the Maltese proposal in 1967, the UNGA set up an Ad Hoc Committee to deal with the issues raised<sup>18</sup> and asked it to provide, *inter alia*, 'an indication regarding practical means of promoting international co-operation in the exploration, conservation and use of the sea-bed and the ocean floor'.<sup>19</sup> The issue of conservation was raised in the committee's general discussions as well as in the discussions of both its working groups, one set up to deal with economic and technical matters and the other with legal aspects. The committee's report reiterated some of the points that had been raised by Ambassador Pardo regarding pollution and the dumping of wastes, and recognized that deep seabed mining activities could themselves entail environmental risks. In particular, the report discussed an Icelandic proposal that there be a 'study of means of minimizing the danger which might arise from the exploration and exploitation of the sea-bed and ocean floor and the subsoil thereof',<sup>20</sup> and it noted that 'the proposal was widely welcomed and supported as one of the practical means which might be commended for the consideration of the General Assembly'.<sup>21</sup> This support is noteworthy in contrast to the lack of consensus with regard to many of the other points discussed by the committee.

Strikingly, a group of developing countries representing the overwhelming majority of those represented in the working group proposed a draft declaration of general principles that included, among guidelines 'aimed at protecting the rightful interests of other States', that '[p]ollution of the waters of the marine environment ... shall be avoided by means of international co-operation' and that '[n]o damage shall be caused to animal and plant life in the marine environment'.<sup>22</sup> This articulation of environmental concerns ended up being incorporated almost verbatim in the 1970 Declaration of Principles Governing the Sea-Bed and the Ocean Floor, and the Subsoil Thereof, Beyond the Limits of National Jurisdiction (Declaration of Principles), Principle 11 of which provides:

<sup>15</sup> Buzan describes Pardo's proposed treaty as 'containing principles to make this common heritage operational'. B. Buzan, *Seabed Politics* (1976), at 68.

<sup>16</sup> GA Res. 2574 (XXIV), 15 December 1969, Part D.

<sup>17</sup> Declaration of Principles Governing the Sea-Bed and the Ocean Floor, and the Subsoil Thereof, beyond the Limits of National Jurisdiction (Declaration of Principles), GA Res. 2749 (XXV), 17 December 1970.

<sup>18</sup> GA Res. 2340 (XXII), 18 December 1967.

<sup>19</sup> *Ibid.*, para. 2(c).

<sup>20</sup> Report of the Ad Hoc Committee to Study the Peaceful Uses of the Sea-Bed and the Ocean Floor beyond the Limits of National Jurisdiction, UN Doc. A/7230, 31 December 1968, para. 61.

<sup>21</sup> *Ibid.*

<sup>22</sup> *Ibid.*, Annex III, at 64. Of the developing countries represented in the committee, only Malta and Somalia are not listed.

With respect to activities in the area beyond national jurisdiction and acting in conformity with the international régime to be established, States shall take appropriate measures for and shall co-operate in the adoption and implementation of international rules, standards and procedures for, *inter alia*:

- (a) The prevention of pollution and contamination, and other hazards to the marine environment, including the coastline, and of interference with the ecological balance of the marine environment.
- (b) The protection and conservation of the natural resources of the area and the prevention of damage to the flora and fauna of the marine environment.<sup>23</sup>

While these specific provisions regarding the environment are not directly connected to the proclamation of the deep seabed as CHM found in Principle 1 of the Declaration of Principles, many state representatives interpreted the principle of common heritage as a holistic one that lay at the core of the emerging international legal framework. Malta, during the debates regarding the report of the Ad Hoc Committee, had insisted that ‘the common-heritage concept is not a slogan; it is not one of a number of more or less desirable principles; rather, it is the very foundation of our work’.<sup>24</sup> The Maltese representative went on to assert that many of the principles contained in the various draft proposals could be derived from CHM:

Thus the concept of common heritage implies the notion of peaceful use, since it is clear that military use of the ocean floor might impair or endanger the common property. The common heritage not only implies freedom of access and use on the part of those having part in the heritage, but also implies regulation of use for the purpose of conserving the heritage and avoiding the infringement of the rights of others. Inherent in regulation of use is, of course, responsibility for misuse. The concept, finally, implies equitable distribution of the benefits for exploitation of the heritage. It is possible to go further; the notion of property that cannot be divided without the consent of all and which should be administered in the interests and for the benefit of all is also a logical extension of the common heritage concept.<sup>25</sup>

As proposals for a New International Economic Order (NIEO) gained in significance during the early 1970s, the CHM principle came to be seen as part of an explicit challenge to the prevailing legal and normative framework.<sup>26</sup> This did not require much of a conceptual stretch; its emphasis on distribution and prioritizing the needs of ‘poor countries’, as they were termed in Pardo’s 1967 statement, fit neatly with the fundamental premises of the NIEO. Pardo himself embraced this linkage; in a piece he co-authored with Elizabeth Mann Borgese, the oceans were described as a ‘great laboratory for the building of the New International Economic Order’,<sup>27</sup> and

<sup>23</sup> Declaration of Principles, *supra* note 17.

<sup>24</sup> Office of Legal Affairs, Division for Ocean Affairs and the Law of the Sea, *The Law of the Sea, Concept of the Common Heritage of Mankind, Legislative History of Articles 133 to 150 and 311(6) of the United Nations Convention on the Law of the Sea* (1996), at 41.

<sup>25</sup> *Ibid.*, at 42.

<sup>26</sup> See generally Boczek, ‘Ideology and the Law of the Sea: The Challenge of the New International Economic Order’, 7 *Boston College International and Comparative Law Review* (1984) 1; Gamble, ‘The Third United Nations Conference on the Law of the Sea and the New International Economic Order’, 6 *Loyola of Los Angeles International and Comparative Law Review* (1983) 65.

<sup>27</sup> A. Pardo and E. Mann Borgese, *The New International Economic Order and the Law of the Sea*, International Oceans Institute Occasional Paper no. 4 (1970), at 142.

the authors asserted that 'shared management and benefit sharing ... change the structural relationship between rich and poor nations and the traditional concepts of development aid'.<sup>28</sup>

In contrast, the environmental aspects of CHM do not seem to have been given quite as much prominence in the NIEO discussions. While some might see this as a reflection of the Third World coalition's ambivalence towards environmental concerns,<sup>29</sup> it may simply have been due to a desire to emphasize the distributional aspects of CHM. In any event, the connections between CHM and the environment were not overlooked. While the formulation of CHM in the Charter of Economic Rights and Duties of States does not specifically mention the environment, it appears in Chapter 3 on 'Common Responsibilities towards the International Community', which contains only one other provision. This relates to environmental protection, proclaiming that '[t]he protection, preservation and enhancement of the environment for the present and future generations is the responsibility of all States'. CHM and environmental concerns are thus clearly linked in this chapter, and the need to read them in tandem is reinforced by the specific mention in the latter of the responsibility of states to avoid causing harm to areas beyond the limits of national jurisdiction.

Even in the highly polarized discussions surrounding the Charter and the NIEO proposals more generally, then, there was an acknowledgement of environmental concerns that could be seen as being integrally connected to the understanding of CHM. Unfortunately, that polarization and the linkage with the NIEO affected the attitude towards CHM amongst the developed countries and the USA, in particular. The tensions characterizing the UNCLOS negotiations centred on competing visions of the proposed regime, with the USA favouring 'a minimal regulatory framework for sea-bed activities', while developing countries supported the establishment of a strong international body with 'the exclusive right to conduct deep seabed mining on behalf of the international community'.<sup>30</sup> These tensions were heightened following the election of Ronald Reagan in November 1980, with the new administration characterizing CHM in the draft UNCLOS regime as unfair, economically inefficient and ideologically suspect. James Malone, the chairman of the US delegation to UNCLOS under President Reagan, was later quite open in linking US concerns about the deep seabed regime to the NIEO, which he described as 'in essence [advocating] re-distribution of the world's economic wealth through organizations such as the

<sup>28</sup> *Ibid.*, at 10.

<sup>29</sup> For a critique of this portrayal of the South, see Mickelson, 'South, North, International Environmental Law and International Environmental Lawyers', 11 *Yearbook of International Environmental Law* (2000) 52; Mickelson, 'The Stockholm Conference and the Creation of the South-North-Divide in International Environmental Law and Policy', in S. Alam *et al.* (eds), *International Environmental Law and the Global South* (2015) 109.

<sup>30</sup> M.G. Schmidt, *Common Heritage or Common Burden: The United States Position on the Development of a Regime for Deep Sea-Bed Mining in the Law of the Sea Convention* (1990), at 212.

International Seabed Authority’.<sup>31</sup> He went on to state that ‘[t]he United States is deeply concerned about the grave dangers of legitimizing this socialist concept by signing the LOS Treaty’.<sup>32</sup>

### 3 Common Heritage of Mankind and the Environment as Operationalized under UNCLOS

#### *A The Original UNCLOS Provisions*

Part XI of UNCLOS lays out a legal and institutional framework for ‘the Area’, defined as ‘the seabed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction’.<sup>33</sup> Article 136 states simply that ‘[t]he Area and its resources are the common heritage of mankind’. An early draft had added: ‘This principle shall be implemented and interpreted in accordance with the provisions of these articles’,<sup>34</sup> but even without such explicit language, the entirety of Part XI can be seen as being designed to put the principle into operation.<sup>35</sup> The institution created to ‘organize and control the activities in the Area’ is the International Seabed Authority (ISA), of which all states parties to UNCLOS are members. The ISA is given the overall (and quite unique) mandate of ‘acting on behalf of ‘mankind as a whole’,<sup>36</sup> in whom ‘[a]ll rights in the resources of the Area are vested’.<sup>37</sup> Aline Jaeckel, who has written extensively on the ISA, has stated that, ‘[a]t its core, the ISA may be regarded as the institutional element of the common heritage principle’,<sup>38</sup> and she has also asserted that ‘[t]he ISA’s exceptional law-making competencies must be understood in the context of its mandate to give effect to the common heritage of mankind’.<sup>39</sup> At the same time, the ISA was intended to play a direct role in resource exploitation, through an operational arm to be known as the Enterprise.<sup>40</sup>

<sup>31</sup> Malone, ‘The United States and the Law of the Sea after UNCLOS III’, 46 *Law and Contemporary Problems* (1983) 29, at 31.

<sup>32</sup> *Ibid.* It is worth noting that John Gamble argues that the USA’s refusal to sign UNCLOS was ‘only partly based on objections to the NIEO’, but he notes that ‘[t]he safe assumption is that NIEO issues contributed to the U.S. position in what was already a very complex negotiation’. Gamble, *supra* note 26, at 80.

<sup>33</sup> UNCLOS, *supra* note 6, Art. 1.

<sup>34</sup> Office of Legal Affairs, *supra* note 24, at 306. This version had been supported by the Group of 77 (at 323).

<sup>35</sup> E.g., Helmut Tuerk has referred to CHM as ‘the basic principle on which the deep seabed mining regime is based’. Tuerk, ‘The Common Heritage of Mankind after 50 Years’, 57 *Indian Journal of International Law* (2017) 259, at 264. This characterization is in the context of Tuerk’s assessment that the 1994 Agreement on the Implementation of Part XI of UNCLOS reaffirmed CHM. Agreement on the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982 (IA) 1994, 1836 UNTS 3.

<sup>36</sup> UNCLOS, *supra* note 6, Art. 137(2).

<sup>37</sup> *Ibid.*

<sup>38</sup> A.E. Jaeckel, *The International Seabed Authority and the Precautionary Principle* (2017), at 88.

<sup>39</sup> *Ibid.*, at 148.

<sup>40</sup> UNCLOS, *supra* note 6, Arts 158(2), 170.



UNCLOS provides extensive guidance as to how the ISA's mandate is to be exercised. The main provision on protection of the marine environment in Part XI is Article 145, which provides:

Necessary measures shall be taken in accordance with this Convention with respect to activities in the Area to ensure effective protection for the marine environment from harmful effects which may arise from such activities. To this end the Authority shall adopt appropriate rules, regulations and procedures for *inter alia*:

- (a) the prevention, reduction and control of pollution and other hazards to the marine environment, including the coastline, and of interference with the ecological balance of the marine environment, particular attention being paid to the need for protection from harmful effects of such activities as drilling, dredging, excavation, disposal of waste, construction and operation or maintenance of installations, pipelines and other devices related to such activities;
- (b) the protection and conservation of the natural resources of the Area and the prevention of damage to the flora and fauna of the marine environment.

While environmental protection is thus woven into the deep seabed regime, Article 145 must also be read in the context of UNCLOS Part XII, which has been characterized as 'a comprehensive framework for the protection and preservation of the marine environment'.<sup>41</sup> Part XII includes a provision dealing with the Area<sup>42</sup> as well as one dealing with 'seabed activities subject to national jurisdiction',<sup>43</sup> both of which recognize the important role of international regulation under Part XI in setting the bar for national standards.

Article 145 in itself was not particularly controversial;<sup>44</sup> it is worth noting, in particular, the close similarity of its wording to that of Principle 11 of the 1970 Declaration of Principles.<sup>45</sup> However, there were broader issues regarding the underlying purpose of Part XI that reflected competing views as to whether resource exploitation was the primary objective of the deep seabed regime. Article 150 on '[p]olicies relating to activities in the Area' proved to be one of the most contentious provisions. The final version seems to emphasize the central imperative of exploitation by the very order in which the first two objectives are laid out:

<sup>41</sup> Nanda, 'Protection of the Internationally Shared Environment and the United Nations Convention on the Law of the Sea', in J.M. Van Dyke (ed.), *Consensus and Confrontation: The United States and the Law of the Sea Convention* (1985) 403, at 407. Contemporary commentators differed in their assessments of the degree to which UNCLOS represented a major innovation in the realm of marine environmental protection. See the differences of opinion reflected in Van Dyke (at 420–423). Writing in 1994, Jonathan Charney expressed the view that the convention 'probably contains the most comprehensive and progressive international environmental law of any modern international agreement'. Charney, 'The Marine Environment and the 1982 United Nations Convention on the Law of the Sea', 28(4) *International Lawyer* 879, at 882.

<sup>42</sup> UNCLOS, *supra* note 6, Art. 209.

<sup>43</sup> *Ibid.*, Art. 208.

<sup>44</sup> The legislative history reveals relatively minor changes to the wording, although none is insignificant, and, cumulatively, they do reduce the provision's scope somewhat. See Office of Legal Affairs, *supra* note 24, at 402.

<sup>45</sup> See text accompanying note 23 above.

Activities in the Area shall ... be carried out in such a manner as to foster healthy development of the world economy and balanced growth of international trade, and to promote international cooperation for the over-all development of all countries, especially developing States, and with a view to ensuring:

- (a) the development of the resources of the Area;
- (b) orderly, safe and rational management of the resources of the Area, including the efficient conduct of activities in the Area and, in accordance with sound principles of conservation, the avoidance of unnecessary waste.

Earlier drafts of Article 150 had combined paragraphs (a) and (b);<sup>46</sup> the separation was proposed by Australia, Canada, Denmark and Norway, on behalf of the so-called Group of 11, as a way of responding to US insistence that ‘the convention should not deter the development of any deep seabed mineral resources to meet national and world demand’.<sup>47</sup> While characterized by its proponents as merely a ‘clear and unambiguous expression’ of a principle that otherwise remained implicit,<sup>48</sup> this change was later described by an Indonesian diplomat as a concession that unfettered the goal of resource development from the qualifications in the following paragraph.<sup>49</sup> From an outsider’s viewpoint, this may appear to be a debate over semantics since resource development is prioritized in both versions. However, Brian Hoyle, who was involved in the Reagan administration’s review of UNCLOS in 1981 and went on to become the director of the Office of Oceans Law and Policy in the US Department of State, argued that ‘to anybody involved in the [negotiations] Article 150 is in code. Article 150 does not really say what Article 150 appears to say’,<sup>50</sup> and he insisted that ‘it is endemic to the whole system that it seemed designed more to inhibit than to encourage the development of [deep seabed] resources’.<sup>51</sup>

The conflict over Article 150 may well have resulted from differing understandings of the concept of CHM itself, which were simply papered over in the attempt to achieve consensus. Was the principle about exploitation or conservation of the common heritage? Any ambiguity in this regard did not prevent CHM from being the conceptual foundation of Part XI. Its normative centrality is underscored by Article 311(d) of UNCLOS, which provides that ‘States Parties agree that there shall be no amendments to the basic principle relating to the common heritage of mankind set forth in article 136, and that they shall not be party to any agreement in derogation thereof’. Article 311(d) was introduced relatively late in the negotiating process, as a compromise response to a Chilean proposal that CHM be recognized as *jus cogens* in UNCLOS, which met with widespread support.<sup>52</sup> It is worth emphasizing, however, that it is only the

<sup>46</sup> The previous version of Art. 150(a) was ‘[o]rderly and safe development and rational management of the resources in the Area, including the efficient conduct of activities in the Area and, in accordance with sound principles of conservation, the avoidance of unnecessary waste’. Office of Legal Affairs, *supra* note 24, at 399. An even earlier version did not modify ‘waste’ with ‘unnecessary’.

<sup>47</sup> *Ibid.*, at 405.

<sup>48</sup> *Ibid.*, at 405–406.

<sup>49</sup> Van Dyke, *supra* note 41, at 270–271.

<sup>50</sup> *Ibid.*, at 269.

<sup>51</sup> *Ibid.*, at 270.

<sup>52</sup> Office of Legal Affairs, *supra* note 24, at 388–389.

'basic principle' that is given this protection; clearly, the drafters contemplated the possibility of changes to the operational regime relating to the deep seabed so long as the conceptual foundation remained intact. While clearly an important factor, the extent to which environmental concerns could be said to be central to that underlying foundation is left unclear.

## **B The Implementation Agreement**

It did not take long for changes to the deep seabed regime to be seen as essential. The USA refused even to sign UNCLOS, and the Reagan administration singled out the deep seabed provisions as the reason.<sup>53</sup> The United Kingdom and the Federal Republic of Germany also refrained from signing, while other developed countries signed but did not ratify the convention. Attempts to increase participation were ongoing throughout the 1980s, gaining momentum as ratifications approached the number required for entry into force. In 1990, then Secretary-General Javier Perez de Cuellar initiated consultations to address some of the concerns that had been raised by developed countries. According to a later report, the secretary-general:

noted that in the eight years that had elapsed since the Convention was adopted certain significant political and economic changes had occurred which had had a marked effect on the regime for deep seabed mining contained in the Convention. ... The general economic climate had been transformed as a result of the changing perception with respect to the roles of the public and private sectors. There was a discernible shift towards a more market-oriented economy.<sup>54</sup>

In 1992, the UNGA called for 'renewed efforts to facilitate universal participation in the Convention', recognizing 'that political and economic changes, including in particular a growing reliance on market principles, underscore the need to re-evaluate, in the light of the issues of concern to some States, matters in the regime to be applied to the Area and its resources'.<sup>55</sup>

The 1994 Agreement on the Implementation of Part XI of UNCLOS (IA),<sup>56</sup> explicitly mentioning 'political and economic changes, including market-oriented approaches'<sup>57</sup> and the goal of 'universal participation in the Convention',<sup>58</sup> altered the deep seabed regime in a number of respects.<sup>59</sup> The IA does not modify the legal status of the Area, and, in fact, the preamble explicitly reaffirms that the Area and its

<sup>53</sup> Ronald Reagan, United States Oceans Policy, Statement by the President, 10 March 1983. US Department of State, *Public Papers of the Presidents of the United States: Ronald Reagan* (1983), at 383.

<sup>54</sup> Consultations of the Secretary-General on Outstanding Issues Relating to the Deep Seabed Mining Provisions of the United Nations Convention on the Law of the Sea: Report of the Secretary-General, UN Doc. A/48/950, 9 June 1994, para. 2.

<sup>55</sup> GA Res. 47/65, 11 December 1992.

<sup>56</sup> IA, *supra* note 35.

<sup>57</sup> *Ibid.*, preambular para. 5.

<sup>58</sup> *Ibid.*, preambular para. 6.

<sup>59</sup> For a concise summary of the changes, see Wood, 'International Seabed Authority: The First Four Years', 3 *Max Planck Yearbook of United Nations Law* (1999) 173, at 181. Art. 2 of the IA provides that the agreement is to be interpreted and applied together with Part XI as a single instrument and specifies that in the event of inconsistency between them, the agreement will prevail.

resources are CHM.<sup>60</sup> Nonetheless, some have argued that the changes in governance and the underlying emphasis on market approaches erode the distributional aspects of CHM,<sup>61</sup> with R.P. Anand characterizing the IA as a ‘mutilation of [the] ideal’ of CHM.<sup>62</sup> Similarly, it could be argued that the emphasis on market-oriented approaches constitutes a blow to CHM’s environmental aspirations, and that the insistence that the ‘[d]evelopment of the resources of the Area shall take place in accordance with sound commercial principles’<sup>63</sup> inevitably prioritizes commerce over ecology. However, it is important to note that the IA does not explicitly restrict or limit the environmental safeguards built into UNCLOS.<sup>64</sup> In fact, the IA’s preamble acknowledges not only UNCLOS’ important role in marine environmental protection, but also ‘the growing concern for the global environment’,<sup>65</sup> which might be said to suggest the need for enhanced environmental oversight of deep seabed activities. Furthermore, the IA lists ‘[a]doption of rules, regulations and procedures incorporating applicable standards for the protection and preservation of the marine environment’ as one of the areas that the ISA should focus on in the period of time between the entry into force of UNCLOS and the beginning of exploitation activities.<sup>66</sup> This not only made environmental concerns an important part of the ISA’s initial mandate but, in fact, indicated that the development of environmental safeguards would need to be made a priority.

### *C CHM and the Environment in the Initial Work of the ISA*

The first session of the Assembly of the ISA began on 16 November 1994, the day of UNCLOS’ entry into force. Due to the length of time that had passed since the conclusion of UNCLOS, considerable time and effort had gone into laying the groundwork for the ISA’s operations. However, the changes resulting from the IA were such that much of the preparatory work was made redundant,<sup>67</sup> and the initial focus was on developing the basic procedural framework. The ISA Council, described in the convention as the ‘executive organ of the Authority’,<sup>68</sup> was elected two years later,<sup>69</sup> and the Legal and Technical Commission (LTC), one of the organs of the Council contemplated in the convention, shortly thereafter.<sup>70</sup>

<sup>60</sup> IA, *supra* note 35, preambular para. 2.

<sup>61</sup> See, e.g., Jaeckel, *supra* note 38, at 86.

<sup>62</sup> R.P. Anand, *Studies in International Law and History: An Asian Perspective* (2004), at 180.

<sup>63</sup> IA, *supra* note 35, Annex, s. 6(1)(a).

<sup>64</sup> Jaeckel points out that, in the discussions leading up to the IA, the environmental aspects of Part XI were explicitly characterized as uncontroversial and were removed from the list of obstacles to the acceptance of UNCLOS. Jaeckel, *supra* note 38, at 119–120.

<sup>65</sup> IA, *supra* note 35, preambular para. 3.

<sup>66</sup> *Ibid.*, Annex, s. 1(5)(g). Wood expresses the view that the IA ‘gives additional emphasis to environmental concerns’. Wood, *supra* note 59, at 181.

<sup>67</sup> Wood describes these as ‘draft rules which were largely overtaken and which had no status and no obvious immediate role’. *Ibid.*, at 195.

<sup>68</sup> UNCLOS, *supra* note 6, Art. 162(1).

<sup>69</sup> Wood, writing in 1999, described the arrangement for the Council as ‘probably the most complex ever reached for the composition of an international organ’. Wood, *supra* note 59, at 201.

<sup>70</sup> See UNCLOS, *supra* note 6, Art. 163(1). For a discussion of the initial election of the Legal and Technical Commission (LTC), see Wood, *supra* note 59, at 219.

Article 165(2) of UNCLOS lays out a wide range of functions for the LTC, described on the ISA's website as 'including the review of applications for plans of work, supervision of exploration or mining activities, assessment of the environmental impact of such activities and [providing] advice to the [ISA's] Assembly and Council on all matters relating to exploration and exploitation of non-living marine resources'.<sup>71</sup> Its already broad mandate under UNCLOS was expanded by the IA to include, on an interim basis, the functions of the other Council organ provided for in the convention, the Economic Planning Commission.<sup>72</sup> As mentioned in the description above, environment assessment is one significant aspect of the LTC's role.<sup>73</sup> However, environmental concerns are also woven into other aspects of its mandate. For example, the LTC is tasked with making recommendations on environmental protection to the Council.<sup>74</sup> More generally, the LTC is entrusted with formulating and submitting to the Council the 'rules, regulations and procedures' of the Authority, 'taking into account all relevant factors including assessments of the environmental implications of activities in the Area'.<sup>75</sup>

The LTC is currently made up of 30 members.<sup>76</sup> UNCLOS indicates that they are to have 'appropriate qualifications such as those relevant to exploration for and exploitation and processing of mineral resources, oceanology, protection of the marine environment, or economic or legal matters relating to ocean mining and related fields of expertise', and it directs the Council to 'endeavour to ensure' that all appropriate qualifications are represented.<sup>77</sup> The actual composition of the LTC has been the subject of criticism, which is perhaps not surprising given the wide range of expertise that is contemplated and the relatively limited membership. Writing in 2014, one commentator pointed out that, of the 25 members of the LTC at that time, only two had 'environmental or life science expertise', and he argued that '[i]t is unrealistic to expect that the LTC will have internally all the necessary expertise to make complex multi-disciplinary decisions'.<sup>78</sup>

<sup>71</sup> International Seabed Authority (ISA), *The Legal and Technical Commission*, available at <http://www.isa.org/jm/la-autoridad/legal-and-technical-commission>.

<sup>72</sup> IA, *supra* note 35, Annex, s. 1(4).

<sup>73</sup> UNCLOS, *supra* note 6, Art. 165(2)(d).

<sup>74</sup> *Ibid.*, Art. 165(2)(e).

<sup>75</sup> *Ibid.*, Art. 165(2)(f).

<sup>76</sup> UNCLOS had specified that the commission should have 15 members, but provided that the Council could increase the membership 'if necessary' and with 'due regard to economy and efficiency'. *Ibid.*, Art. 163(2). The membership was set at 22 for the first election, largely for reasons of expediency. See Wood, *supra* note 59, at 219. The membership had increased to 25 by 2006, where it stabilized for a decade until it was increased to 30 'on an exceptional and temporary basis, without prejudice to future elections' in 2016. Council of the International Seabed Authority, Decision Relating to the Election of Members of the Legal and Technical Commission, Doc. ISBA/22/C/29, 26 July 2016.

<sup>77</sup> UNCLOS, *supra* note 6, Art. 165(1). In contrast, the expertise of the members of the Economic Planning Commission is to include 'appropriate qualifications such as those relevant to mining, management of mineral resource activities, international trade or international economics'.

<sup>78</sup> Ardron, *Ocean Sustainability through Transparency: Deep Sea Mining and Lessons Learnt from Previous Resource Booms*, 2014 Potsdam Ocean Governance Workshop: Background Document no. 3, (copy on file with the author).

Regardless of these limitations, the LTC has operated with an awareness of the importance of environmental protection to its mandate. This goes back to the early years of its work. Describing the Council's discussions of an LTC draft 'Mining Code' dealing with prospecting and exploration of polymetallic nodules in March 1998, Michael Wood notes that '[a] common theme in almost all general statements was the need to ensure that the Mining Code included effective rules for the protection and preservation of the marine environment'.<sup>79</sup> While regulations on prospecting and exploration of polymetallic nodules were adopted in 2000,<sup>80</sup> the second set of regulations, dealing with polymetallic sulphides,<sup>81</sup> was not adopted until 2010. The ISA went on to adopt regulations for cobalt-rich ferromanganese crusts in 2012<sup>82</sup> and an updated version of the Nodules Regulations in 2013.<sup>83</sup> The time lag between the original Nodules Regulations and the Sulphides Regulations, on which work had begun in 2001, was attributed at least in part to environmental issues. Addressing the Meeting of States Parties to UNCLOS in June 2010, the ISA secretary-general noted:

It has been a long and difficult road, strewn with obstacles and unexpected difficulties. I should emphasise that this is in no way due to the intransigence of individual delegations, but reflects the fact that we know so little about the resources in question and the environments in which they occur. It was necessary therefore to proceed cautiously, taking into account the best available scientific advice on each aspect of the draft regulations and remitting particular issues from time to time to the Legal and Technical Commission for further consideration. The result, I believe, is a set of regulations that is both balanced and progressive and, most importantly, ensures effective protection for the marine environment.<sup>84</sup>

While the Nodules Regulations had included numerous environmental safeguards, including the application of a precautionary approach, the secretary-general emphasized that '[t]he environmental provisions in the [Sulphides] Regulations, whilst based upon those adopted in 2000 ... are in fact much strengthened'.<sup>85</sup> One example was the precautionary approach itself. In the Nodules Regulations, this is mentioned once in the context of a discussion of the environmental obligations of the ISA and sponsoring states: 'In order to ensure effective protection for the marine environment from harmful effects which may arise from activities in the Area, the Authority and sponsoring States shall apply a precautionary approach, as reflected in principle 15 of the

<sup>79</sup> Wood, *supra* note 59, at 201.

<sup>80</sup> ISA, Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area (Nodules Regulations), Doc. ISBA/6/A/18, 13 July 2000.

<sup>81</sup> ISA, Regulations on Prospecting and Exploration for Polymetallic Sulphides in the Area (Sulphides Regulations), Doc. ISBA/16/A/12/Rev. 17 May 2010.

<sup>82</sup> ISA, Regulations on Prospecting and Exploration for Cobalt-rich Ferromanganese Crusts in the Area (Cobalt-rich Crusts Regulations), Doc. ISBA/18/A/11, 27 July 2012.

<sup>83</sup> ISA, Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area, Doc. ISBA/19/C/17, 25 July 2013. The Regulations had been provisionally adopted by the Council on 22 July and are found in an annex to its decision.

<sup>84</sup> *Statement by the Secretary-General of the ISA to the 20th Meeting of the States Parties to the 1982 UN Convention on the Law of the Sea*, 14–18 June 2010, at 1, available at <https://ran-s3.s3.amazonaws.com/isa.org.jm/s3fs-public/documents/EN/SG-Stats/splos-2010.pdf>.

<sup>85</sup> *Ibid.*, at 2.

Rio Declaration, to such activities.’<sup>86</sup> The Sulphides Regulations not only include a similar provision relating to the ISA and sponsoring states<sup>87</sup> but also mandate the precautionary approach as an obligation for contractors in relation to prospecting and other activities.<sup>88</sup> Another example was the threshold required for emergency orders. Jaeckel notes that, while the Nodules Regulations contemplated the availability of emergency orders for an incident ‘that has caused, or is likely to cause, serious harm to the marine environment’, the later regulations refer to an incident ‘that has caused, is causing, or poses a threat of serious harm to the marine environment’.<sup>89</sup> Jaeckel points out that this change was based on the LTC’s view that the previous formulation was incompatible with the precautionary approach, ‘which requires that there be only a threat of serious damage’.<sup>90</sup>

While the environmental safeguards in the exploration regulations evolved over time, CHM was articulated in precisely the same manner in all of the regulations. Each preamble begins by affirming that, in accordance with UNCLOS, ‘the seabed and ocean floor and the subsoil thereof beyond the limits of national jurisdiction, as well as its resources, are the common heritage of mankind, the exploration and exploitation of which shall be carried out for the benefit of mankind as a whole, on whose behalf the International Seabed Authority acts’. The principle is not mentioned elsewhere. While this does not necessarily detract from its foundational importance to the overall regulatory regime, it does make it easier to overlook.<sup>91</sup>

In contrast, CHM has played a more visible role in the development of the ISA’s designation of Areas of Particular Environmental Interest (APEIs). In 2007, a scientific workshop was held with the goal of designing ‘a set of representative preservation reference areas to safeguard biodiversity and ecosystem function’ in the Clarion-Clipperton Zone (CCZ), a seabed area in the Eastern Central Pacific Region.<sup>92</sup> The CCZ had long been a focus of interest due to its significant deposits of polymetallic nodules, and a number of exploration contracts in the area had been granted by the ISA. Citing the extent of the exploration areas (each covering 75,000 square kilometres) and the potential timescale of mining operations, the workshop report notes that the entirety of the claim areas could be seen as potentially affected. The report goes on to assert that ‘the slow ecosystem recovery rates at the abyssal sea floor will cause the environmental impacts of mining to be widespread and simultaneous across the [CCZ], requiring that conservation be managed across the region as a whole’.<sup>93</sup> The

<sup>86</sup> Nodules Regulations, *supra* note 80, Regulation 31(2).

<sup>87</sup> Sulphides Regulations, *supra* note 81, Regulation 33(2).

<sup>88</sup> *Ibid.*, Regulations 2(2), 5(1), 33(5). The precautionary approach also appears in Annex 4, Standard Clauses for Exploration Contract, s. 5.1.

<sup>89</sup> Jaeckel, *supra* note 38, at 181.

<sup>90</sup> Quoted in *ibid.*

<sup>91</sup> Jaeckel characterizes CHM as ‘undoubtedly the most central normative framework’ for the ISA and states that it ‘sets the foundation for the legal regime of seabed mining in the area’. *Ibid.*, at 52.

<sup>92</sup> LTC, Rationale and Recommendations for the Establishment of Preservation Reference Areas for Nodule Mining in the Clarion-Clipperton Zone, Doc. ISBA/14/LTC/2, 28 March 2008, at 1.

<sup>93</sup> *Ibid.*, at 2.

workshop proposed the creation of a preservation reference area for each of nine distinct subregions of the CCZ, each with a core area of at least 200 kilometres in width and length surrounded by a buffer area of 100 kilometres in width, for a total size of 400 kilometres by 400 kilometres.

The report of the meeting reflects the participants' view that their proposal was consistent with the ISA's existing regulatory structure, noting specifically that the exploration regulations contemplated the establishment of 'preservation reference zones'.<sup>94</sup> These were defined in the original Nodules Regulations as 'areas in which no mining shall occur to ensure representative and stable biota of the seabed in order to assess any changes in the flora and fauna of the marine environment'.<sup>95</sup> The report also reflected the role that CHM played in framing the proposal. After setting out the conservation goals that underpinned the preservation reference area system, the report notes that '[t]hese goals are in agreement with the International Seabed Authority's mandate to protect the marine environment, and to manage seabed mining in a way that sustains the ocean environment and its resources as the common heritage of mankind'.<sup>96</sup>

The LTC considered this proposal in 2008, but took the view that it should be dealt with as part of an overall plan for environmental management of the CCZ. The discussions that followed revealed some resistance to the assumption that the ISA had the legal authority for this kind of initiative.<sup>97</sup> Specific provisions of UNCLOS and the regulations did in fact pose interpretive difficulties. For example, while the regulations provided for preservation reference zones, these were to be proposed by a contractor upon application for exploitation rights; the decision to use the term APEIs was made partly to avoid confusion on this particular point. However, as Michael Lodge, then the legal counsel to the ISA, noted in 2011, under UNCLOS, '[b]oth the LTC and the Council have broad and abundant power to take measures for the protection of the marine environmental with a view to fulfilling the broad objectives of the Convention and the 1994 Agreement in this respect'.<sup>98</sup> This expansive view is reflected in both the 2012 Council decision adopting the Environmental Management Plan recommended by the LTC<sup>99</sup> as well as the plan itself.<sup>100</sup> CHM appears as the first of the Guiding Principles of the Plan, alongside the precautionary approach, protection and preservation of the

<sup>94</sup> *Ibid.*, at 2–3.

<sup>95</sup> Nodules Regulations, *supra* note 80, Regulation 31(7).

<sup>96</sup> LTC, *supra* note 92, at 3.

<sup>97</sup> Lodge, 'Some Legal and Policy Considerations Relating to the Establishment of a Representative Network of Protected Areas in the Clarion-Clipperton Zone', 26 *International Journal of Marine and Coastal Law* (2011) 463, at 465; see also Lodge *et al.*, 'Seabed Mining: International Seabed Authority Environmental Management Plan for the Clarion-Clipperton Zone, A Partnership Approach', 49 *Marine Policy* (2014) 66, at 67.

<sup>98</sup> Lodge, *supra* note 97, at 467.

<sup>99</sup> ISA Council, Decision of the Council Relating to an Environmental Management Plan for the Clarion-Clipperton Zone, Doc. ISBA/18/C/22, 26 July 2012.

<sup>100</sup> LTC, Environmental Management Plan for the Clarion-Clipperton Zone, Doc. ISBA/17/LTC/7, 13 July 2011.



marine environment, prior environmental impact assessment, conservation and sustainable use of biodiversity and transparency.<sup>101</sup>

### D *The Advisory Opinion of the Seabed Disputes Chamber of ITLOS*

In 2010, the ISA Council requested an advisory opinion from the Seabed Disputes Chamber of ITLOS on the 'responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area'.<sup>102</sup> While the questions that had been put to the Chamber focused primarily on sponsoring states' responsibilities, the Chamber also articulated broader principles relating to sustainability and environmental protection in its interpretation of the (original) Nodules and Sulphides Regulations and the provisions of UNCLOS and the IA.

Much of the commentary on the advisory opinion has focused on its discussion of the precautionary approach, which ventures beyond the legal obligations created by the ISA regulations to emphasize its broader applicability, asserting that 'the precautionary approach is also an integral part of the general obligation of due diligence of sponsoring States, which is applicable even outside the scope of the Regulations'.<sup>103</sup> The Chamber also looked to the future, noting that while the Nodules and Sulphides Regulations apply to specific prospecting and exploration activities, '[i]t is to be expected that the Authority will either repeat or further develop this approach when it regulates exploitation activities and activities concerning other types of minerals'.<sup>104</sup>

For the purposes of the present inquiry, however, what is particularly important about the decision is the way in which the Chamber interpreted the responsibilities of sponsoring states in light of CHM, stating that '[t]he role of the sponsoring State, as set out in the Convention, contributes to the realization of the common interest of all States in the proper application of the principle of the common heritage of mankind'.<sup>105</sup> The Chamber also invoked CHM explicitly to inform its interpretation of a number of specific state obligations. Strikingly, it is used to support the Chamber's view that developing countries, acting as sponsoring states, must meet the same

<sup>101</sup> *Ibid.*, at 4–5.

<sup>102</sup> Seabed Disputes Chamber of the International Tribunal on the Law of the Sea, *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*, Advisory Opinion, 1 February 2011, available at [www.itlos.org/fileadmin/itlos/documents/cases/case\\_no\\_17/adv\\_op\\_010211.pdf](http://www.itlos.org/fileadmin/itlos/documents/cases/case_no_17/adv_op_010211.pdf). Nauru had first put forward a proposal for the advisory opinion based on its need to understand its responsibilities and potential liabilities as a sponsoring state.

<sup>103</sup> *Ibid.*, para. 131. In its discussion of the regulations, the Chamber emphasizes the qualifying language in Principle 15, noting that 'while the first sentence ... seems to refer in general terms to the precautionary approach, the second sentence limits its scope to threats of "serious or irreversible damage" and to "cost-effective" measures adopted in order to prevent "environmental degradation"' (para. 128). It does not indicate whether the precautionary approach as part of the due diligence obligation would incorporate the same types of limitations or restrictions as those required by Principle 15. It does, however, express the view that the frequent mention of the precautionary approach in international instruments 'has initiated a trend towards making this approach part of customary international law' (para. 135).

<sup>104</sup> *Ibid.*, para. 130.

<sup>105</sup> *Ibid.*, para. 76. The Chamber goes on to note that support for the 'common interest role' of sponsoring states can also be found in the obligation under Art. 153(4) to 'assist the Authority'.

obligations as developed states, with the Chamber noting that ‘[t]he spread of sponsoring States “of convenience” would jeopardise uniform application of the highest standards of protection of the marine environment, the safe development of activities in the Area and protection of the common heritage of mankind’.<sup>106</sup> CHM is also used to highlight the need for keeping national measures under review ‘so as to ensure that they meet current standards and that the contractor meets its obligations effectively without detriment to the common heritage of mankind’,<sup>107</sup> and is again invoked in the Chamber’s rejection of a contractual approach to contractor liability in favour of regulatory oversight.<sup>108</sup> CHM is also crucial to the Chamber’s interpretation of how the sponsoring state is to approach the formulation of laws and regulations:

The sponsoring State does not have an absolute discretion with respect to the action it is required to take under Annex III, article 4, paragraph 4, of the Convention. In the sphere of the obligation to assist the Authority acting on behalf of mankind as a whole, while deciding what measures are reasonably appropriate, the sponsoring State must take into account, objectively, the relevant options in a manner that is reasonable, relevant and conducive to the benefit of mankind as a whole. It must act in good faith, especially when its action is likely to affect prejudicially the interests of mankind as a whole.<sup>109</sup>

Thus, CHM constitutes an essential element in the interpretive framework applied by the Chamber.<sup>110</sup> This was by no means a foregone conclusion, or even foreseeable, as evidenced by the limited reliance on CHM by environmental organizations that had some involvement in the proceedings. The written statement submitted on behalf of the International Union for the Conservation of Nature and Natural Resources (IUCN), for example, recognized the significance of common heritage and included several references to the principle, but it did little to connect it to specific legal arguments.<sup>111</sup> An *amicus curiae* brief that Greenpeace International and the Worldwide Fund for Nature sought to submit paid almost no attention to CHM, mentioning it only once in passing.<sup>112</sup> All of these organizations emphasized the environmental protections built into Part XI and the rest of UNCLOS and drawn from international

<sup>106</sup> *Ibid.*, para. 159.

<sup>107</sup> *Ibid.*, para. 222.

<sup>108</sup> *Ibid.*, para. 226. The Chamber again emphasizes the sponsoring state’s responsibility to contribution to the implementation of CHM and states: ‘Contractual arrangements alone cannot satisfy this obligation’.

<sup>109</sup> *Ibid.*, para. 230.

<sup>110</sup> See French, ‘From the Depths: Rich Pickings of Principles of Sustainable Development and General International Law on the Ocean Floor – the Seabed Disputes Chamber’s 2011 Advisory Opinion’, 26 *International Journal of Marine and Coastal Law* (2011) 525, at 567; Jaeckel, *supra* note 38, at 109.

<sup>111</sup> International Union on the Conservation of Nature (IUCN), Commission on Environmental Law, Oceans, Coastal and Coral Reefs Specialist Group, *Written Statement*, 19 August 2010, available at [www.itlos.org/fileadmin/itlos/documents/cases/case\\_no\\_17/StatementIUCN.pdf](http://www.itlos.org/fileadmin/itlos/documents/cases/case_no_17/StatementIUCN.pdf). The recognition of CHM’s importance is discussed at para. 114. The one section that engages with CHM in more depth is the discussion of liability in para. 24.

<sup>112</sup> *Memorial Filed on Behalf of Stichting Greenpeace Council (Greenpeace International) and the World Wide Fund for Nature*, 13 January 2010, at 21, available at [www.itlos.org/fileadmin/itlos/documents/cases/case\\_no\\_17/Statement\\_Greenpeace\\_WWF.pdf](http://www.itlos.org/fileadmin/itlos/documents/cases/case_no_17/Statement_Greenpeace_WWF.pdf). The petition was unsuccessful; see the discussion in *Responsibilities and Obligations*, *supra* note 102, paras 13–14.

environmental law more generally. This could quite easily have been the approach taken by the Chamber, which chose instead to interpret CHM as integrally connected to the environmental protections embedded in the deep seabed regime. In so doing, it not only reinforced the normative significance of CHM<sup>113</sup> but, arguably, also opened the door to its further integration into the ISA's ongoing work on the Mining Code.

### *E CHM and the Environment in the Current Work of the ISA*

In recent years, the ISA's focus has shifted to developing a regulatory framework for exploitation. The process appears to have gotten formally underway with a stakeholder survey in 2014, through which the ISA sought to obtain input from members of the Authority and 'current and future stakeholders' on the content of the exploitation regulations.<sup>114</sup> In the background section of the survey, the linkage between CHM and environmental protection was stated explicitly:

The Convention provides that the Area and its resources are the Common Heritage of Mankind and that activities in the Area are carried out for the benefit of mankind as a whole. This will be achieved through the equitable sharing of the benefits realized from activities in the Area. The Common Heritage of Mankind principle also embodies the protection of the marine environment and the conducting of scientific research for the benefit of the international community.<sup>115</sup>

Successive drafts of the exploitation regulations were released in July 2016,<sup>116</sup> August 2017<sup>117</sup> and July 2018.<sup>118</sup> While references to environmental issues abound in all versions of the regulations, CHM makes only limited appearances. It appears only once in the July 2016 draft, as part of the preamble, which reiterates the common heritage status of the deep seabed and its resources and indicates that 'exploration and exploitation ... shall be carried out for the benefit of mankind as a whole, on whose behalf the International Seabed Authority acts'.<sup>119</sup> In the August 2017 draft, the preambular language is modified only slightly,<sup>120</sup> but CHM also appears in a draft annex on standard clauses for exploitation contracts, which provides that a contractor shall, *inter alia*, '[m]anage the Resources in a way that promotes further investment and

<sup>113</sup> French, *supra* note 110, notes that while CHM 'may have become a rather historic and iconic idea in international politics ... the Chamber has done much to present it as very much an active principle of international law, as well as being a fundamental, if a discrete, element of the promotion of global sustainable development'.

<sup>114</sup> ISA, *Developing a Regulatory Framework for Mineral Exploitation in the Area, Stakeholder Engagement*, February 2014, at 3, available at <https://ran-s3.s3.amazonaws.com/isa.org/jm/s3fs-public/isa-ssurvey.pdf>.

<sup>115</sup> *Ibid.*, at 4.

<sup>116</sup> ISA, *Developing a Regulatory Framework for the Area, Report to Members of the Authority and All Stakeholders (2016 Draft)*, July 2016, available at [www.isa.org/jm/files/documents/EN/Regs/DraftExpl/Draft\\_ExplReg\\_SCT.pdf](http://www.isa.org/jm/files/documents/EN/Regs/DraftExpl/Draft_ExplReg_SCT.pdf).

<sup>117</sup> ISA, *Draft Regulations on Exploitation of Mineral Resources in the Area (2017 Draft)*, 8 August 2017, available [www.isa.org/jm/files/documents/EN/Regs/DraftExpl/ISBA23-LTC-CRP3-Rev.pdf](http://www.isa.org/jm/files/documents/EN/Regs/DraftExpl/ISBA23-LTC-CRP3-Rev.pdf).

<sup>118</sup> ISA, *Draft Regulations on Exploitation of Mineral Resources in the Area (2018 Draft)*, 9 July 2018, available at [https://ran-s3.s3.amazonaws.com/isa.org/jm/s3fs-public/files/documents/isba24\\_itcwp1rev1-en\\_0.pdf](https://ran-s3.s3.amazonaws.com/isa.org/jm/s3fs-public/files/documents/isba24_itcwp1rev1-en_0.pdf).

<sup>119</sup> *2016 Draft*, *supra* note 116, at 13.

<sup>120</sup> *2017 Draft*, *supra* note 117, at 2.

contributes to the long term development of the common heritage of mankind'.<sup>121</sup> Despite the limited mention of CHM in the document, the fact that it is both posited as the conceptual starting point for the Exploitation Regulations and given the concrete role of informing a contractor's responsibility could be said to indicate its ongoing role in the ISA regulatory regime. Even so, according to the *Earth Negotiations Bulletin*, a major focus of participants in the March 2018 meeting of the ISA Council was on 'the need to strengthen the draft regulations with regard to the implementation of the common heritage of mankind and the protection of the marine environment'.<sup>122</sup>

The July 2018 draft again contains only two references to CHM, but the principle is given considerably greater weight. Rather than simply stating that the deep seabed and its resources are CHM, the preamble 'reaffirm[s] the fundamental importance of the principle that the Area and its Resources are the common heritage of mankind'.<sup>123</sup> The new draft now includes a list of 'fundamental principles' in Draft Regulation 2; these begin with the recognition 'that the rights in the Resources of the Area are vested in mankind as a whole, on whose behalf the Authority shall act'.<sup>124</sup> while an explicit reference to CHM comes in the second to last principle, to '[e]nsure the effective management and regulation of the Area and its Resources in a way that promotes the development of the common heritage of mankind'.<sup>125</sup> It is worth noting, however, that the phrase 'development of the common heritage of mankind' could be said to prioritize exploitation, given how development is ordinarily understood and interpreted. This interpretation is supported by the similarity in phrasing to the provision on contractor responsibilities in the August 2017 draft.<sup>126</sup>

The process of developing the exploitation regulations has involved considerable exchange of views between the ISA and various stakeholders. This is in part a reflection of an increasing emphasis on participation and transparency. These issues have been contentious with regard to ISA proceedings from the outset. The LTC originally planned to meet in private, but it came under pressure very early on in its work to open its meetings up regarding the preparation of the Mining Code in order to promote transparency and enhance acceptance of the code.<sup>127</sup> The LTC itself resisted these calls, not only because of concerns about confidentiality of commercial data, but also, according to Wood, because of its view that the presence of observers 'would alter the nature of the expert discussions, politicizing them'.<sup>128</sup> Some meetings regarding the Mining Code were opened to a limited number of observers beginning in August 1997, but this appears to have been done grudgingly,<sup>129</sup> and concerns continued to be

<sup>121</sup> *Ibid.*, Draft Annex X, s. 3.3(k).

<sup>122</sup> 'Summary of the Twenty-Fourth Annual Session of the International Seabed Authority (First Part)'. *Earth Negotiations Bulletin*, 5–9 March 2018, at 1, available at <http://enb.iisd.org/download/pdf/enb25157e.pdf>.

<sup>123</sup> *2018 Draft*, *supra* note 118, preamble.

<sup>124</sup> *Ibid.*, Draft Regulation 2(1).

<sup>125</sup> *Ibid.*, Draft Regulation 2(7).

<sup>126</sup> See text accompanying note 121 above.

<sup>127</sup> Wood, *supra* note 59, at 219.

<sup>128</sup> *Ibid.*, at 220.

<sup>129</sup> Wood describes this as having been done 'at the insistence of certain countries invoking the need for "transparency" ... and against the unanimous view in the Commission'. *Ibid.*, at 219. The understanding was that there would generally be no more than 15 observers, that their participation would be arranged on a 'first come, first served' basis, and that they would not participate in discussions.

raised regarding 'excessive confidentiality' and its incompatibility with common heritage in relation to specific issues such as prospecting.<sup>130</sup>

These types of concerns have only grown more pronounced over the years, particularly in relation to environmental concerns. As ISA Council President Olav Myklebust recently described the implications of this shift, '[t]he world is watching and we have to deliver'.<sup>131</sup> In a January 2017 discussion document regarding the environmental aspects of the draft Exploitation Regulations, the ISA acknowledged the procedural implications of CHM when it stated that 'the draft demands a full and fair discussion in the interest of the common heritage and that of sustainable development'.<sup>132</sup> Shortly thereafter, the committee conducting the first periodic review of the ISA released its final report,<sup>133</sup> in which, according to the *Earth Negotiations Bulletin*, transparency was a 'leitmotif'.<sup>134</sup> The Review Committee acknowledged the significance of confidentiality for the LTC, but noted that it 'occupies a central place within the structure of the Authority that engenders particular interest in its work, not only by member States, but by all stakeholders',<sup>135</sup> and it recommended that the LTC 'should be encouraged to hold more open meetings in order to allow for greater transparency in its work'.<sup>136</sup> The Review Committee emphasized, in particular, that environmental data and information 'are not to be considered confidential',<sup>137</sup> and also went on to recommend that non-confidential information 'should be shared widely and should be readily accessible'.<sup>138</sup>

The increased attention to transparency and participation is consistent with the views expressed by scholars who have emphasized the implications of CHM's focus on the interests of 'mankind' or humanity.<sup>139</sup> Finding support in the UNCLOS preamble's reference to the objective of contributing to 'the realisation of a just and equitable international economic order which takes into account the interests and needs of mankind as a whole', for example, Marie Bourrel, Torsten Thiele and Duncan Currie argue that '[t]he full and effective implementation of the CHM principle by the

<sup>130</sup> *Ibid.*, at 233.

<sup>131</sup> 'Summary of the Twenty-Fourth Annual Session', *supra* note 122, at 12.

<sup>132</sup> ISA, *Discussion Paper on the Development and Drafting of Regulations on Exploitation for Mineral Resources in the Area (Environmental Matters)*, January 2017, at 5, available at [www.isa.org.jm/files/documents/EN/Regs/DraftExpl/DP-EnvRegsDraft25117.pdf](http://www.isa.org.jm/files/documents/EN/Regs/DraftExpl/DP-EnvRegsDraft25117.pdf).

<sup>133</sup> Review Committee, *Final Report on the Periodic Review of the International Seabed Authority Pursuant to Article 154 of the United Nations Convention on the Law of the Sea*, Doc. ISBA/23/A3, 8 February 2017, Annex. The periodic review was required under Art. 154 of UNCLOS, *supra* note 6.

<sup>134</sup> 'Summary of the Twenty-Third Annual Session of the International Seabed Authority', *Earth Negotiations Bulletin*, 8–18 August 2017, at 16, available at <http://enb.iisd.org/download/pdf/enb25151e.pdf>.

<sup>135</sup> Review Committee, *supra* note 133, at 10.

<sup>136</sup> *Ibid.*, at 11.

<sup>137</sup> *Ibid.*

<sup>138</sup> *Ibid.*, Recommendation 18, at 12. The committee's final recommendation also addressed the issue of transparency in relation to finance provisions (*ibid.*).

<sup>139</sup> See, e.g., Bourrel, Thiele and Currie, 'The Common Heritage of Mankind as a Means to Assess and Advance Equity in Deep Sea Mining', 95 *Marine Policy* (2018) 311; see also Jaeckel, Gjerde and Ardron, 'Conserving the Common Heritage of Mankind: Options for the Deep-Seabed Mining Regime', 78 *Marine Policy* (2017) 150, at 153.

ISA' requires, *inter alia*, 'the recognition of the pluralistic interests attached to "mankind", which can go beyond those defended by the classic stakeholders' as well as 'a decision-making process through which "mankind" can be effectively represented'.<sup>140</sup> Helmut Tuerk, who served as a judge of ITLOS from 2005 to 2014 and was the chair of the Review Committee, recently noted that the ISA has 'arrived at a critical juncture of its existence. Its current work is characterized by intensified stakeholder participation as well as a steadily increasing number of non-governmental observers at its annual sessions, which is also a clear indication of renewed and growing interest in deep seabed mineral exploitation.'<sup>141</sup>

#### 4 CHM as a Basis for Advocacy in Current Debates

Given the increased attention to stakeholder participation, it is important to consider whether and how CHM is being used by stakeholders. The ongoing process of developing the exploitation regulations provides a useful focal point; for the purposes of this discussion, the focus will be further narrowed to the stakeholder responses to the August 2017 draft.<sup>142</sup> Seventeen individual ISA member states submitted comments, along with a submission from Algeria on behalf of the African Group, which numbers 47 member states.<sup>143</sup> Among the other submissions, there were comments from two other governmental bodies, six entities characterized by the ISA as 'academic/scientific', twelve contractors, three e-non-governmental organizations (e-NGOs) and three entities labelled 'industry/other association'.<sup>144</sup> A significant number of stakeholders did not mention CHM at all; this was the case for all of the 'industry/other association' entities, most of the contractors and academic/scientific bodies and eight of the individual member states. Among the stakeholders that did mention CHM, both the extent of the discussion and the ways in which the principle was framed varied quite significantly.

The individual member states that dealt with CHM, in addition to highlighting its general significance, tended to focus on one or more of three common themes. One was that the common heritage status of the Area required transparency and widespread participation in the process of regulatory development;<sup>145</sup> another was the

<sup>140</sup> Bourrel, Thiele and Currie, *supra* note 139, at 313. Similarly, Ardron has argued that 'the unique communal legal status of the seabed beyond national jurisdiction would appear to require decision-making with more than the usual level of transparency'. Ardron, *supra* note 78, at 10.

<sup>141</sup> Tuerk, *supra* note 35, at 281.

<sup>142</sup> The ISA received a limited number of stakeholder submissions by December 2017, the deadline that had been set, and made these publicly available through *Submissions to International Seabed Authority's/Draft Regulations on Exploitation of Mineral Resources of the Area*, available at [www.isa.org.jm/files/documents/EN/Regs/2017/List-1.pdf](http://www.isa.org.jm/files/documents/EN/Regs/2017/List-1.pdf). All subsequent references in this section refer to stakeholder submissions linked to in this document.

<sup>143</sup> The membership of the African Group and other regional groups is provided online at [www.isa.org.jm/regional-groups](http://www.isa.org.jm/regional-groups).

<sup>144</sup> There were also comments from one international organization (the International Maritime Organization), three 'other users of the marine environment' and six private persons.

<sup>145</sup> See the submissions of New Zealand, the Netherlands and Singapore.

connection between CHM and benefit sharing or royalties.<sup>146</sup> The third was the linkage between CHM and environmental protection.<sup>147</sup> Mexico noted, for example, that given the common heritage status, 'every entity that takes advantage of the Area and its resources must assure its protection and conservation'.<sup>148</sup>

In contrast, CHM plays a much more extensive role in the African Group's submission. In its introductory comments, the group notes that its responses are 'guided by [UNCLOS and the IA], especially the core principle of the Common Heritage of Mankind'.<sup>149</sup> It goes on to emphasize that CHM 'is the overarching basis of the regulations, and should therefore be more clearly reflected in the body/operative part of the draft regulations'.<sup>150</sup> Like other stakeholders, the African Group uses CHM to ground a demand for 'the highest standards of transparency',<sup>151</sup> but goes further to connect the need for widespread consultation to 'the imperative that Activities in the Area only be carried out where they benefit humankind as a whole'.<sup>152</sup> The need to demonstrate benefits to humankind as a whole is also mentioned as 'an essential criterion for contract approval'.<sup>153</sup> The fact that a broad interpretation of those benefits is contemplated is supported by a 'takeaway point' to the effect that, in order to understand 'the assets involved in the common heritage', there should be a 'focus not only [on] the important mineral resources, but also protecting the environment and sharing scientific knowledge'.<sup>154</sup> The submission ends along with the same lines as it began, with the African Group expressing the hope that its submission will 'assist the LTC and the Secretariat to further develop the Exploitation Regulations to highlight more clearly the central place of the Common Heritage of Mankind principle, as enunciated in UNCLOS and the 1994 Agreement, in the regime of the Area, including exploitation activities'.<sup>155</sup>

Of the six academic/scientific entities submitting comments, only the Deep Ocean Stewardship Initiative (DOSI) Minerals Working Group and the Institute for Advanced Sustainability Studies (IASS) addressed CHM. Like the African Group, DOSI invokes a broad interpretation of the principle, arguing that the ISA needs to do more to explain how the proposed regulatory framework will promote CHM:

The Regulations should specify how the ISA intends to give effect to the common heritage of mankind principle, including its social, financial, and environmental dimensions. 'Common Heritage of Mankind' is mentioned in the Preamble and appears once in the regulations, whereby it is stipulated that the Contractor shall: 'Manage the Resources in a way that promotes

<sup>146</sup> See the submissions of China, Tonga and the United Kingdom.

<sup>147</sup> See the submissions of Germany, South Africa and Mexico.

<sup>148</sup> Submission of Mexico, at 2.

<sup>149</sup> Permanent Mission of Algeria to the ISA, *African Group's Comments and Inputs on the Draft Regulations on Exploitation of Mineral Resources in the Area of the International Seabed Authority*, 18 December 2017, at 1, available at [www.isa.org.jm/files/documents/EN/Regs/2017/MS/Algeria.pdf](http://www.isa.org.jm/files/documents/EN/Regs/2017/MS/Algeria.pdf).

<sup>150</sup> *Ibid.*, at 2.

<sup>151</sup> *Ibid.*, at 10.

<sup>152</sup> *Ibid.*, at 11.

<sup>153</sup> *Ibid.*, at 16.

<sup>154</sup> *Ibid.*, at 13.

<sup>155</sup> *Ibid.*, at 21.

further investment and contributes to the long term development of the common heritage of mankind'. ... However, as outlined [in] UNCLOS the principle is much broader, and invokes governance requirements beyond normal business investment, particularly concerning fair and equitable benefit-sharing, and protection and preservation of the marine environment.<sup>156</sup>

DOSI had raised the concern about the minimal references to CHM in its commentary on a previous working draft of the regulations, emphasizing 'the unique legal character of the Area and its resources', and recommending 'that the regulations reaffirm its centrality through its inclusion in more clauses'.<sup>157</sup> In the DOSI commentary on the August 2017 draft regulations, however, there is a more explicit engagement with the breadth of CHM; the reference to 'governance requirements beyond normal business investment' is particularly striking. Again, like the African Group, DOSI mentions CHM specifically in relation to the understanding of benefits and participation.<sup>158</sup> With regard to the latter, it takes a somewhat different approach when it alludes to the obligations of sponsoring states: 'Since "the Area" is the common heritage of mankind, the Sponsoring State should seek public comment prior to application for mineral exploitation. We are embarking on a major new initiative; wide participation can bring wisdom and much needed knowledge.'<sup>159</sup>

The IASS uses CHM in a distinctive fashion. First and foremost, it is used to support a critique of the ISA's approach to the development of the regulations themselves. The IASS begins by expressing concern that Draft Regulation 1(5), which provides for the possibility of the Regulations being supplemented by further 'rules, regulations and procedures', actually contemplates regulatory delay:

[I]t seems that the discussion on the environmental framework conditions for deep seabed mining, in particular its regulatory control and enforcement, will be postponed until after the regulations defining the conditions for contracts are adopted. ... In our understanding, only a comprehensive understanding of the environmental implications of the activities, the ecological boundary conditions for the acceptance of Plans of Work and the regulatory oversight and implementation mechanisms can ensure the responsible and accountable use of the Common Heritage of Mankind.<sup>160</sup>

<sup>156</sup> Deep Ocean Stewardship Initiative (DOSI), *Commentary on 'Draft Regulations on Mineral Exploitation in the Area'*, 12 August 2017, at 3, available at [www.isa.org.jm/files/documents/EN/Regs/2017/A-Sc/DOSI.pdf](http://www.isa.org.jm/files/documents/EN/Regs/2017/A-Sc/DOSI.pdf). The Draft Regulation referred to is 3(3)(k).

<sup>157</sup> DOSI, *DOSI Response to ISA Draft Exploitation Regulations (ISBA/Cons/2016/1)*, 31 October 2016, at 2, available at <http://dosi-project.org/wp-content/uploads/2015/08/DOSI-Comment-on-ISA-Draft-Exploitation-Regulations-Oct-31-2016.pdf>. DOSI suggested in particular that the Preamble 'should stress the need to adhere to the common heritage principle, including its focus on inter- and intra-generational equity, the sharing of benefits, and environmental protection'.

<sup>158</sup> Specifically, DOSI is critical of the draft Environmental Impact Statement Template found in Annex V, which indicates that the section on Project Viability 'should provide information on the viability of the proposed development and provide economic context, why the project is needed, and include a description of benefits to the sponsoring State, etc'. The Working Group states: 'There is need to elaborate on the benefits of the proposed development beyond simply an "etc."' The provision should include a description of benefits to the sponsoring State, the Authority, developing countries and humankind as a whole.' DOSI, *supra* note 156, at 15.

<sup>159</sup> *Ibid.*, at 7.

<sup>160</sup> Institute for Advanced Sustainability Studies (IASS), *Comments on Draft Regulations on Exploitation of Mineral Resources in the Area*, 19 December 2017, at 2–3, available at [www.isa.org.jm/files/documents/EN/Regs/2017/A-Sc/IASS.pdf](http://www.isa.org.jm/files/documents/EN/Regs/2017/A-Sc/IASS.pdf).



The IASS goes on to raise questions as to whether the ISA's current working mode can actually lead to such a comprehensive understanding, noting that 'the principle of the Common Heritage of Mankind demands intra- and intergenerational equity, and entails a particular respect for transparency, accountability and environmental sustainability'.<sup>161</sup> It then makes specific proposals for 'more participatory work forms' that would better enable a comprehensive framework to be developed.<sup>162</sup>

In contrast to the nuanced use of CHM by DOSI and the IASS, the three E-NGOs that submitted comments on the August 2017 draft used it only sparingly. Both the Code Project and the Deep Seas Conservation Coalition (DSCC) used it to support the need for transparency and widespread participation,<sup>163</sup> while the DSCC also mentions CHM in its general introductory comments, noting that 'any mining activities permitted ... must respect the common heritage of humankind and ensure real benefits to society as a whole'.<sup>164</sup> Seas at Risk makes the least use of the principle, mentioning the CHM status of the Area only in passing in a submission that is highly critical of the ISA, and argues strongly against deep seabed mining.<sup>165</sup>

## 5 Assessing CHM as a Limit to the Exploitation of the Commons

This survey of the trajectory of CHM in the context of the deep seabed regime over the last 50 years has shown that environmental limits have been central to the understanding of the principle from the outset. CHM's environmental aspects were a key theme in early debates, have constituted a central conceptual pillar of the work of the ISA, have helped provide the foundation for a progressive interpretation of the deep seabed regime by the ITLOS Seabed Disputes Chamber, and are being utilized creatively as a basis for advocacy with regard to deep seabed mining.

This may seem to be a wholly positive assessment. However, it is important to acknowledge that CHM as operationalized in the UNCLOS deep seabed regime largely sidesteps one question: rather than pursuing 'better' exploitation, should we be

<sup>161</sup> *Ibid.*, at 4.

<sup>162</sup> *Ibid.* Elsewhere in the submission, the IASS expresses a preference for dispute settlement through the Seabed Disputes Chamber, asserting that 'because the members of the SDC must reflect equitable geographic representation, the SDC is a more appropriate forum for decisions concerning any matter related to the common heritage of mankind as it is more likely to reflect the interests of all mankind' (at 14).

<sup>163</sup> Code Project, Response to Questions Posed by the ISA Secretary-General Regarding Draft Exploitation Regulations – August 2017, 21 November 2017, at 11, <https://ran-s3.s3.amazonaws.com/isa.org.jm/s3fs-public/documents/EN/Regs/2017/ENgo/Pew.pdf>; Deep Sea Conservation Coalition (DSCC), DSCC Submission on the International Seabed Authority Draft Regulations on Exploitation of Mineral Resources in the Area, 20 December 2017, at 9, <https://ran-s3.s3.amazonaws.com/isa.org.jm/s3fs-public/documents/EN/Regs/2017/ENgo/DSCC.pdf>.

<sup>164</sup> DSCC, *supra* note 163, at 2.

<sup>165</sup> Seas at Risk, Submission to the Consultation on the International Seabed Authority Draft Regulations on Exploitation of Mineral Resources in the Area, 20 December 2017, at 2, <https://ran-s3.s3.amazonaws.com/isa.org.jm/s3fs-public/documents/EN/Regs/2017/ENgo/SeasAtRisk.pdf>.

exploiting at all? While it is impossible to deny that the ISA's contemporary understanding of its mandate to act in the interests of humankind as a whole recognizes the critical importance of environmental considerations, the imperative of development remains very much in play. In 2017, ISA Secretary-General Michael Lodge openly acknowledged the tension that creates:

Perhaps the primary concern for the Authority as a regulator is how to balance the societal benefits of deep seabed mining, including access to essential minerals, the non-displacement of communities, extensive deep sea research and technological development, against the need to protect the marine environment. Of course, the fact that no part of the Area may be exploited without permission from the Authority ensures that the environmental impacts of deep seabed mining will be monitored and controlled by an international body. This in itself reflects a precautionary approach to seabed development. It is evident, nevertheless, that mining will impact the marine environment to some extent, especially in the immediate vicinity of mining operations.<sup>166</sup>

The secretary-general nonetheless offered a positive evaluation of the ability of the regime to strike the appropriate balance, asserting:

Although it has taken more than 50 years of multilateral effort to begin to realize the promise of the 'common heritage of mankind' envisioned by Ambassador Pardo and enshrined in UNCLOS, the prospects for sustainable exploitation of seabed mineral resources are better now than at almost any other time in the last 30 years.<sup>167</sup>

The tensions reflected in the above passages may be unavoidable when an institution has been entrusted with the specific task of regulating resource extraction – and is in fact intended to participate in extraction activities at some point in the future – but has also been given the broad responsibility of acting, as Rüdiger Wolfrum has put it, 'as a trustee for the world community'.<sup>168</sup> Nevertheless, the emphasis on exploitation is doubtless deeply unsatisfying for many who are committed to protecting the global commons.<sup>169</sup>

Given these limitations, it is tempting to turn to alternative visions, and there would certainly be no lack of potential sources. Theorists of the commons have sought to re-imagine patterns of interaction at a fundamental level, appealing to our best, rather than our worst, selves in fashioning just and inclusive systems of governance.<sup>170</sup> Similar calls have come from civil society – for example, the Reclaim the Commons Manifesto, adopted by the World Social Forum in 2009, encourages citizens and organizations to 'demonstrate how commons-based management – participatory, collaborative and transparent – offers the best hope for building a world that is sustainable,

<sup>166</sup> Lodge, 'The International Seabed Authority and Deep Seabed Mining', 54(1–2) *UN Chronicle* (2017) 44, at 46.

<sup>167</sup> *Ibid.*

<sup>168</sup> Wolfrum, *supra* note 1, at 316.

<sup>169</sup> See, in particular, the concerns expressed by Feichtner, 'Sharing the Riches of the Sea: The Redistributive and Fiscal Dimensions of Deep Seabed Exploitation', in this issue, 601, and Ranganathan, 'Ocean Floor Grab: International Law and the Making of an Extractive Imaginary', in this issue, 573.

<sup>170</sup> See, e.g., B.H. Weston and D. Bollier, *Green Governance: Ecological Survival, Human Rights and the Law of the Commons* (2013).

fair and life-giving'.<sup>171</sup> Principles relating to distributive justice, environmental justice and human rights could all play a role in informing debates around the global commons. Similarly, environmental ethics that recognize the intrinsic value of ecosystems and non-human life forms could (and, I would argue, should) be incorporated into new models.

But how to bridge the gulf between the realities of existing power structures and the tantalizing possibilities offered by visionary ideals? It may be that, despite its limitations, CHM still offers the best hope. There are, after all, significant advantages to building on an existing normative framework. In an analysis of global commons debates and international distributive justice, Roberts and Sutch point out:

Highlighting the fairness discourse that is already on the table as at least part of the basis for thinking about distributive justice both draws on the relative success of the language of CHM and draws attention to the moral accessibility of the ideas. If you are critiquing the current state of the world, then you have good reason to build on relevant norms and values that are already present in international law as at least a starting point for discussion, an 'anchor in reality' to offset criticisms of utopianism and irrelevance.<sup>172</sup>

There are also good reasons to have a bit of historical humility, and to pay serious attention to the delicate balance struck by those in previous generations tasked with translating new visions regarding the commons into reality. It is worth recalling that CHM already represents a negotiated balance between pragmatism and idealism, both in how it was originally envisaged and how it has come to be operationalized. In setting out his initial proposal for an international body to oversee deep seabed activities, for example, Ambassador Pardo expressed Malta's view that the United Nations should not itself be that body, pointing out the unlikelihood that states with greater technological capacity 'would agree to an international regime if it were administered by a body where small countries, such as mine, had the same voting power as the United States or the Soviet Union'.<sup>173</sup> While Pardo has been criticized for this aspect of

<sup>171</sup> World Social Forum, *Reclaim the Commons*, available at <https://www.kosmosjournal.org/article/reclaim-the-commons-manifesto/>.

<sup>172</sup> Roberts and Sutch, 'The Global Commons and International Distributive Justice', in C. Boisen and M.C. Murray, *Distributive Justice Debates in Political and Social Thought* (2016) 230, at 241. Roberts and Sutch argue that we are presently witnessing the second phase in what they refer to as 'global commons debates', the first having taken place 'in the cold war and in the context of post-colonial arguments about distributive justice' (at 231). In their view, distributive justice remains central to how we deal with the global commons, and global commons debates can in turn contribute to a richer and less abstract understanding of international distributive justice (at 240). I would argue that Roberts and Sutch's use of CHM is not merely strategic, but also indicates that some of the innovative work being done on the commons draws inspiration from CHM and its underlying ethos, just as contemporary interpretations of common heritage have drawn from and been enriched by developments in other areas.

<sup>173</sup> UNGA, *supra* note 12, para. 7. Speaking at the annual meeting of the American Society of International Law the following spring, Pardo was even more frank in his assessment of the compromise that might be required: 'Clearly an authority with the wide powers envisaged would not be acceptable to the major maritime countries, unless there was assurance that it would not act against their vital interests. We believe that all states should enjoy the right to have a voice in the direction of the authority. *We also believe that the realities of advanced technology, financial capability, and of power require to be given due weight.* ... My country certainly would not oppose the concept that a small number of maritime states having

his proposal,<sup>174</sup> it demonstrates that pragmatic considerations were certainly within his contemplation. This continues to be reflected in how CHM is understood to this day, both in the ongoing operations of the ISA and in the advocacy work that seeks to ensure that the deep seabed regime does not fall too short of its aspirations.

Furthermore, while it is not difficult to identify the shortcomings of CHM, it may be that our energies would be better spent learning from the experience in trying to make it a reality. It is worth bearing in mind that the prioritization of resource exploitation is not limited to the deep seabed; it underlies domestic legal systems as well. In fact, many aspects of CHM, if incorporated into domestic law, could result in a dramatically different vision of the social good, not only because it would provide or reinforce the ideal of a collective interest in public resources, but also because of its commitment to intergenerational equity and emphasis on the fair distribution of benefits.<sup>175</sup>

Finally, in considering the future of CHM, there is room for hope. As embedded in the legal regime of the deep seabed, CHM reflected the spirit and tensions of the times during which it was negotiated.<sup>176</sup> However, it was crafted as, and has in fact proven to be, a concept that is capable of being given an evolutionary interpretation. Jaeckel has argued that ‘the ISA’s law-making powers enable the legal regime to adapt to changes in international law and in social attitudes towards the parameters of mining this common heritage of mankind’.<sup>177</sup> I would go further and suggest that CHM is evolving and changing in part because of the multiplicity of interpretations in a variety of contexts. It is also worth bearing in mind that CHM was impacted by a more profound shift when the UNCLOS deep seabed regime was reformulated in response to the embrace of market-based approaches. In the years to come, there might be a willingness to again readjust and reduce the emphasis on exploitation based on an enhanced global awareness and appreciation of environmental and ethical concerns, and I would argue that such a shift would in fact be easier to reconcile with CHM’s underlying values.

CHM is often relegated to ‘the ether of ideas whose time may never come’.<sup>178</sup> Such a characterization is not only overly pessimistic, but also inaccurate. CHM has proven

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outstanding technological and financial capability should receive majority representation on the board, as long as it is also accepted that all states, whether landlocked or coastal, should have a voice in it.’ Address by Ambassador Arvid Pardo, Permanent Representative of Malta to the United Nations’, 62 *American Society of International Law Proceedings* (1968) 216, at 228 (emphasis added).

<sup>174</sup> Ranganathan notes that this aspect of Pardo’s proposal could be seen as antithetical to Third World support for the one state-one vote system prevailing in the UNGA (Ranganathan, *supra* note 1, at 710), and she cites this aspect of his proposal as one of its ‘imperial and illiberal dimensions’ (at 715).

<sup>175</sup> Similarly, Dire Tladi has argued that a shift away from CHM in the context of biodiversity in areas beyond national jurisdiction can result in a reduced role for intergenerational equity and solidarity. See Tladi, ‘The Common Heritage of Mankind and the Proposed Treaty on Biodiversity in Areas beyond National Jurisdiction: The Choice between Pragmatism and Sustainability’, 25 *Yearbook of International Environmental Law* (2015) 113.

<sup>176</sup> See Wolfrum, *supra* note 1, at 312.

<sup>177</sup> Jaeckel, *supra* note 38, at 148.

<sup>178</sup> Mickelson, *supra* note 11, at 638.

to be a vibrant and important part of international discourse on the global commons, and it can only be hoped that a renewed interest in the principle within the broader international law community will not only allow us to pay homage to the visionaries of the past but also help to inspire the hard work that will be required to build a more just and sustainable future.