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# International Law and Economic Exploitation in the Global Commons: Introduction

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In search of alternative political economies – less exploitative, less ecologically destructive – scholars and activists have turned to the commons and to commoning in recent years.<sup>1</sup> For international lawyers, the term commons brings to mind the domains designated as ‘global commons’ and, among them, the oceans and outer space. Yet current initiatives that seek to harness the economic potential of the oceans in the name of ‘blue growth’,<sup>2</sup> projects seeking to commercialize outer space<sup>3</sup> and, *a fortiori*, proposals to ‘colonize’ outer space<sup>4</sup> and the oceans<sup>5</sup> as a solution to conflict and environmental destruction stand in stark contrast with visions of a commons economy built on solidarity.

The growing interest of states and corporations in the resource potential of both domains – the oceans and outer space – at a time when planetary limitations, mass extinctions and impending climate catastrophe dominate the news provide the context for this symposium. We are motivated by several questions: How does international law reconcile the designation of the oceans and outer space as humankind’s common heritage, on the one hand, with simultaneously laying the ground for value extraction by individual private enterprises, on the other? Or are the two (inextricably) connected?

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<sup>1</sup> See only D. Bollier, *Think Like a Commoner: A Short Introduction to the Life of the Commons* (2014).

<sup>2</sup> See, e.g., UN Economic Commission for Africa, *Africa’s Blue Economy: A Policy Handbook* (2016); European Commission, *Report on the Blue Growth Strategy: Towards More Sustainable Growth and Jobs in the Blue Economy*, Doc. SWD (2017) final 128, 31 March 2017.

<sup>3</sup> See, e.g., Goldman Sachs, *Space: The Next Investment Frontier*, 4 April 2017; see also Feichtner, ‘Mining for Humanity in the Deep Sea and Outer Space: The Role of Small States in the Extraterritorial Expansion of Extraction’, 32 *Leiden Journal of International Law (LJIL)* 255.

<sup>4</sup> Musk, ‘Making Humans a Multi-Planetary Species’, 5 *New Space* (2017) 46.

<sup>5</sup> Seasteading Institute, *Reimagining Civilization with Floating Cities* (undated), available at [www.seasteading.org/](http://www.seasteading.org/); see also Ranganathan, ‘Seasteads, Landgrabs and International Law’, Editorial, 32 *LJIL* (2019) 205.

How can we understand talk of a ‘US Space Force’<sup>6</sup> in light of international law’s prohibitions on the militarization of outer space? How, indeed, do military imaginations of sea and space interconnect with extractive imaginations and imaginations of these domains as global commons? To what extent is it within the remit of international law to allocate rights in these spaces? Are there any limits that international law imposes on its own jurisdictional reach or on the expansion of extraction?

Preparations for large-scale mining of the deep ocean floor are already underway. The International Seabed Authority (ISA) has granted 29 licenses for exploration of potential mining sites in the Atlantic, Indian and Pacific Oceans. It is currently drafting regulations that will enable corporations to move from the phase of exploration to that of exploitation – commercial recovery – of seabed minerals, thus completing the ‘Mining Code’ that it first began to formulate 20 years ago and worked on more intensively in the past decade.<sup>7</sup> States and corporations have called upon the ISA to continue this work<sup>8</sup> and complete it by 2020.<sup>9</sup> The European Union (EU) Commission noted in 2012 that the ‘[g]lobal annual turnover of marine mineral mining can be expected to grow ... up to €10 billion by 2030’;<sup>10</sup> a Japanese corporation has unveiled a plan for building marine human habitations by the same year.<sup>11</sup> While the field is led by high-income states, as well as China, India and Russia, small island states like Nauru are also keen to sponsor seabed mining operations by private companies, hoping this will generate public revenue and provide a boost to their economies.<sup>12</sup> The industry is organizing regular meetings of investors and technology entrepreneurs and lobbying for a quick adoption of regulations that will foster a lucrative rate of return on their investments,<sup>13</sup> even as marine scientists and environmental groups express grave concerns about the impact that mining may have on the marine environment and beyond and urge for a more gradual approach.

Alongside seabed mining, extra-terrestrial mining too has become the fulcrum of an expanding legal and financial architecture. To prepare the legal ground for a

<sup>6</sup> ‘Trump Space Force: US to Set Up Sixth Military Branch’, *BBC News*, 16 June 2018, [www.bbc.co.uk/news/world-us-canada-44527672](http://www.bbc.co.uk/news/world-us-canada-44527672).

<sup>7</sup> The International Seabed Authority (ISA) first adopted regulations on exploration of polymetallic nodules in 2000; since 2010, it has also adopted exploration regulations with respect to two other types of deep sea ores, revised its regulations on polymetallic nodules and adopted several recommendations. These are all available at [www.isa.org.jm/mining-code](http://www.isa.org.jm/mining-code).

<sup>8</sup> See, e.g., Leader’s Declaration, G7 Summit, Germany, 7–8 June 2015, available at [https://sustainabledevelopment.un.org/content/documents/7320LEADERS%20STATEMENT\\_FINAL\\_CLEAN.pdf](https://sustainabledevelopment.un.org/content/documents/7320LEADERS%20STATEMENT_FINAL_CLEAN.pdf).

<sup>9</sup> The deadline of 2020 was identified by the ISA (after an initial target date of 2016 had proved unattainable) and is favoured by mining companies. It is, however, unlikely to hold. See, e.g., D. Amon, ‘Deep-Sea Mining from 2018 to 2024: What Can We Expect’, *DSM Observer*, 14 August 2018, available at <http://dsmobserver.com/2018/08/deep-sea-mining-from-2018-to-2024-what-can-we-expect/>.

<sup>10</sup> European Commission, *Blue Growth Opportunities for Marine and Maritime Sustainable Growth*, Doc. COM (2012) 494 final, 18 September 2012, at 10.

<sup>11</sup> Ocean Spiral, available at [www.shimz.co.jp/en/topics/dream/content01/](http://www.shimz.co.jp/en/topics/dream/content01/); see Ranganathan, ‘Ocean Floor Grab: International Law and the Making of an Extractive Imaginary’, in this issue, 573.

<sup>12</sup> See Feichtner, ‘Sharing the Riches of the Sea: The Redistributive and Fiscal Dimension of Deep Seabed Exploitation’, in this issue, 601.

<sup>13</sup> See, e.g., Deep Sea Mining Summit, available at [www.deepsea-mining-summit.com/index](http://www.deepsea-mining-summit.com/index).

future space mining industry, both the USA and Luxembourg have adopted legislation recognizing private property rights in minerals mined in space,<sup>14</sup> provoking a debate on whether international space law's freedom of peaceful use encompasses asteroid mining or whether these states are violating the non-appropriation provision of the Outer Space Treaty.<sup>15</sup> Given that international law designates both the deep seabed as well as celestial bodies as the common heritage of mankind, further debates concern the question how commercial exploitation may be reconciled with the imperative that activities in these areas benefit all humankind.<sup>16</sup>

The current excitement over the economic potential of the oceans and outer space represents a renewal of older fantasies. Half a century ago, in the era of decolonization and the Cold War, these domains became the focus of major international law-making initiatives. Culminating in distinctive legal regimes of continuing operation, those initiatives both built on and consolidated the imaginaries that underpin the present extractive adventures. Examining the economic and geopolitical contexts in which these imaginaries took – and continue to take – shape, and linking the past with the present, the contributions to this symposium speak to the foundations as well as the current workings of the legal regimes for the oceans and outer space. Teasing out, in particular, the paradoxes of the assertions of the 'common benefit' that are routine in these regimes, the contributions highlight the principal commitments and distributive effects of international law from post-war to the present.

The first two contributions to this symposium, by Matt Craven and Surabhi Ranganathan, examine the construction of the oceans and outer space as global commons, drawing attention not only to law and geopolitics, but also to imagination, and science and technology, as resources that enabled this construction. Craven's article shows how the international law of outer space – the 'Code', announcing international law 'to be of unlimited extent, inter-galactic as much as international' – was shaped in the shadow of the Cold War. Craven draws attention to the two oppositions upon which the Code was built: the opposition between outer space as a site of warfare and a realm of peaceful use; and the opposition between outer space as subject to primitive accumulation and arena of cooperation. While the Code was meant to displace the imaginaries of outer space as a place of warfare and as an object of colonization, it reinscribes both. Craven's reading of the Code's constitutive silences and equivocations offers insight into the defining contradictions of the Cold War and the administrative state in late capitalism. 'Peace' becomes reconfigured as the totalization of war, imbuing all sectors of society, including scientific and economic activities in outer space, with military significance. And 'commons' become understood in terms of an economy of interests in which the rampant commercial exploitation of nature is justified with the satisfaction of societal needs. These contradictions, reflected in the

<sup>14</sup> See 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>15</sup> Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies 1967, 610 UNTS 205.

<sup>16</sup> Feichtner, *supra* note 3.

ongoing intertwinement of projects of militarization and economic exploitation, and association of the common heritage of mankind with resource extraction, continue to shape engagements with outer space.

Ranganathan's article locates the emergence of the international law of the oceans in the context of post-War order-making and decolonization. It traces how the ideology of economic exploitation, together with a Cold War-informed interest to preserve the freedoms of the sea for military purposes, facilitated the legal construction of zonal, medium-wise (water/land) and use-based divisions of the ocean. Focusing upon the ocean floor, the article examines the ways in which the law created the conditions for its 'grab' by way of both national and international jurisdiction – the latter turning the deep seabed over to extractive activity in the act of casting it as the 'common heritage of mankind'. Reminiscent of Craven's notion of outer space as a 'site of speculative endeavour', Ranganathan suggests that the imagination of the deep sea as 'remote' contributes to its grab, for it presents the building of a legal regime for the deep seabed as simply an exercise in the inclusion of a new domain within the international system, veiling the ways in which it also dispossesses various land- and marine-based communities. Further exploring the grounds on which the grab of seabed is achieved, Ranganathan argues that both its 'natural geography' and 'economic value' were reified through law. The article discusses the role of international lawyers in making the arguments that turned the ocean floor into sites of extraction, suggesting that a layered understanding of the factors that guided their pragmatism is important. Not least influential was a liberal anxiety to preserve international law's centrality as an ordering medium. This raises questions about the extent and ways in which similar anxieties—now about the proper delivery of the ISA's institutional mandate—might shape present law-making and what that would mean in terms of the configuration of interests expressed through the law.

Isabel Feichtner and Karin Mickelson's contributions offer further traction on these questions by focusing upon the ways in which the ideas of common heritage and common benefit have been deployed over time and are being legally implemented in the present. Feichtner's article examines how competing arguments of 'supply security' and 'economic redistribution' have been asserted to justify the extraction of minerals from the oceans. It shows that Part XI of the 1982 UN Convention on the Law of the Sea (UNCLOS), regulating the deep seabed and focusing upon promoting both aims, locked in an exploitation bias.<sup>17</sup> This bias was strengthened by the amendments made to the regime via the 1994 Agreement on the Implementation of Part XI of UNCLOS (IA).<sup>18</sup> It is further enhanced in the present day by the deep seabed regime's disembeddedness, which Feichtner argues results, in particular, from the institutional design of the ISA – established by UNCLOS to administer the deep seabed – as a mining authority that lacks integration into a larger institutional system of checks and balances. Feichtner offers a close analysis of the current negotiations over the Mining

<sup>17</sup> Convention on the Law of the Sea 1982, 1833 UNTS 3.

<sup>18</sup> Agreement on the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982 1994, 1836 UNTS 3.

Code, including the financial model that is being developed by experts contracted by the ISA, to reveal that the redistributive objective spelled out in UNCLOS has receded into the background. In fact, it is further weakened by increasing attention to the potential ecological harms of seabed mining, which themselves appear to receive subordinate consideration compared with the concerns for the commercial viability of the regime. Feichtner points out that, given 'the frustrations of the redistributive objective', some developing states are seeking opportunities to partake in the profits from seabed mining by becoming sponsoring states; a development that is further consolidating an economic order characterized by competition and creating the conditions for accelerated extraction of seabed resources.

Feichtner's account is contrasted by the article authored by Mickelson, who asks whether the common heritage principle 'lives up to the promise of providing an appropriate foundation for governance of the global commons' and, in particular, whether it may impose meaningful limitations on resource extraction to prevent ecological harm.<sup>19</sup> Confronting arguments that common heritage as a principle seeks to maximize and not limit economic exploitation, Mickelson highlights the ways in which concerns for the protection of the marine environment have not only become a dominant theme recently, but also informed the concept of common heritage of mankind from its inception. Mickelson notes that environmental issues were already prominent in the famous speech of the Maltese ambassador, Arvid Pardo, to the UN General Assembly, which set the ball rolling on the negotiations for a seabed mining regime.<sup>20</sup> Turning to the subsequent General Assembly deliberations, with the 1970 Declaration of Principles Governing the Seabed emphasizing the prevention of pollution and contamination and other hazards to the marine environment,<sup>21</sup> and to the 'highly polarized discussions' on the proposals for a New International Economic Order, Mickelson shows that environmental concerns were not only present and sometimes prominent, but that they could also be seen as integrally connected with the common heritage principle and its redistributive dimension.

UNCLOS itself included many provisions on the marine environment, and the IA, whilst making many alterations to the seabed regime to enhance its 'market orientation', did not 'explicitly restrict or limit the environmental safeguards built into UNCLOS'. Mickelson then examines the role that environmental considerations have played in the work of the ISA, up to and including the current negotiations on the Mining Code, and emphasizes the importance of the advisory opinion of the Seabed Disputes Chamber of the International Tribunal for the Law of the Sea in interpreting the responsibilities of sponsoring states in light of the common heritage principle.<sup>22</sup> Tracing this alternate account of the evolution of the regime, Mickelson clarifies the ecological dimension of the common heritage principle. She concludes with hope

<sup>19</sup> Mickelson, 'Common Heritage of Mankind as a Limit to Exploitation of the Global Commons', in this issue, 635.

<sup>20</sup> UN General Assembly, First Committee Debate, UN Docs A/C.1/PV.1515–1516, 1 November 1967.

<sup>21</sup> Principle 11, GA Res. 2749 (XXV), 12 December 1970.

<sup>22</sup> Seabed Disputes Chamber of the International Tribunal for 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.

about the possibility of operationalizing this principle in order to better protect the marine environment in the context of seabed mining.

In this symposium we have given much attention to understanding the role of international law and international lawyers in the shaping of the global commons regimes of sea and space, examining both agency (and, thus, the contingencies of these regimes) and constraint (and, thus, the ‘false contingency’ of these regimes<sup>23</sup>) in the context of the geopolitical, economic, scientific and imaginative influences of periods ranging from post-war, Cold War and decolonization to neo-liberalism and its contestations in the present. However, rather than pressing strict transitions between periods, we seek to reflect upon the ways in which those periods generate multiple legacies for the present, some appearing as imaginaries to be overcome, others as seeds of alternative visions to build upon today. We hope to leave our readers with several thoughts. Feichtner points out that the construction of political economy through international law is ongoing and that international lawyers should recognize the drafting of the Mining Code as an exercise in making – and not just regulating – a mining economy. Craven and Ranganathan caution against easy suppositions of the outer space or the oceans as ‘spatial fixes’ in the face of resource depletion on earth; and against ‘environmental fixes’ that serve as face-lifts only, leaving intact the legal foundations of exploitative regimes. All three articles also suggest the need for close analysis of the distributive potential of the current sea and space regimes. Mickelson then offers guidance on the possibilities inherent in the common heritage principle and reminds us of the need for political compromise. Even though today’s endeavours to operationalize the principle seem distant from its more utopian conceptions, perhaps they might yet pave the way to ocean regimes built on ethical and environmental concerns if we recognize the balance of pragmatism and idealism that the principle contains.

And, here, we too would like to close on a constructive note. It is true, of course, that legal concepts are capable of multivalent interpretations, and we have shown here those that accompany thinking about the common heritage. But we do not simply invite international lawyers to give that principle more environmental content. Rather, we suggest taking seriously the possibility of uncovering (or recovering) conceptualizations of the common heritage of mankind, and, more generally, the global commons that point away from a political economy built on the competitive pursuit of interests, in which commercial considerations come to drive the exploitation of nature. We hope that the common heritage principle might indicate a potential path to pursue both ecological concerns and redistributive aims, to see them as imbricated and not as mutually opposed, and to embrace that this might mean a reconstruction of the regimes for sea and space on non-competitive lines. These global commons then may not lose their paradoxical structure, but, possibly, international lawyers may more productively unfold it.

<sup>23</sup> Marks, ‘False Contingency’, 62 *Current Legal Problems* (2009) 1.