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The Common Heritage of Mankind: Past, Present, and Future

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Recommended Citation
John E. Noyes, The Common Heritage of Mankind: Past, Present, and Future, 40 DENV. J. INT'L L. & POL'Y 447 (2012).

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Citation: 40 Denv. J. Int'l L. & Pol'y 447 2011-2012

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THE COMMON HERITAGE OF MANKIND: PAST, PRESENT, AND FUTURE

JOHN E. NOYES*

I. INTRODUCTION

The international community has developed several different types of legal regimes to govern natural resources. In general terms, these include:

- according states exclusive permanent sovereignty over natural resources, a system associated with territoriality;
- sharing resources, as in the cases of international rivers and migratory species;
- recognizing common property rights, as in the case of the high seas, where no one user has exclusive rights to resources and no one can exclude others from exploiting them, but capturing resources results in exclusive property rights; and
- recognizing property as the common heritage of mankind – or, to use a more contemporary phrase, the common heritage of humankind (CH) – whereby all manage resources and share in the rewards of exploiting them, even if they are not able to participate in that exploitation.

In this essay I reflect on what has happened to the CH principle, which underlies the last of these regimes. Several exemplary studies have examined the evolution and content of the CH principle.[1]

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1. *See, e.g.*, KEMAL BASLAR, THE CONCEPT OF THE COMMON HERITAGE OF MANKIND IN INTERNATIONAL LAW (1998); VED P. NANDA & GEORGE PRING, INTERNATIONAL ENVIRONMENTAL LAW FOR THE 21ST CENTURY § 2.1.10 (2003); R.P. Anand, *Common Heritage of Mankind: Mutilation of an Idea*, 37 INDIAN J. INT'L L. 1 (1997); Elisabeth Mann Borgese, *The Common Heritage of Mankind: From Non-living to Living Resources and Beyond*, *in* 2 LIBER AMICORUM JUDGE SHIGERU ODA 1313 (Nisuke Ando et al. eds., 2002); Ian Brownlie, *Legal Status of Natural Resources in International Law (Some Aspects)*, *in* 162 RECUEIL DES COURS 249, 294-300 (1979); Vladimir-Djuro Degan, *The Common Heritage of Mankind in the Present Law of the Sea*, *in* 2 LIBER AMICORUM JUDGE SHIGERU ODA 1363 (Nisuke Ando et al. eds., 2002); Erik Franckx, *The International*

Although I comment on the evolution of the principle, I also focus on recent developments affecting its implementation and its possible future.

Part II of this essay discusses what the CH principle means in international law. This discussion involves three questions: To what situations does the principle apply? What are its components or elements? And what is its legal status? Parts III and IV suggest that "context" is essential to understanding the CH principle, or indeed any principle of international law. Part III places the CH principle, which was promoted especially in the late 1960s and the 1970s, in historical context. Part IV notes that the CH principle has been incorporated in some treaties. The most notable of these is Part XI of the 1982 United Nations Convention on the Law of the Sea ("LOS Convention"),[2] as revised by its associated 1994 Implementation Agreement,[3] concerning seabed mining beyond the limits of national jurisdiction. An additional development has accompanied the translation from principle to detailed rule in the law of the sea: the practice of states and international legal institutions has reinforced aspects of the CH seabed mining regime. Finally, Part V of this essay evaluates the current status and significance of the CH principle or concept. What, if anything, remains of it?

Seabed Authority and the Common Heritage of Mankind: The Need for States to Establish the Outer Limits of their Continental Shelf, 25 INT'L J. MARINE & COASTAL L. 543 (2010); L.F.E. Goldie, *A Note on Some Diverse Meanings of "The Common Heritage of Mankind,"* 10 SYR. J. INT'L L. & COM. 69 (1983); Edward Guntrip, *The Common Heritage of Mankind: An Adequate Regime for Managing the Deep Seabed?*, 4 MELB. J. INT'L L. 376 (2003); Christopher C. Joyner, *Legal Implications of the Concept of the Common Heritage of Mankind*, 35 INT'L & COMP. L.Q. 190 (1986); Alexandre-Charles Kiss, *La Notion de Patrimoine Commun de l'Humanité*, *in* 175 RECUEIL DES COURS 99 (1982); Bradley Larschan & Bonnie C. Brennan, *The Common Heritage of Mankind Principle in International Law*, 21 COLUM. J. TRANSNAT'L L. 305 (1983); R. St. J. Macdonald, *The Common Heritage of Mankind*, *in* RECHT ZWISCHEN UMBRUCH UND BEWAHRUNG: FESTSCHRIFT FÜR RUDOLF BERNHARDT 153 (Ulrich Beyerlin et al. eds., 1995); Arvid Pardo & Carl Q. Christol, *The Common Interest: Tension Between the Whole and the Parts*, *in* THE STRUCTURE AND PROCESS OF INTERNATIONAL LAW 643 (R. St. J. Macdonald & Douglas M. Johnston eds., 1983); Rüdiger Wolfrum, *The Common Heritage of Mankind*, *in* MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW, www.mpepil.com (updated Nov. 2009; last visited Dec. 10, 2010); Rüdiger Wolfrum, *The Principle of the Common Heritage of Mankind*, 43 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 312 (1983). These sources cite much additional commentary.

2. United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter LOS Convention].

3. Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982, *adopted* July 28, 1994, 1836 U.N.T.S. 3 [hereinafter Part XI Implementation Agreement].

II. THE COMMON HERITAGE PRINCIPLE

We can explore the meaning of any principle by considering three questions. First, to what events or situations does it apply? That is, with respect to the CH principle, what sorts of property or resources fall within the scope of the principle? Second, what are the elements or components of the principle, the features that give it content? And third, what is its legal status? When we ask these questions about the CH principle we discover that its meaning is less than clear, despite several decades of use of the principle in international law.

The first question is perhaps the easiest to answer. States and commentators have promoted the CH principle as applying particularly to areas beyond the limits of national jurisdiction and to natural resources found there. One early influential document was the Declaration of Principles, adopted by the U.N. General Assembly in 1970.[4] Paragraph 1 of this Declaration provides that "[t]he sea-bed and ocean floor, and the subsoil thereof, beyond the limits of national jurisdiction (hereinafter referred to as the area), as well as the resources of the area, are the common heritage of mankind."[5] Article 136 of the widely adopted 1982 LOS Convention explicitly provides that "[t]he Area and its resources are the common heritage of mankind";[6] the Convention defines the "Area" as "the seabed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction,"[7] and "resources" are limited to "solid, liquid or gaseous mineral resources in situ in the Area at or beneath the seabed, including polymetallic nodules."[8] Article 11 of the 1979 Moon Treaty, now in force for thirteen states (albeit none of the space powers), explicitly incorporates the CH principle.[9] The principle has also been discussed in connection with Antarctica,[10] and some commentators have advocated applying the

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4. Declaration of Principles Governing the Sea-Bed and the Ocean Floor, and the Subsoil Thereof, Beyond the Limits of National Jurisdiction, G.A. Res. 2749, U.N. GAOR, 25th Sess., Supp. No. 28, U.N. Doc. A/8028, at 24 (Dec. 17, 1970) [hereinafter Declaration of Principles].

5. *Id.* ¶ 1.

6. LOS Convention, *supra* note 2, art. 136.

7. *Id.* art. 1(1)(1).

8. *Id.* art. 133(a).

9. 1979 Agreement Governing the Activities of States on the Moon and Other Celestial Bodies art. 11, Dec. 5, 1979, 1363 U.N.T.S. 3 [hereinafter Moon Treaty].

10. *See, e.g.*, U.N. Doc. A/C.1/38/PV.2 (1983), 38th Sess., 1st Comm., Summary Record of the 42nd Mtg. (comments of Mr. Abidin of Malaysia, urging that the "common heritage approach . be considered in a future international design for Antarctica"). In 2005 Malaysia abandoned its efforts to promote more global and U.N. involvement in Antarctic matters. *See* Marie Jacobsson, *The Antarctic Treaty System: Legal and Environmental Issues – Future Challenges for the Antarctic Treaty System*, *in* ANTARCTICA: LEGAL AND ENVIRONMENTAL CHALLENGES FOR THE FUTURE 1 (Gillian Triggs & Anna Riddell eds., 2007).

principle to other common space resources, including geostationary orbit and high seas fisheries.[11] In 1995 Malta invoked the CH principle in proposing that the U.N. Trusteeship Council be transformed "from a guardian of dependent territories to a body that acts as guardian and trustee of the global commons and the common concerns in the interest of present and future generations,"[12] a proposal directed at conserving the international environment.

Commentators and international organizations have also proposed that a range of other, non-common space resources that are essential to humans and of widely shared interest should be governed under a CH regime. Such resources include, for example, rain forests, genetic resources (even when found within national boundaries), cultural heritage, and food.[13] However, the idea of applying the CH principle to resources within the territorial jurisdiction of states has proved controversial, and the principle has gained traction only with respect to some common space resources, particularly deep seabed minerals in the Area.[14]

Second, what are the elements of the CH principle? Features often associated with it include:

- a prohibition of acquisition of, or exercise of sovereignty over, the area or resources in question;
- the vesting of rights to the resources in question in humankind as a whole;
- reservation of the area in question for peaceful purposes;
- protection of the natural environment;
- an equitable sharing of benefits associated with the exploitation of the resources in question, paying particular

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11. *See, e.g.*, Kiss, *supra* note 1, at 145-64.

12. Letter from the Permanent Rep. of Malta to the United Nations to the Secretary-General (June 2, 1995), U.N. Doc. A/50/142, at 3 (June 16, 1995).

13. *See, e.g.*, PHILIPPE SANDS, PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW 552 (2d ed. 2003) (discussing FAO Conf. Res. 5189 (1989), an Agreed Interpretation of the International Undertaking, recognizing plant genetic resources as "a common heritage of mankind to be preserved, and to be freely available for use, for the benefit of present and future generations"); Borgese, *supra* note 1, at 1313-34; Kiss, *supra* note 1, at 164-96.

14. The International Law Association's influential 2002 New Delhi Declaration of Principles of International Law Relating to Sustainable Development categorized "the proper management of climate system, biological diversity and fauna and flora of the Earth" as "the *common concern of humankind*," while grouping "[t]he resources of outer space and celestial bodies and of the sea-bed, ocean floor and subsoil thereof beyond the limits of national jurisdiction" as "the *common heritage of humankind*." ILA New Delhi Declaration of Principles of International Law Relating to Sustainable Development, Annex ¶ 1.3, *in* INT'L LAW ASS'N, REPORT OF THE SEVENTIETH CONFERENCE 22, 26 (2002) [hereinafter ILA New Delhi Declaration] (emphasis added).

attention to the interests and needs of developing states; and
- governance via a common management regime.

The first two of these features relate to the juridical status of the area in question. The first – prohibition on sovereignty – is not unique to a CH regime: for example, it has long been accepted that no state may exercise sovereignty over the high seas. The notion that rights vest in humankind as a whole does, however, radically diverge from the concept of high seas freedoms, which permits individual acquisition of fish or other resources.

The next three features concern the utilization of the area and resources in question. Some formulations of the CH principle explicitly provide that protection of the environment entails a sharing of burdens as well as benefits,[15] and note that such protection involves an obligation to take into account the interests of future generations.[16] Because non-peaceful uses of an area could destroy its resources, the peaceful purposes prong may also encompass concern with future generations. The equitable sharing of benefits, implying distributive justice, is the most novel and most controversial feature of the CH principle. This element may imply a sharing or broadening of the base of knowledge about resources. It also encompasses sharing the material benefits or proceeds derived from exploiting resources. Opposition to this benefit-sharing feature, as well as to the prohibition on sovereignty, help explain why the CH principle has not been applied to rain forests or other resources located within national territory.[17]

The last feature, governance through a common management system, reflects the view that "humankind" as a whole is responsible for managing the area or resource in question. The CH principle anticipates the creation of appropriate institutional machinery or other cooperative arrangements to implement such governance.

Although I assert that these features are "often associated" with the CH principle, each of them has been subject to much debate. States and commentators disagree about several components of the CH principle. A few examples provide a sense of the discourse:

Juridical Status. The United States has historically argued that the CH principle is simply another verbal formulation of a freedoms regime, under which no country has sovereignty over a common space but may acquire exclusive property rights in its resources.[18] Professor

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15. BASLAR, *supra* note 1, at 99-103.
16. *Id.* at 103-05, 174; Joyner, *supra* note 1, at 195.
17. NANDA & PRING, *supra* note 1, § 2.1.10, at 35.
18. *See* Goldie, *supra* note 1, at 80-81.

Christopher Joyner argues that "vesting of rights in all of humankind" is an element only of a radical form of the CH principle.[19] Many commentators, however, regard humankind's rights to the resources as an essential characteristic of the CH principle.

Utilization: Peaceful Purposes. The International Law Association, in its 1986 Seoul Declaration concerning the CH principle, does not list "peaceful purposes" among the utilization features of a common heritage regime.[20] Commentators have noted that "peaceful purposes" could stand apart from the CH concept as a separate principle.[21]

Utilization: Environmental Protection. The existence and formulation of an environmental protection element of the CH principle have been disputed. Professor R. St. J. McDonald does not consider environmental protection an element. He finds that environmental preservation is linked to "an obligation to leave a particular area in as good a condition as the present generation received it," and believes that "obligations on intergenerational rights and on environmental and natural preservation" must await "a more mature" formulation of the CH principle.[22] By contrast, Judge Rüdiger Wolfrum finds that "the interests of future generations have to be respected in making use of the international commons," approaches environmental protection through the lens of sustainable development, and considers "the concept of sustainable development [to be] one of the important elements of the common heritage principle."[23] However, Professor Duncan French questions whether the concept of sustainable development applies to common spaces, noting that "the generic idea of 'development' . . . has generally been conceptually restricted to areas within a State's territory, or at least its jurisdiction" and that Agenda 21 did not mention the deep seabed when discussing sustainable development.[24]

Utilization: Benefit Sharing. Commentators dispute whether the equitable sharing of benefits under the CH principle requires

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19. Joyner, *supra* note 1, at 192-93.

20. *See* Declaration on the Progressive Development of Principles of Public International Law Relating to a New International Economic Order § 7, *in* INT'L LAW ASS'N, REPORT OF THE SIXTY-SECOND CONFERENCE 8 (1987) [hereinafter ILA Seoul Declaration].

21. BASLAR, *supra* note 1, at 106-07.

22. Macdonald, *supra* note 1, at 155.

23. Wolfrum, *The Common Heritage of Mankind*, *supra* note 1, ¶¶ 22-23; *see* BASLAR, *supra* note 1, at 103.

24. Duncan 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 INT'L J. MARINE & COASTAL L. 525, 535 (2011).

preferential treatment for developing states. According to Wolfrum, de facto equal participation "derives from the common heritage concept, placing all States . . . on the same footing and accordingly benefitting all States," but preferential treatment "favours only developing countries and has its roots in the development aid philosophy."[25] Joyner, arguing that the CH principle includes the idea that "any economic benefits derived from" efforts in a common space "would be shared internationally,"[26] also finds that giving a preference to developing countries is an ideological gloss accepted only in some formulations of the principle.[27]

Common Management. If a common management or other cooperative decision-making arrangement has not actually been established, the question arises how a country should act in accordance with the CH principle. Wolfrum concludes that each state must then "decide how to ensure that activities subject to the principle are carried out for the benefit of all mankind." To this end, each state retains discretion "whether to attempt to achieve this objective by refraining from unilateral, in favour of joint, activities, by seeking cooperation on a bilateral or multilateral basis, *or* by distributing revenues or information."[28] However, the possibility that a state could comply with the CH principle by unilaterally "distributing revenues or information" raises questions about whether common management is an essential element of the CH concept. For some, a procedural element of the CH principle, requiring that exploration and exploitation of resources must be managed under treaty-based mechanisms, may be more controversial than a substantive requirement of some sort of sharing of benefits.

Other Possible Elements. Joyner stresses that scientific research "would be freely and openly permissible" under a CH regime, with research results made available to those interested in them.[29] This assertion is consistent with the notion that the CH principle requires

25. Wolfrum, *The Principle of the Common Heritage of Mankind*, *supra* note 1, at 323.

26. Joyner, *supra* note 1, at 192.

27. *See id.* at 192-93.

28. Wolfrum, *The Common Heritage of Mankind*, *supra* note 1, ¶ 25 (emphasis added). *See* Tullio Scovazzi, *Is the UN Convention on the Law of the Sea the Legal Framework for All Activities in the Sea? The Case of Bioprospecting*, *in* LAW, TECHNOLOGY AND SCIENCE FOR OCEANS IN GLOBALISATION 309, 313 (Davor Vidas ed., 2010) (suggesting that each state operating under a CH principle has the obligation, even absent institutional direction, to ensure that knowledge resulting from marine scientific research be disseminated). For discussion of the possible roles of states and international institutions in managing different CH regimes, see Kiss, *supra* note 1, at 240-42.

29. Joyner, *supra* note 1, at 192.

sharing benefits,[30] but most commentators do not specifically include scientific research as one of the features characterizing how a CH resource or area must be utilized. Professor Kemal Baslar would add the explicit requirement that "only those natural and cultural resources which globally affect the survival and welfare of mankind can be exploited, conserved or protected under the common heritage regime."[31] Others suggest that the "common concern" concept, important in international environmental law, is distinct from and weaker than the CH principle, not incorporating other elements of the CH principle.[32]

In sum, one source of indeterminacy in articulating the CH principle is disagreement about which elements comprise the CH principle and how each should be formulated.

In addition, some words commonly associated with the CH principle are themselves unclear. For example, what is meant by "[hu]mankind"? Does this word encompass future generations? Does it suggest that the CH principle embodies a type of human right? Or does it include, along with states, only peoples and territories that are not yet capable of self-governance? How broad is the definition of "benefits"? Do the words "peaceful purposes" connote complete demilitarization or simply limit uses of force to those that have been recognized as legal in other contexts? The law is to some degree inevitably indeterminate,[33] but typical formulations of the CH principle on their face leave significant questions about its meaning.

The reason why the features I set out above are often associated with the CH principle becomes clearer when we consider the context in which the principle developed (outlined in Part III). These features also may be found (albeit some of them in qualified form) in one part of the treaty that implements the CH principle in the most detail, namely Part XI of the LOS Convention as modified by the 1994 Implementation Agreement. The terms of the LOS Convention and the Implementation Agreement limit the indeterminacy of the CH principle as developed in that treaty regime.

Finally, consider the third question: What is the legal status of the CH principle? Where the CH principle has been included in a treaty that has entered into force, states parties are of course bound by the principle in the form incorporated in the treaty. Assertions about a more universal legal status for the CH principle have varied widely.

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30. *See* BASLAR, *supra* note 1, at 98.

31. *Id.* at 110.

32. *Id.* at 287-96; NANDA & PRING, *supra* note 1, § 2.1.10, at 35.

33. *See* John E. Noyes, *Interpreting the 1982 Law of the Sea Convention and Defining Its Terms*, *in* DEFINITIONS OF THE LAW OF THE SEA: TERMS NOT DEFINED BY THE 1982 CONVENTION 45 (George K. Walker ed., 2012) (discussing treaty interpretation and indeterminacy).

Some have argued that it sets out a fundamental and non-derogable norm, constituting a *jus cogens* obligation.[34] This assertion historically seems linked to political efforts to promote the CH principle in the LOS Convention, but today must raise eyebrows, especially outside that context. Some have concluded that the principle has attained the status of customary international law. The International Law Association's 1986 Seoul Declaration, for example, provides that "[t]he concept of the common heritage of mankind as a general legal principle has entered into the corpus of public international law."[35] Writing in 2009, Wolfrum also finds that "[t]he common heritage principle, as far as the use of common spaces is concerned, is a part of customary international law," constituting "a distinct basic principle providing general . . . legal obligations with respect to the utilization of areas beyond national jurisdiction."[36] Others have found too bold the assertion that the CH principle is established in customary international law. For example, Joyner (although writing before the 1994 Implementation Agreement and the ensuing widespread acceptance of the LOS Convention) concludes that the CH principle is too indeterminate and too lacking in accompanying state practice and *opinio juris* to have gained acceptance in customary international law.[37] Even if one were to conclude that the principle today rises to the level of customary international law, one would have to be open to the possibility that some states may have persistently objected to applying the principle in particular settings.

If not a principle of international law, the CH principle is left to the realm of political or moral concept or non-binding soft law. Professors Ved Nanda and George Pring accurately but cautiously report that the CH concept "has received very favorable support from many expert

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34. *See, e.g.*, 14 THIRD UNITED NATIONS CONFERENCE ON THE LAW OF THE SEA OFFICIAL RECORDS 16 (¶¶ 52, 58), 37 (¶ 93), 42 (¶ 6), 71 (¶ 145), 75 (¶ 6), U.N. Sales No. E.82.V.2 (1980) (statements of representatives of India, Trinidad and Tobago, Argentina, Iran, Jamaica, and Niger); *see also* BASLAR, *supra* note 1, at 365-67; Degan, *supra* note 1, at 1373-74. For purposes of the LOS Convention, the CH principle is accorded special prominence. The Convention 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." LOS Convention, *supra* note 2, art. 311(6).

35. ILA Seoul Declaration, *supra* note 20, § 7.1; ILA New Delhi Declaration, *supra* note 14, pmbl., at 24 (reaffirming the Seoul Declaration in 2002).

36. Wolfrum, *The Common Heritage of Mankind*, *supra* note 1, ¶ 25. *See supra* note 14 and accompanying text.

37. Joyner, *supra* note 1, at 197-99; *accord Report of the Committee on Legal Aspects of a New International Economic Order*, *in* INT'L LAW ASS'N, REPORT OF THE SIXTY-SECOND CONFERENCE 409, 469 (1987) [hereinafter ILA NIEO Report] (comments of Prof. D.H.N. Johnson, remarking that "the concept of the common heritage of mankind . . . is not yet a principle of international law, let alone a basic one").

commentators" and refrain from giving an opinion on its exact legal status.[38]

With respect to one arena – the mineral resources of the seabed beyond the limits of national jurisdiction – a decision maker could well find that the CH principle represents customary international law. The near-universal acceptance of the LOS Convention and the 1994 Implementation Agreement,[39] along with the practice of states and international organizations concerning deep seabed minerals,[40] provide evidence supporting customary international law status. However, the exact content of such a norm is debatable: does it track the particulars of the widely accepted 1994 Implementation Agreement[41] or instead reflect more general standards?[42]

In sum, we are left with significant questions about the scope of application of the CH principle, and especially about its elements and legal status. Any decision maker faced with applying the CH principle to a legal dispute would have considerable discretion in interpreting its meaning and status. As discussed in Part IV, the LOS Convention added some determinacy to the meaning of the CH principle for purposes of that treaty. We may also obtain some clues about the meaning and lasting influence of the CH principle – or any principle – by paying attention to the context in which it developed. Part III explores some of the important context related to the CH principle.

III. HISTORICAL AND ETHICAL CONTEXTS

The standard story of the CH principle begins with the undoubtedly influential August 1967 speech of Ambassador Arvid Pardo of Malta to the U.N. General Assembly. In that speech, Pardo asserted that "[t]he seabed and the ocean floor are a common heritage of mankind and should be used and exploited for peaceful purposes and for the exclusive benefit of mankind as a whole."[43] More generally, Pardo also espoused

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38. NANDA & PRING, *supra* note 1, § 2.1.10, at 35.

39. U.N. Div. for Ocean Affairs and the Law of the Sea, Office of Legal Affairs, *Chronological Lists of Ratifications of, Accessions and Successions to the Convention and the Related Agreements as at 03 June 2011*, http://www.un.org/Depts/los/reference_files/chronological_lists_of_ratifications.htm#The%20United%20Nations%20Convention%20on%20the%20Law%20of%20the%20Sea (last visited Dec. 10, 2011) (listing162 parties to the LOS Convention and 141 parties to the Part XI Implementation Agreement).

40. *See infra* notes 81-93 and accompanying text.

41. *See* Louis B. Sohn, *International Law Implications of the 1994 Agreement*, 88 AM. J. INT'L L. 696 (1994).

42. *See* Wolfrum, *The Principle of the Common Heritage of Mankind*, *supra* note 1, at 333-37.

43. *Quoted in* Brownlie, *supra* note 1, at 294; *see* U.N. GAOR, 1st Comm. 22d Sess., 1515th mtg., at 1-15, U.N. Doc. A/C.1/PV.1515 (Nov. 1, 1967); U.N. GAOR, 1st Comm., 22d Sess., 1516th mtg., at 1-3, U.N. Doc. A/C.1/PV.1516 (Nov. 1, 1967). Although Pardo's invocation of the CH principle gained traction, work undertaken some forty years earlier

an international oceans management regime responsible for a wide range of oceans activities.[44] Others articulated the CH principle in the late 1960s as well. The World Peace Through Law Conference adopted a resolution in July 1967 directed primarily at deep seabed resources, but referring to "the high seas" as "the common heritage of all mankind."[45] In a June 1967 speech, Ambassador Aldo A. Cocca of Argentina, during deliberations of the U.N. Outer Space Committee, argued that "the international community has endowed [a] new subject of international law – mankind – with the vast [ ] common property" of outer space.[46] Invocation of the CH principle in legal and political forums coincided with proposals to exploit common space resources. The perception that technology allowed, or might soon allow, the exploitation of previously unobtainable common space resources, in short, gave rise to proposals for new legal regimes to manage them. The proposed CH regimes differed from regimes treating common spaces as *res communis*, open to all, or *res nullius*, subject to occupation and sovereignty.

Although these expressions of the CH principle were undoubtedly important in pushing it onto the world political and legal stage, they provide an overly narrow view of how and why the principle developed. With any principle, it is important to try to identify its core underlying values. When political formulations of a principle are linked to longstanding values and traditions, the principle is more likely to resonate with people and gain acceptance. A thorough investigation of the values associated with the CH principle could fill at least a book, but I note here a few pertinent points. The CH principle's antecedents include the legal public trust doctrine and precepts of Roman law applicable to common space resources.[47] A complete story of the origins of the principle would also note its religious and natural law

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in the League of Nations concerning living resources of the oceans had included similar references. The League's Assembly appointed a Committee of Experts for the Progressive Codification of International Law, which considered, inter alia, "[w]hether it is possible to establish by way of international agreement rules regarding the exploitation of the products of the sea." League of Nations Comm. of Experts for the Progressive Codification of Int'l Law, *Questionnaire No. 7 adopted by the Committee at its Second Session, held in January 1926: Exploitation of the Products of the Sea*, 20 AM. J. INT'L L. SPECIAL SUPP. 230, 230 (1926). The Rapporteur, José León Suárez of Argentina, examined living resources, finding that "[t]he riches of the sea, and especially the immense wealth of the Antarctic region, are the patrimony of the whole human race." José León Suárez, *Report on the Exploitation of the Products of the Sea*, *in id.* Annex 231, 236. *See* 1 PATRICIA BIRNIE, INTERNATIONAL REGULATION OF WHALING 109-13 (1985).

44. *See* Louis B. Sohn, *Managing the Law of the Sea: Ambassador Pardo's Forgotten Second Idea*, 36 COLUM. J. TRANSNAT'L L. 285, 289-91 (1997).

45. Wolfrum, *The Principle of the Common Heritage of Mankind*, *supra* note 1, at 315.

46. U.N. Legal Subcomm. of the U.N. Comm. on the Peaceful Uses of Outerspace, 75th mtg. at 7-8, U.N. Doc. A/AC.105/C.2/SR.75 (Nov. 13, 1967).

47. *See* BASLAR, *supra* note 1, at 65-68.

underpinnings. For example, all religious traditions emphasize the promotion of peace and the resolution of disputes without recourse to violence.[48] All religious traditions emphasize the importance of generosity, of sharing wealth with the poor and unfortunate, even if they have not "earned" that wealth.[49] Furthermore, Judeo-Christian, Islamic, and Buddhist traditions support the notion of human stewardship of the earth, with responsibilities for future generations.[50] It is, admittedly, a large step from the view that individuals have certain moral responsibilities to the view that nation-states should embrace them with respect to non-citizens. Nonetheless, the ideals of peaceful resolution of disputes, sharing with the poor, and stewardship of the earth for future generations persuaded religious leaders to endorse the CH principle.[51] Furthermore, the perceived benefits of the principle for individuals have led some commentators to regard it as a human rights principle.[52]

A consideration of context reveals, then, two important underpinnings of the CH principle. In general, aspects of the principle coincide with long-held values. Second, political leaders articulated the principle at a time in history when it was important to develop legal guidance concerning common space resources.

The context in which the CH principle developed also helps explain why its scope of application, content, and legal status have remained so disputed.[53] No one global forum arrived at consensus on the meaning of

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48. *See, e.g.*, BRIAN D. LEPARD, HOPE FOR A GLOBAL ETHIC 145-49 (2005).

49. The Old Testament of the Bible calls on property owners to leave a portion of their lands' production to "the alien, the orphan, and the widow." *Deuteronomy* 24: 19-21; *id.* 15:7-8; *Leviticus* 19:10; *Proverbs* 25:21. In the New Testament, Jesus called on people to share material wealth with the less fortunate (and to cultivate a rightness of spirit). *Matthew* 5:42; *Luke* 18:22. The Koran describes "true piety" or "righteousness" as encompassing the giving "of one's substance, however cherished, to kinsmen, and orphans, the needy, the traveler, beggars." *Koran* 2:177. The Bhagavad Gita, Buddhist scriptures, Confucius's Analects, and Bahá'í readings also extol the virtues of generosity and help for the needy. *See* LEPARD, *supra* note 48, at 45-49, 86-87.

50. *See* BASLAR, *supra* note 1, at 13-20.

51. *See id.* at 14-20; Borgese, *supra* note 1, at 1321-26.

52. *See* BASLAR, *supra* note 1, at 318-34; *see also* Ved P. Nanda, *The Right to Development: An Appraisal*, *in* WORLD DEBT AND THE HUMAN CONDITION 41 (Ved P. Nanda et al. eds., 1993) (reviewing individual human rights and collective aspects of the right to development).

53. The U.N. General Assembly's 1970 Declaration of Principles, *supra* note 4, focused only on deep seabed mineral resources, and its compromise language has been the subject of much interpretive debate. See, *e.g.*, Goldie, *supra* note 1, at 69-105. The International Law Association, the world's foremost international non-governmental organization devoted to the study and development of international law, adopted its Seoul Declaration, *supra* note 20, two decades after the CH principle was articulated in various forums on the law of the sea, outer space, and Antarctica; did so in an effort to promote the "progressive development" of international law; and arrived at conclusions that were immediately questioned. *See* ILA NIEO Report, *supra* note 37, at 411, 414-16, 469.

this general concept early in its development. Much of the development of the CH principle has been left to commentators who, as we saw in Part II, often disagree about the principle's legal status and elements.

The indeterminacy surrounding the CH principle relates to the political context of 1960s and 1970s. Debates over the CH principle reflected deep-seated political tensions between Western developed states and the Third World. In particular, developed and developing states disagreed about whether rights to common space resources should vest in all of humankind (rather than in whoever captured the resource) and about whether benefits should be equitably distributed, taking particular account of the needs developing states.[54] Formulations of the CH principle that strongly emphasized the vesting of rights in all of humankind and the distribution of benefits to developing states were linked to the New International Economic Order ("NIEO") movement. In line with that movement, many developing states criticized what they saw as Western economic exploitation.[55] For those states, the traditional law of the sea, based on high seas freedoms, embodied such exploitation. Only developed states had the economic wherewithal to send factory ships to fish freely off the coasts of developing states, depleting coastal fisheries. Only maritime powers had navies that could sail near the shores of developing states or through their straits, posing security and environmental risks. The CH principle as applied to deep seabed minerals – a principle incorporating shared access to those common space resources, common management responsibilities, and equitable distribution of benefits – was an antidote to developed state privileges under the traditional law of the sea. In Pardo's words:

> We wanted dignity for poor countries and an end to humiliating financial hand-outs, by giving even the poorest

54. In the mid-1960s and early 1970s, some Western leaders did in general terms assert the need to respect the interests of all humanity in common spaces. For example, in 1966 U.S. President Lyndon Johnson declared, "[w]e must insure that the deep seas and the ocean bottom are, and remain, the legacy of all human beings." President Lyndon Johnson, Remarks at the Commissioning of the New Research Ship, The "Oceanographer," *in* 2 WEEKLY COMP. PRES. DOCS. 930, 931 (1966); *see* EDWARD WENK, JR., THE POLITICS OF THE OCEAN 212-13, 258 (1972). Four years later, President Richard Nixon issued a statement referring to deep seabed mineral resources as "the common heritage of mankind," proposing "the collection of substantial mineral royalties to be used for international community purposes, particularly economic assistance to developing countries," and calling for "international machinery" to "authorize and regulate exploration and use of seabed resources beyond the continental margins." President Richard Nixon, Statement About United States Oceans Policy (May 23, 1970), *reprinted in* 2 NEW DIRECTIONS IN THE LAW OF THE SEA: DOCUMENTS 751-52 (S. Houston Lay et al. eds., 1973). These U.S. statements did not, however, fully embrace all aspects of the CH principle.

55. *See* Larschan & Brennan, *supra* note 1, at 306-12.

> members of the international community the opportunity to obtain access to marine technology at a tolerable cost and to participate on a basis of equality in the management and development of very significant resources.
>
> Finally, we wanted radically to change the traditional law of the sea which, we believed, reflected the interests of only a few members of the international community. It certainly was not in harmony with the ever more urgent need of cooperation in addressing world problems, and for environmental sensitivity and sustainable cooperative development of world resources. In short, we wanted the common heritage principle to replace freedom of the seas as the foundation of international law of the sea.[56]

If it proved impossible to extend the CH principle to all ocean spaces, its application to deep seabed mineral resources could, in Pardo's view, partially counterbalance navigational and other privileges accorded maritime powers. The political tension between NIEO proponents and Western leaders who resisted restrictions on free enterprise and were skeptical of international bureaucracy shaped how the CH concept was implemented in Part XI of the LOS Convention.

IV. IMPLEMENTING THE COMMON HERITAGE PRINCIPLE IN TREATY LAW

Legal principles have value even if left in general terms. Indeed, it is not always desirable to convert broad principles into more concrete or determinate rules. Principles of international law[57] may fill gaps in rules and provide decision makers with a guiding mindset – a reminder of basic objectives of the law – when they interpret or apply rules. Principles, when applied in good faith, also allow for, in David Caron's words, "diversity within convergence."[58] That is, they may accord different states discretion to pursue a common objective in different ways, in line with particular domestic political and legal arrangements.

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56. Arvid Pardo, *The Origins of the 1967 Malta Initiative*, 9 INT'L INSIGHTS 66, 69 (1993). Pardo also acknowledged that Malta had certain selfish concerns at stake: Government officials hoped that the initiative would bolster Malta's political standing with other states, especially in the Mediterranean, and that Malta might become the headquarters of a significant international institution. *Id.*

57. I refer to broad principles embodied in treaties and customary international law, as well as to "general principles of law" derived from analogies to municipal law principles.

58. *See* David D. Caron, *Contemporary International Law Issues in the Asia Pacific: The Importance and Challenge of the Difference Between Principles and Rules in International Law* 13, 2011 International Law Association Asia-Pacific Regional Conference on Contemporary International Law Issues in the Asia Pacific: Opportunities and Challenges, Taipei, Taiwan, May 2011, *available at* http://works.bepress.com/david_caron/118.

A legal principle need not be incorporated in treaty law in order to have significance. Indeed, even as soft law, political concept, or "emerging customary international law," a principle may be used to influence debates and shape legal developments.

However, the CH principle itself points towards its eventual incorporation and elaboration in treaty rules. If there is to be "common management" or at least some cooperative decision-making structure concerning common space resources – one commonly listed element of the CH principle – the managers must know the governing procedures. If natural resources or other benefits are to be shared equitably, it will be helpful to learn exactly what is to be shared and how distribution is to take place. The uncertainty about elements of the CH principle, noted in Part II, may suggest the desirability of more determinate language to guide states and other actors operating under the principle. To this end, the U.N. General Assembly's 1970 Declaration of Principles concerning deep seabed mineral resources provided that "an international régime . . . including appropriate international machinery to give effect to [the Declaration's] provisions shall be established by an international treaty of a universal character, generally agreed upon."[59] The International Law Association's 1986 Seoul Declaration indicated that the CH principle was "to be specified by internationally agreed regimes."[60]

Indeed, a few treaties have incorporated the CH principle. The Moon Treaty explicitly does so,[61] and also sets out in general terms several elements commonly associated with the principle. Along with these elements – no acquisition of sovereignty over the moon or its resources, equal access for parties to the use and exploration of the moon, a peaceful purposes provision, and the requirement to carry out exploration of the moon "for the benefit and in the interests of all countries, irrespective of their degree of economic or scientific development"[62] – the Moon Treaty commits its parties "to undertake to establish an international regime, including appropriate procedures, to govern the exploitation of the natural resources of the moon as such exploitation is about to become feasible."[63] However, Part XI of the LOS Convention, which provides that "[t]he Area and its resources are the common heritage of mankind,"[64] along with the 1994 Implementation Agreement, which reaffirms the CH character of the Area and its resources,[65] are the only international agreements that

59. Declaration of Principles, *supra* note 4, ¶ 9.
60. ILA Seoul Declaration, *supra* note 20, ¶ 7.1.
61. Moon Treaty, *supra* note 9, art. 11(1).
62. *Id.* arts. 2, 4, 11.
63. *Id.* art. 11(5).
64. LOS Convention, *supra* note 2, art. 136.
65. Part XI Implementation Agreement, *supra* note 3, pmbl.

have as yet developed detailed rules and procedures to implement the CH principle.[66]

The LOS Convention/1994 Implementation Agreement regime for deep seabed mining has been analyzed in depth elsewhere.[67] For present purposes, two general points deserve emphasis. First, negotiating compromises resulted in a regime that, broadly, leaves states operating through the International Seabed Authority ("ISA" or "Authority") to represent humankind, but, in its details, does not fully reflect several elements commonly associated with the CH principle. Second, the practice of states and international institutions has reinforced at least some CH features of the LOS Convention/1994 Implementation Agreement deep seabed mining regime.

The 1982 Convention itself reflected compromises related to the CH principle. In negotiating the Convention, the political tensions noted in Part III of this essay were evident. First, the deep seabed mining regime in Part XI of the LOS Convention formed part of a "package deal." Many developed states did not truly embrace the CH principle, but were willing to accept its application to the Area and its minerals as part of a package, the price for assurances in the LOS Convention of expanded navigational rights and limits on coastal state jurisdiction. Second, Part XI in its original form did not fully incorporate the version of the CH principle advocated by Pardo and many developing states. For example, Part XI established a so-called parallel system, whereby national or private companies could exploit seabed resources in one of a pair of mining sites; the Enterprise, which is the mining arm of the ISA, or a developing state could mine only the second site.[68] This parallel

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66. The CH principle has been discussed in conjunction with other treaties, but it is debatable whether they implement the principle. Some features of the Antarctic Treaty system, e.g., reserving the continent for peaceful purposes, protecting the environment, and sharing the results of scientific research, reflect elements of the CH principle. Antarctic Treaty, Dec. 1, 1959, 12 U.S.T. 794, 402 U.N.T.S. 72. However, other features appear incompatible with the CH principle, notably claims to sovereignty, a ban on mineral exploitation (rather than exploitation with equitable distribution), and management by only some parties to the Antarctic Treaty (rather than global common management). *See* BASLAR, *supra* note 1, at 243-76; Guntrip, *supra* note 1, at 404-05. A few other treaties also contain language that broadly echoes the CH principle. *See* Convention for the Protection of the World Cultural and Natural Heritage pmbl., Nov. 16, 1972, 1037 U.N.T.S. 240 (referring to cultural and natural heritage sites as "the heritage of all the nations of the world"); Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies pmbl., Jan. 27, 1967, 610 U.N.T.S. 205 (referring to outer space as the "province of all mankind"). These treaties do not elaborate a detailed regime for common management or for equitable distribution of benefits.

67. For an introduction to the deep seabed mining regime, *see* LOUIS B. SOHN, KRISTEN GUSTAFSON JURAS, JOHN E. NOYES & ERIK FRANCKX, LAW OF THE SEA IN A NUTSHELL 339-45, 351-60 (2010).

68. *See* LOS Convention, *supra* note 2, Annex III, arts. 3, 8-9.

system undercut the equitable distribution or resource-sharing aim of the CH principle with respect to a significant portion of seabed resources.[69] Overall, the meaning of the CH principle, which is not defined in Article 136 of the LOS Convention, was linked to particular treaty provisions. According to the influential *Virginia Commentary*, the meaning of "'common heritage of mankind' . . . *for the purposes of the Convention* can be derived from other provisions of Part XI."[70]

The 1994 Implementation Agreement reflected a changing global political situation. Developed states refused to accept the LOS Convention because they opposed its deep seabed mining provisions; the United States under the Reagan administration was the most vocal opponent of those provisions. Developing states agreed to changes that benefited developed states and incorporated market-oriented features into Part XI. Many developing states were, by the end of the twentieth century, less enamored of NIEO precepts than they had been a few decades earlier, and the Preamble to the 1994 Part XI Implementation Agreement explicitly "note[s] the political and economic changes, including market-oriented approaches, affecting the implementation of Part XI."[71] States agreed on changes necessary to persuade developed states to accept the LOS Convention just months before it was due to enter into force in November 1994. These changes are set out in the Implementation Agreement and its Annex, which are "interpreted and

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69. However, other LOS Convention provisions – e.g., requiring the transfer of technology to developing states, obligating mining companies to pay significant fees to assist with the Authority's expenses, and requiring parties to the Convention to fund the mining activities of the Enterprise or provide it with technology – could have a redistributional effect. *See id.* Annex III, arts. 5(1), 13, Annex IV, art. 11(3).

70. 6 UNITED NATIONS CONVENTION ON THE LAW OF THE SEA 1982: A COMMENTARY ¶ 136.8(a) (Satya N. Nandan ed., 2002) (emphasis added). The *Commentary* then summarizes some of the relevant provisions of Part XI, section 2 of the LOS Convention:

> [N]o state may claim or exercise sovereignty or sovereign rights over the Area (article 137(1)); rights to the resources of the Area are vested in humankind as a whole and may not be alienated (article 137(2)); activities in the Area are to be carried out for the benefit of humankind as a whole, "irrespective of the geographical location of States, whether coastal or land-locked" (article 140(1)); financial and other economic benefits derived from activities in the Area are to be shared equitably (article 140(2)); the Area is to be used exclusively for peaceful purposes and can be used by all States without discrimination (article 141); and States have a responsibility to protect the marine environment from harmful effects that may be caused by activities in the Area (article 145). In addition, the principle of the common heritage of mankind requires that the interests and needs of developing States, and especially the landlocked and geographically disadvantaged among them, be taken into particular consideration in the conduct of all activities undertaken in the Area (e.g., articles 140(1), 143(3)(b), 144 and 148).

Id.

71. Part XI Implementation Agreement, *supra* note 3, pmbl.

applied together" with Part XI of the LOS Convention "as a single instrument."[72]

The Implementation Agreement differed significantly from Pardo's original vision of a CH regime. Some provisions, for example, affect the goal of equitable distribution of benefits: provisions for the mandatory transfer of technology to developing states "shall not apply";[73] the Enterprise is to operate through joint ventures in accordance with "sound commercial principles," and the requirement that States Parties fund the Enterprise "shall not apply";[74] any state on the Authority's Finance Committee, which would include the United States should it become a party to the LOS Convention, could block financial distributions.[75] Other changes call into question whether the Authority is to be operated under a true common management system: any one of four chambers of states, each composed of states with similar characteristics (including a chamber of developed states), may block actions of the Authority's Council;[76] LOS Convention provisions for a Review Conference that might have resulted in amendments to Part XI binding on parties even without their consent "shall not apply."[77] One commentator has concluded that the 1994 Implementation Agreement pays "mere lip-service to [the CH] principle" and that the Agreement and its Annex "have destroyed [the principle's] substance as defined in the 1970 Declaration [of Principles]."[78] The U.S. view was that "the common heritage principle fully comports with private economic activity in accordance with market principles."[79]

Despite these assessments, however, traditional elements of the CH principle remain in place. As a formal matter, the 1994 Implementation Agreement did not change basic features of the CH concept set out in the LOS Convention's Part XI, section 2 – e.g., the prohibition on sovereign claims, the basic provision concerning the

72. *Id.* art. 2(1). Provisions of the Implementation Agreement prevail "[i]n the event of any inconsistency" between the Agreement and Part XI of the LOS Convention. *Id.*

73. *Id.* Annex § 5.

74. *Id.* Annex § 2.

75. *See id.* Annex § 9(3), (7)-(8).

76. *Id.* Annex § 3(9)(a), (15)-(16).

77. *Id.* Annex § 4.

78. Degan, *supra* note 1, at 1374; *accord* Anand, *supra* note 1, at 16-18.

79. *United States: President's Transmittal of the United Nations Convention on the Law of the Sea and the Agreement Relating to the Implementation of Part XI to the U.S. Senate with Commentary*, 34 I.L.M. 1393, 1429 (1995). For an excellent overview of the Part XI Agreement, see Bernard H. Oxman, *Law of the Sea Forum: The 1994 Agreement on the Implementation of the Seabed Provisions of the Convention on the Law of the Sea*, 88 AM. J. INT'L L. 687 (1994). Professor Oxman concludes that "[t]he 1994 Agreement substantially accommodates the objections of the United States and other industrial states to the deep seabed mining provisions of the Law of the Sea Convention." *Id.* at 695; *see also* Anand, *supra* note 1, at 16-17 ("The international community bent backwards to make sure that Washington was satisfied and got all it wanted and more.").

equitable sharing of benefits, the peaceful purposes provision, and the requirement to protect the marine environment.[80] Furthermore, states and the ISA have reinforced aspects of the CH principle.[81] By operating continuously under the LOS Convention/1994 Implementation Agreement, states and the ISA have, for example, emphasized that the Area is not subject to claims of sovereignty. The Authority's mining codes and contracts with miners mandate protections for the marine environment, one component of a CH regime.[82] The CH notion of sharing benefits is reflected in Authority-sponsored marine scientific research concerning the Area, the results of which are widely distributed.[83]

In practice, no state is actively pursuing any alternative deep seabed mining regime. Although the U.S. Code still provides for a registration mechanism for U.S. nationals involved with deep seabed mining initiatives,[84] U.S. companies have essentially abandoned any such initiatives.[85] Activity is taking place only under the LOS Convention/1994 Implementation Agreement regime. Parties to the LOS Convention apply to the ISA, on their own behalf or by sponsoring their nationals, in order to undertake mineral exploration, prospecting, and eventually exploitation, and miners enter into contracts with the Authority for those purposes.[86] The possibility of a competing deep seabed regime appears extremely remote, and any such regime would surely be condemned as inconsistent with international law.[87] The LOS Convention/Part XI Implementation Agreement regime has become the "only game in town."

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80. *See* Part XI Implementation Agreement, *supra* note 3, pmbl.; LOS Convention, *supra* note 2, arts. 136-49; *supra* note 70.

81. In applying the core elements of the CH principle as set out in the LOS Convention, the Authority is called on to take into account not only the interests of States Parties but of all states. LOS Convention, *supra* note 2, pmbl.

82. *See* Int'l Seabed Auth., *Decision of the Assembly of the International Seabed Authority Relating to the Regulations on Prospecting and Exploration for Polymetallic Sulphides in the Area*, ISBA 16/A/12 (May 7, 2010); Int'l Seabed Auth., *Decision of the Assembly of the International Seabed Authority Relating to the Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area*, ISBA/6/A/18 (Oct. 4, 2000).

83. *See* Int'l Seabed Auth., http://www.isa.org.jm/en/scientific (last visited Jan. 17, 2012); Satya Nandan, *Administering the Mineral Resources of the Deep Seabed*, *in* THE LAW OF THE SEA: PROGRESS AND PROSPECTS 75, 91-92 (David Freestone et al. eds., 2006).

84. Deep Seabed Hard Mineral Resources Act, 30 U.S.C. §§ 1401-73 (2011).

85. *See* SOHN ET AL., *supra* note 67, at 360.

86. For an overview of the Authority's activities, see Int'l Seabed Auth., *Report of the Secretary-General of the International Seabed Authority Under Article 166, Paragraph 4, of the United Nations Convention on the Law of the Sea*, ISBA/17/A/2 (June 13, 2011).

87. *E.g.*, L.D.M. Nelson, *The New Deep Sea-Bed Mining Regime*, 10 INT'L J. MARINE & COASTAL L. 189, 202 (1995) (concluding that widespread acceptance of the 1994 Implementation Agreement means the position that "deep seabed mining is a freedom of the high seas" is "no longer tenable").

Another institutional actor has also significantly reinforced the CH underpinnings of the Part XI/Implementation Agreement regime. In May 2010, in response to a request by Nauru, the ISA's Assembly asked the Seabed Disputes Chamber of the International Tribunal for the Law of the Sea ("SBC" or "Chamber") to issue an advisory opinion on three questions concerning, to quote the name of the case, "Responsibilities and Obligations of States Sponsoring Persons and Entities with respect to Activities in the Area."[88] In the resulting unanimous opinion, which the Authority's Council and Assembly in turn noted with appreciation,[89] the SBC discussed several emerging aspects of the principle of sustainable development, including them within the parameters of sponsoring states' obligation of due diligence; these aspects have a bearing on how duties of environmental protection concerning the Area are to be carried out.[90] The Chamber also explicitly highlighted aspects of the CH principle as set forth in the deep seabed treaty regime. The Chamber reiterated that the LOS Convention sought to "'contribute to the realization of a just and equitable international economic order which takes into account the interests and needs of mankind as a whole and, in particular, the special interests and needs of developing countries, whether coastal or landlocked,'" concluding that various Convention articles "require effective implementation with a view to enabling the developing States to participate in deep seabed mining on an equal footing with developed States."[91] The "role of the sponsoring State," the SBC found, "is to contribute to the common interest of all States in the proper implementation of the principle of the common

88. According to Article 191 of the LOS Convention, the SBC "shall give advisory opinions at the request of the Assembly or the Council on legal questions arising within the scope of their activities." LOS Convention, *supra* note 2, art. 191. More particularly, the three questions concerned: 1) the content of the obligations and responsibilities of sponsoring states under the Part XI LOS Convention/1994 Implementation Agreement regime; 2) the extent of liability of sponsoring states should a sponsored entity fail to comply with its undertakings; and 3) the measures a sponsoring state must take to fulfill its responsibilities under the LOS Convention. Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area, Case No. 17, Advisory Opinion of Feb. 1, 2011, 50 I.L.M. 455, ¶ 1 (2011) (Seabed Disputes Chamber of the Int'l Tribunal of the Law of the Sea, 2011).

89. Int'l Seabed Auth., *Statement of the President of the Council of the International Seabed Authority on the Work of the Council During the Seventeenth Session* ¶ 8, ISBA/17/C/21* (July 21, 2011); Int'l Seabed Auth., *Decision of the Assembly of the International Seabed Authority Relating to the Advisory Opinion of the Seabed Disputes Chamber of the International Tribunal for the Law of the Sea on Matters Relating to the Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area* ¶ 2, ISBA/17/A/9 (July 25, 2011).

90. According to some commentators, the concept of sustainable development underpins the environmental protection aspects of the CH principle. *See Responsibilities and Obligations* ¶¶ 117-20, 136-37; *see also* French, *supra* note 24, at 538-44.

91. *Responsibilities and Obligations* ¶ 163 (quoting LOS Convention, *supra* note 2, pmbl).

heritage of mankind."[92] The Chamber also determined that "obligations relating to preservation of the environment . . . in the Area" have an "*erga omnes* character," suggesting that the obligations are applicable to all humankind.[93]

The advisory opinion also highlighted compliance mechanisms that could help specify rights under this *erga omnes* notion. The SBC suggested that the Authority itself – by virtue of its implied powers under Article 157(2), for the LOS Convention itself is silent on the point – may make a claim for compensation for "damage to the Area and its resources constituting the common heritage of mankind, and damage to the marine environment."[94] Furthermore, "[e]ach State Party may also be entitled to claim compensation" for breach of these *erga omnes* obligations.[95] Other actors that could make claims include "entities engaged in deep seabed mining, other users of the sea, and coastal States."[96] These claims need not be relegated to diplomatic protests. Article 187 of the LOS Convention, concerning the jurisdiction of the SBC in contentious cases, provides one avenue of recourse for States Parties, the Authority, or contractors with respect to breaches by sponsoring states. The SBC's opinion reinforces the notion that the Area and its resources are part of the common heritage of humankind.[97]

Although the ISA may challenge actions of sponsoring states that violate CH requirements in the Area, it lacks the authority to challenge coastal states' maritime boundaries that affect the size of the Area. The Area is bounded by coastal states' continental shelves, and in many regions the outer limits of the shelf extend beyond 200 nautical miles from baselines. Coastal states themselves set the outer limits of their continental shelves, the general criteria for which are specified in Article 76 of the LOS Convention. Coastal states with outer limits beyond 200 miles from baselines also must submit data to the Commission on the Limits of the Continental Shelf ("CLCS"), a technical body established by the Convention, and limits established "on the basis of" CLCS recommendations "shall be final and binding."[98] Although outer limits lines affect the extent of the Area and hence where the CH principle applies, Article 187 limits the jurisdiction of the SBC in contentious cases to disputes involving "activities in the Area"; this limitation precludes the Authority from challenging the legality of

92. *Id.* ¶ 226.
93. *Id.* ¶ 180.
94. *Id.* ¶¶ 179-80.
95. *Id.* ¶ 180.
96. *Id.* ¶ 179.
97. For discussions of the SBC's advisory opinion, see David Freestone, *International Decision*, 105 AM. J. INT'L L. 755 (2011); French, *supra* note 24, at 544-46.
98. LOS Convention, *supra* note 2, art. 76(8). For a brief overview of Article 76 and the CLCS process, see SOHN ET AL., *supra* note 67, at 306-17.

continental shelf outer limits set by a coastal state.[99] In addition, the ISA's Council or Assembly probably could not request an advisory opinion from the SBC on the legality of the location of an outer limits line.[100] The potential thus exists for coastal states to assert "creeping jurisdiction" against the Area,[101] and the international community has not provided effective legal mechanisms to challenge such encroachment. Despite this limitation, however, the international institutional mechanisms governing deep seabed mining can, as noted above, help to reinforce precepts of the CH principle established in the LOS Convention/1994 Implementation Agreement regime.

V. THE FUTURE OF THE COMMON HERITAGE PRINCIPLE

What lies ahead for the CH principle? It is useful to break this inquiry into more specific questions. First, what of the principle's application in the treaty regime governing deep seabed mining? Treaty provisions, such as those in the LOS Convention/1994 Implementation Agreement, may cure much of the indeterminacy associated with the principle and create specific CH regimes. Widespread acceptance of a treaty may also bolster support for the CH principle as a norm of customary international law. As discussed in Part IV of this essay, the LOS Convention/Implementation Agreement regime – our only example of a widely accepted treaty regime specifically incorporating the CH principle – appears stable, despite the United States not being a party. Indeed, the practice of states and international institutions operating under this regime reinforces the CH principle as applied to deep seabed mining.

Second, does the CH principle, as set out in Article 136 of the LOS Convention, apply to *non*-mineral activities on the seabed beyond the limits of national jurisdiction? Article 136, after all, applies to "the Area" as well as to its mineral "resources." Some have argued that such features of the Area as deep-sea hydrothermal vents (and perhaps their living resources, prized for biotechnology) are subject to the CH principle.[102] Others contend that such resources are instead governed

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99. *See* John E. Noyes, *Judicial and Arbitral Proceedings and the Outer Limits of the Continental Shelf*, 42 VAND. J. TRANSNAT'L L. 1211, 1239-40 (2009). The LOS Convention defines "activities in the Area" as "all activities of exploration for, and exploitation of, the resources of the Area," and "resources" in the Area are in turn defined in terms of mineral resources. LOS Convention, *supra* note 2, arts. 1(1)(3), 133(a).

100. *See* Noyes, *supra* note 99, at 1256-58.

101. Franckx, *supra* note 1, at 566-67.

102. *See* Alex G. Oude-Elferink, *The Regime of the Area: Delineating the Scope of Application of the Common Heritage Principle and Freedom of the High Seas*, 22 INT'L J. MARINE & COASTAL L. 143, 174-75 (2007).

under other legal regimes, including the high seas freedom of fishing.[103] The ISA is not authorized directly to regulate deep-sea vents, for its mandate is limited to particular functions concerning mineral "resources" and mining-related "activities in the Area."[104] It seems quite possible that in trying to fashion a legal regime applicable to living resources at deep-sea vents, political tensions similar to those attending the negotiation of the deep seabed mining regime may surface. Any generally accepted regime for managing issues arising in the Area other than seabed mining must await an agreement, the details of which appear unlikely to reflect the CH principle in any "pure," Pardo-esque form, if at all.[105]

Third, what of the CH principle's future with respect to areas other than the deep seabed? What can it contribute to other common space regimes? Here again, political opposition to the redistribution and common management prongs of the CH principle persists. It may well be difficult to incorporate the redistribution element of the principle, which links to NIEO goals, into any generally accepted global legal mechanisms. Although the Moon Treaty explicitly references the CH principle, widespread acceptance of a more detailed international legal regime governing the moon and its resources could depend on jettisoning or redefining the CH principle.

None of this is to say that all the values underlying the CH principle have become unimportant. Its core values surface in other declarations and legal principles. Some elements of the CH principle – for example, reserving the area in question for peaceful purposes – restate values found in the U.N. Charter, other basic international law documents, and moral and religious traditions. The environmental protection component of the CH principle is now reflected in many principles of international environmental law, often under the rubric of sustainable development. The work and structures of regional fisheries management organizations suggest international policy makers recognize that common management mechanisms, or at least some type of cooperative arrangements, are necessary to conserve and manage common space living resources. In short, many values associated with the CH principle continue to find expression, sometimes in modified form, in other international law principles and arrangements.

The controversial equitable redistribution or benefit-sharing element of the CH principle may, however, be too closely linked to the

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103. *See* Craig H. Allen, *Protecting the Oceanic Gardens of Eden: International Law Issues in Deep-Sea Vent Resource Conservation and Management*, 13 GEO. INT'L ENVTL. L. REV. 563, 632-36 (2001).

104. *See* Oxman, *supra* note 79, at 688-89.

105. For discussion of one possible regulatory model, see Scovazzi, *supra* note 28, at 314-15.

NIEO movement to gain acceptance in new treaties or general international law. This element of the CH principle is in large measure a product of the political climate of the 1960s and 1970s.[106] However, benefit sharing reflects, broadly, a concern with development and the needs of developing states that continues to be recognized in many international law and soft law instruments. For example, the concept of common but differentiated responsibilities has been incorporated in some treaties, reflecting the concern that many developing states require additional time or resources in order to contribute on the same basis as developed states to amelioriating international environmental or common space problems.[107] Similar sentiments underlie the numerous international efforts at capacity building. Although capacity building and common but differentiated responsibilities concern developed states' obligations, they also reflect the needs of developing states. Many policy makers may argue that redistributing the proceeds of resource exploitation is not the best way to further development in Third World states. But many also recognize that it is difficult to achieve a stable and just world without such development, and they search for alternative modalities toward that end. Ved Nanda has written wisely that the underpinnings of an asserted right to development include "enhanc[ing] the human condition, recogniz[ing] basic needs, and foster[ing] participatory and sustainable development."[108] Even if the world is unwilling to embrace direct wealth redistribution, as Pardo envisioned in his formulation of the CH principle, the goal of development remains to be addressed through other mechanisms.

In sum, the CH principle incorporates several norms that have been recognized elsewhere, including reserving an area for peaceful purposes, environmental protection or sustainable development, and cooperation in the management of common space resources. The most controversial aspect of the CH principle, involving the equitable sharing of benefits, may not survive in new contexts. But other principles, international instruments, and international arrangements have recognized the development needs of people in developing states.

International lawyers and policy makers are of course concerned about much more than the abstract meaning of principles and the identification of their underlying values. They also engage with process – who decides, in what forum, about interpreting and applying principles and rules – and with compliance mechanisms. The fully

106. *See* Franckx, *supra* note 1, at 566 n.139.

107. *See* Duncan French, *Developing States and International Environmental Law: The Importance of Differentiated Responsibilities*, 49 INT'L & COMP. L.Q. 35 (2000).

108. Nanda, *supra* note 52, at 42; *see also* Ved P. Nanda, *The Right to Development under International Law—Challenges Ahead*, 15 CAL. W. INT'L L.J. 431 (1985).

operational deep seabed mining regime of the LOS Convention/1994 Implementation Agreement provides one example of international dispute settlement processes and compliance-enhancing mechanisms addressing common space and international environmental issues. Observers may well evaluate this regime in terms of its real-world contributions to sensible environmental protections, the fostering of marine scientific research, and the avoidance of conflicts in exploring for and exploiting deep seabed minerals. The fact that the deep seabed mining regime formally embodies the CH principle may prove less significant than the regime's concrete achievements concerning various specific goals that the world recognizes as essential.