Yearbook of international Environmental Law, Vol. 25, No. 1 (2015), pp. 113–132
doi:10.1093/yiel/yvv060

The Common Heritage of Mankind and the Proposed Treaty on Biodiversity in Areas beyond National Jurisdiction: The Choice between Pragmatism and Sustainability

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I. INTRODUCTION

On 3 June 2015, the United Nations General Assembly (UNGA) adopted a resolution in which it decided to 'develop an internationally legally binding instrument under the Convention' on the Law of the Sea (UNCLOS) to address biodiversity in areas beyond national jurisdiction.[1] This decision was the culmination of a process that began in 2004 when the United Nations (UN) established the Ad Hoc Open-ended Working Group to study issues relating to the conservation and sustainable use of marine biological diversity in areas beyond national jurisdiction (Working Group).[2] Through the deliberations of the Working Group, a proposal to launch negotiations on an implementing agreement[3] under UNCLOS was made to the UNGA.[4] A key element of the

The author is grateful for the comments of the reviewers and editors. The views expressed herein are attributable only to the author.

[1] UN General Assembly (UNGA), Resolution on Oceans and the Law of the Sea on the Development of an International Legally-binding Instrument under the United Nations Convention on the Law on the Conservation and Sustainable Use of Marine Biological Diversity of Areas beyond National Jurisdiction, Doc A/Res/69/292 (9 June 2015) para 1. United Nations Convention on the Law of the Sea, 21 ILM 1261 (1982) [UNCLOS].

[2] UNGA, Resolution on Oceans and the Law, Doc A/Res/59/24 (4 February 2005) para 73.

[3] The phrases: 'implementing agreement under the Convention,' 'treaty' (or 'treaty under the Convention'), or 'binding instrument under the Convention' were all used in the deliberations. For some states, the treaty to be negotiated has to be under UNCLOS, for others, it should be a self-standing agreement, while for yet others, it should be a treaty consistent with the convention. What all these positions have in common is that the instrument in question should be a treaty. For that reason, even though the author prefers the phrase 'implementing agreement,' the term 'treaty' will be used throughout the article, except where reference is made to a specific position or document.

[4] See Outcome of the Ad Hoc Open-ended Informal Working Group to Study Issues Relating to Conservation and Sustainable Use of Marine Biological Diversity beyond Areas of National Jurisdiction (20–23 January 2015) [Outcome of the Ad Hoc Open-ended Informal Working Group] and Co-Chairs' Summary of Discussions, Doc A/69/78 <http://www.un.org/Depts/losbiodiversityworkinggroup/documents/ahwg-9_report.pdf> especially para (e), in which the Working Group recommended that the UNGA decide to 'develop an international legally binding instrument under the Convention' to address conservation and sustainable use of marine biological diversity in areas beyond national jurisdiction.

discussions of the Working Group has been the principle of the common heritage of mankind and its applicability, in particular, to marine genetic resources on the deep seabed.

Unsurprisingly, the question of applying the common heritage of mankind principle to marine genetic resources has caused controversy both with respect to whether it applies under the law as it currently exists, *lex lata,* and the more normative question whether it should apply, *lex ferenda.* After all, the principle was born out of what has been referred to as 'the emergence of a North-South cleavage.'[5] Thus, it should not be surprising that, in the context of the discussions in the Working Group, opinions differed on the applicability and scope of the principle of the common heritage of mankind.[6] It should also not be a surprise that opinions were divided along North-South lines, with the developed northern states generally disputing the applicability of the common heritage of mankind principle and the developing south generally championing its applicability.[7]

In the interest of moving beyond what might be termed ideological differences, there appears to be an emerging trend to avoid the term in favour of a more pragmatic approach. Such an approach purports to give effect to the demands of adherents of the common heritage of mankind principle but relies on the term 'benefit sharing' and so avoids the phrase common heritage of mankind. The result of this search for consensus has been an almost imperceptible shift in the deliberations of the Working Group and the UNGA away from discussions based on the common heritage of mankind to that of benefit sharing.[8] Apart from avoiding the controversy, the phrasing 'benefit sharing' has the benefit of presenting an easier route to a new treaty. However, there is a risk that important elements may fall by the wayside if the common heritage of mankind disappears from the discussion without proper reflection.

[5] Bradley Larschan and Bonnie Brennan, *The Common Heritage of Mankind Principle in International Law* 21 Columbia J Transnational L 305 at 305 (1983). See also Christopher C Joyner, *Legal Implications of the Concept of the Common Heritage of Mankind* 35 Intl & Comp L Q 190 (1986), who notes that the common heritage of mankind 'has attracted considerable attention and generated polemical debate' (at 190). See also Gbenga Oduntan, Sovereignty and Jurisdiction in the Airspace and Outer Space: Legal Criteria for Spatial Delimitation, at 192 (2012).

[6] See Dire Tladi, *Marine Genetic Resources on the Deep Seabed: The Continuing Search for a Legally Sound Interpretation of UNCLOS* 8 Intl Envtl-Making and Diplomacy in Rev: UNEP Course Series 65 at 70 (2008). See also Dire Tladi, *Conservation and Sustainable Use of Marine Genetic Resources*, *in* Rosemary Rayfuse, ed, Research Handbook on International Marine Environmental Law (2015).

[7] See, however, Dire Tladi, *State Practice and the Making and (Re) Making of International Law: The Case of the Legal Rules Relating to Marine Biodiversity in Areas beyond National Jurisdiction* 1 State Practice & Intl L J 97 at 100 (2014), where it is stated that the blanket typology of states is subject to a caveat: '[T]he existence of negotiating blocs, in particular, the European Union (EU) and the Group of 77 (G77) probably distorts the numbers. It is not inconceivable that some states within the G77 may actually be supportive of the freedom of the high seas approach, while some EU members also have strong views either in support of the common heritage of mankind or freedom of the highs seas.'

[8] See Outcome of the Ad Hoc Open-ended Informal Working Group, *supra* note 4 at para (f).

This article assesses whether anything is lost when redirecting discussions from the common heritage of mankind to benefit sharing. The debate of the Working Group centred around the doctrinal question whether, as the law stands, marine genetic resources on the deep seabed are governed by the regime in Part VII (freedom of the high seas) or the one in Part XI (common heritage of mankind) of UNCLOS. Much of the discussion has involved intricate analyses of the words in both Part VII and Part XI of UNCLOS.[9] While the doctrinal approach is without question important, this article will not attempt any in-depth analysis of the issue. The debate is introduced only to provide a context for the place of the common heritage of mankind principle in a potential future instrument.

The article begins, in the next section, with a brief overview of the Working Group process in the UN in which the deliberations on a possible new treaty on marine biodiversity in areas beyond national jurisdiction have taken place. In this section, the article discusses the intersections between the common heritage of mankind principle to which UNCLOS applies and related concepts and regimes that could impact on the application of the common heritage of mankind in a new treaty under the convention, including marine scientific research. In the next section, the transition in focus from the common heritage of mankind to benefit sharing is described. It then proceeds to provide an analysis of the common heritage of mankind principle. On the basis of this analysis, the article evaluates the transition made from the common heritage of mankind to benefit sharing, focusing on whether the latter is an apt replacement of the former. It finally offers brief concluding remarks, designed not to complicate future negotiations but, rather, to enlighten decisions makers as they proceed on what may become a pivotal process in the governance of the ocean.

II. UN PROCESS FOR A NEW TREATY ON MARINE BIODIVERSITY

1. Contested Area

Early in the deliberations, two main areas of contention emerged. The first area of contention relates to the need for enhanced conservation measures for the protection of marine biodiversity in areas beyond national jurisdiction, including the possible use of tools such as marine protected areas and the obligation to conduct impact assessments for activities in areas beyond national jurisdiction. The second area of contention—the area in which the common heritage of mankind is directly at issue—concerns the legal regime applicable to marine genetic resources. Both sets of issues are characterized by deep divisions along various political lines.

[9] For a discussion, see Petra Drankier et al, *Marine Genetic Resources in Areas beyond National Jurisdiction: Access and Benefit Sharing* 27 Intl J Marine & Coastal L 375 (2012).

With respect to the first area of contestation, UNCLOS contains several provisions on the protection and preservation of the marine environment.[10] The relevant provisions of UNCLOS relevant to areas beyond national jurisdiction are found in Part VII and XI. In addition, Part XII is concerned generally with the protection and preservation of the marine environment, including in areas beyond national jurisdiction. Part XII contains a general obligation on states to 'protect and preserve the environment,'[11] provisions obliging states to take measures, collectively or individually, to prevent and reduce marine pollution,[12] as well as a duty to perform impact assessments when there are 'reasonable grounds for believing that planned activities. . . may cause' significant damage to the marine environment.[13] In addition to these general provisions, there are specific provisions on conservation applicable to the deep seabed (Part XI) and the high seas (Part VII). With respect to the high seas, Part VII contains provisions on the duty of states to adopt, individually or in cooperation with one another, measures for 'the conservation of the living resources.'[14] Similarly, with respect to the deep seabed, referred to in UNCLOS as the Area, the convention provides for necessary measures to be taken to protect the marine environment from 'harmful effects which may arise' from activities in the Area.[15]

Although UNCLOS has provisions on the marine environment, its provisions have been criticized as being insufficient to address modern threats to the marine environment and biodiversity, in particular.[16] Its provisions arguably do not 'spell out sufficiently coherent obligations' to ensure conservation.[17] The perceived weaknesses in the conservation regime relate to the entrenchment of the freedom of the high seas as well as vague provisions that, in essence, rely on self-regulation.[18] These perceived gaps in the provisions of the conservation provisions of UNCLOS led many states, in particular, the European

[10] For a discussion, see Charlotte Salpin and Valentin Germani, *The Status of High Seas Biodiversity in International Policy and Law*, *in* Pierre Jacquet, Rajendra K Pachauri, and Laurence Tubiana, eds, Oceans: The New Frontier, 194 especially at 195ff (2011); Marko Berglund, *Protection of Marine Biodiversity in Areas beyond National Jurisdiction* 8 Intl Environmental-Making and Diplomacy in Review: UNEP Course Series 55 (2008).

[11] UNCLOS, *supra* note 1, Article 192.

[12] Eg, *ibid*, Article 194.

[13] *Ibid*, Article 205.

[14] *Ibid*, Articles 117, 118, 119, and 120.

[15] *Ibid*, Article 145.

[16] See, eg, Kristina M Gjerde and Anna Rulksa-Domino, *Marine Protected Areas beyond National Jurisdiction: Some Practical Perspectives for Moving Ahead* 27 Intl J Marine & Coastal L 351 at 352 (2012).

[17] Richard Barnes, *The Convention on the Law of the Sea: An Effective Framework for Domestic Fisheries Conservation? in* David Freestone Richard Barnes, and David Ong, eds, The Law of the Sea: Progress and Prospects, 233 at 233 (2006). See also Kristina Gjerde, *High Seas Fisheries Management under the Convention on the Law of the Sea*, *in* Freestone, Barnes, and Ong, *ibid*, 281.

[18] Dire Tladi, *Oceans Governance: A Regulatory Framework*, *in* Jacquet, Pachauri, and Tubiana, *supra* note 10 at 103.

Union (EU), to call for an implementing agreement under the convention to tackle the issue. Other states, in particular, the United States, Iceland, Japan, Norway, and others, however, argued that the provisions of the convention were sufficient and what was lacking was the effective implementation of those provisions.[19]

With respect to marine genetic resources, the contestation concerned whether the exploitation of marine genetic resources in the Area was subject to the common heritage of mankind regime or the freedom of the high seas.[20] The divergence of views arises from an ambiguity in UNCLOS. On the one hand, the convention provides that the 'Area and its resources are the common heritage of mankind.'[21] On the other hand, the convention provides that, for the purposes of Part XI of UNCLOS governing the Area, 'resources' means 'all solid, liquid or gaseous mineral,' thus excluding, by definition, marine genetic resources. Some states, most notably the United States, Canada, Japan, and Russia, have argued that since marine genetic resources are, by definition, excluded from the regime established in Part XI, then the freedom of the high seas in Part VII of UNCLOS must apply thereto.[22] On the other hand, the Group of 77 (G77) and China argue, *inter alia*, that the common heritage of mankind applies to the Area since, under Article 136 of the convention it is not only the 're-sources' of the Area, but the Area itself, that is subject to the common heritage of mankind. The definition of resources in Article 133 does not affect the applicability of the regime.

There is a third approach, initially raised by the EU, which would avoid the doctrinal debate about what is the current state of law—*lex lata*—and which places emphasis on seeking practical ways to give effect to the G77 and China's interests without resolving the ideological battle over the common heritage of mankind and its applicability to the deep seabed.[23] Since the G77 and China's concern over marine genetic resources has appeared to be (mainly) about benefit sharing, this third approach proposed that options for benefit sharing, including borrowing from the multilateral benefit-sharing scheme in the International

[19] See, eg, submission of the United States to the Working Group in the Informal Working Document Compiling the Views of Member States, prepared in accordance with UNGA Resolution 68/70 (4 December 2014) at 33, para 201.

[20] For a detailed discussion of the contestation, see Dire Tladi, *Genetic Resources, Benefit Sharing and the Law of the Sea: The Need for Clarity* 13 J Intl Maritime L 183 (2007). See also Petra Drankier et al, *Marine Genetic Resources in Areas beyond National Jurisdiction: Access and Benefit Sharing* 27 Intl J Marine & Coastal L 375 (2012).

[21] UNCLOS, *supra* note 1, Article 136.

[22] For full arguments, including counter-arguments, see Tladi, *supra* note 20. See also Tladi, *supra* note 6 at 70.

[23] See Larschan and Brennan, *supra* note 5 at 305. For description of the ideological differences between the North and the South, see Harminderpal Singh Rana, *The 'Common Heritage of Mankind' and the Final Frontier: Revaluation of Values Constituting the International Legal Regime for Outer Space Activities* 26 Rutgers LJ 225 at 230ff (1994).

Treaty on Plant Genetic Resources for Food and Agriculture, be considered.[24] In essence, the idea would be to address questions of benefit sharing, without addressing the common heritage of mankind.

2. Intersections between the Common Heritage of Mankind and Other Related Concepts

The calls for the application of the common heritage of mankind principle in the proposed treaty are based principally on the fact that UNCLOS already provides for the common heritage of mankind, at least with respect to the Area.[25] Since the treaty is intended to be an 'implementing agreement'—that is, implementing the principles of UNCLOS rather than a self-standing treaty with new principles—it may be argued that as an existing principle of the convention, the common heritage of mankind should be reflected in the new instrument. However, the proposed treaty would apply not only to the Area but also to areas beyond national jurisdiction as a whole.

In the context of the law of the sea, areas beyond national jurisdiction include all of the areas that do not fall within the national jurisdiction of a state or in which a state does not exercise sovereign rights. Maritime areas falling within the jurisdiction of a state or in which a state exercises sovereign rights are the territorial sea,[26] the exclusive economic zone,[27] and the continental shelf.[28] Areas beyond national jurisdiction, therefore, refer to the remaining maritime zones, namely the Area and the high seas. The high seas is defined under UNCLOS in contra-distinction to areas included 'in the exclusive economic zone, in the territorial sea or in the internal waters, or in the archipelagic waters of an archipelagic State.'[29] While a literal reading of this provision defining the high seas might suggest that the high seas include the Area, the Area is governed by a different part of the convention, namely Part XI.[30] The

[24] See, eg, Statement by Mr. Aleksander Čičerov, Minister Plenipotentiary, Permanent Mission of Slovenia to the United Nations, on Behalf of the European Union, during the Ad-Hoc Open-ended Informal Working Group to Study Issues Relating to the Conservation and Sustainable Use of Marine Biological Diversity beyond Areas of National Jurisdiction, Agenda Item 5(e) (30 April 2008) <http://eu.un.europa.eu/articles/en/article_7848_en.htm>, stating that '[t]he EU suggests that States could consider setting up a "multilateral system" for MGR in ABNJ, inspired by the International Treaty on Plant Genetic Resources for Food and Agriculture.'

[25] See generally UNCLOS, *supra* note 1, Part XI; see, in particular, Article 136, which provides that the 'Area and its resources are the common heritage of mankind.'

[26] *Ibid*, Article 1(1), which provides that the 'sovereignty of a coastal State extends, beyond its land territory and internal waters. . . to an adjacent belt of sea, described as the territorial sea.'

[27] *Ibid*, Article 56(1), which provides that in the exclusive economic zone the coastal state 'has sovereign rights for the purposes of exploring and exploiting, conserving and managing the natural resources, of the waters waters superajacent to the seabed and of the seabed.'

[28] *Ibid*, Article 77(1), which provides that 'the coastal State exercises over the continental shelf sovereign rights for the purpose of exploring it and exploiting its natural resources.' Article 77(2) further provides that these rights 'are exclusive.'

[29] *Ibid*, Article 86.

[30] *Ibid*, Article 134(1), which provides that Part XI 'applies to the Area.' Similarly, Article 134(2) provides the activities in the Area 'shall be governed by the provisions of.'

Area, defined as 'the seabed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction,'[31] is thus not covered by the provision of UNCLOS relating to the high seas. Areas beyond national jurisdiction, the scope of the proposed implementing agreement, therefore include both high seas and the Area. These areas, the high seas and the Area, are governed by two principles that generally tend to pull in different directions with the freedom of the high seas allowing states the freedom subject to few restrictions, while the common heritage of mankind restricts freedom in the interest of the greater good.

That areas beyond national jurisdiction—the scope of the proposed implementing agreement—covers both the Area and the high seas, raises question about whether the principles of the Area would be applied to high seas and whether such an extension would be consistent with UNCLOS. The first point to make is that the common heritage of mankind has been raised by developing states, principally to apply to marine genetic resources in the Area. Thus, as proposed, it would not apply to the areas beyond national jurisdiction as a whole. In this sense, its application to the new proposed treaty would be based on the strict zonal approach of UNCLOS.[32] However, there is no *a priori* reason why an implementing agreement could not provide for the application of the common heritage of mankind principle, subject to certain limited freedoms of the high seas as specifically spelled out in the convention.[33]

One of the freedoms specifically listed in Part VII of UNCLOS, relating to the freedom of the high seas and which has a particular impact on the marine genetic resources debate, is marine scientific research. However, in the context of areas beyond national jurisdiction, the freedom of scientific research is subject to Part XIII of UNCLOS.[34] Article 238, in Part XIII, of UNCLOS provides that states and competent international organizations 'have the right to conduct marine scientific research.' This provision, however, is itself subject to the 'rights and duties of other States as provided for in' UNCLOS.[35] Part XIII has two provisions specifically relevant for marine scientific research in areas beyond national jurisdiction. Article 256, applicable to the Area, provides that marine scientific research in the Area should be conducted in conformity with Part XI.[36] This means that the application of the common heritage of mankind in the Area

[31] *Ibid*, Article 1(a).

[32] See Tladi, *supra* note 7 at 101, where the author describes 'the fundamental logic of the Convention,' as a zonal approach, where the regulation of the rights and obligations of states is made 'dependent on the maritime zone' in which an activity takes place or a resource if found.

[33] UNCLOS, *supra* note 1, Article 87(1) lists, '*inter alia*' the following as the freedom of the high seas: freedom of navigation, freedom of overflight, freedom to lay submarine cables and pipelines, freedom to construct artificial islands, freedom of fishing, and freedom of marine scientific research.'

[34] See further Tladi, *supra* note 20 at 187.

[35] UNCLOS, *supra* note 1, Article 238.

[36] *Ibid*, Article 256 provides that all 'States, irrespective of their geographical location, and competent international organisations have the right, *in conformity with the provisions of Part XI,* to conduct marine scientific research in the Area' [emphasis added].

would not only be permitted but also that it is provided for in the Convention with respect to marine scientific research in the Area. In the high seas, marine scientific research is subject only to UNCLOS and not to Part XI.[37] Marine scientific research, however, is not inconsistent with the common heritage of mankind.[38] This suggests that it may be possible to apply the common heritage of mankind generally to areas beyond national jurisdiction as long as the modalities ensure the application of the freedom to conduct marine scientific research.

It is perhaps worth noting that the parties to the Convention on Biological Diversity have adopted the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from Their Utilization (Nagoya Protocol) with a provision potentially applicable to, or at least directed at, marine genetic resources in areas beyond national jurisdiction.[39] Article 10 of the Nagoya Protocol states that the 'Parties shall consider the need for ... a global multilateral benefit-sharing mechanism' for genetic resources over which 'it is not possible to grant prior informed consent.' This is clearly a reference to genetic resources in areas beyond national jurisdiction. UNCLOS is arguably a more appropriate forum in which to develop an instrument to address the sharing of benefits from the exploitation of marine genetic resources in areas beyond national jurisdiction.[40] The adoption by the UNGA of a process that could lead to the adoption of such an implementation agreement under UNCLOS makes the extension of the Nagoya Protocol to cover genetic resources in areas beyond national jurisdiction all the less likely.

III. THE COMMON HERITAGE PRINCIPLE IN THE NEGOTIATIONS

It is fair to say that the prospects for a new treaty, with or without the common heritage of mankind principle, looked fairly dim until recently. Apart from the fact that powerful states such as the United States, Russia, and Japan were opposed to the idea of a new treaty, the G77 and China were also divided on

[37] *Ibid*, Article 257 provides that all 'States, irrespective of their geographical location, and competent international organisations have the right, in conformity with this Convention, to conduct marine scientific research in the water column beyond the limits of the exclusive economic zone.'

[38] See, eg, *ibid*, Article 241, which provides that '[m]arine scientific research shall not constitute a legal basis for any claim to any part of the marine environment or its resources' See the discussion later in this article on the key elements of the common heritage of mankind.

[39] See the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from Their Utilisation, 29 October 2012 <http://www.cbd.int/abs/text/> Article 10 [Nagoya Protocol] to the Convention on Biological Diversity, 1760 UNTS 79 (1992) [CBD]. For a brief discussion of the history of Article 10 of the Nagoya Protocol, see Tladi, *supra* note 7 at 107.

[40] UNCLOS, *supra* note 1, Article 4(a), which limits the jurisdictional scope of the CBD to national jurisdiction, with the exception of 'processes and activities.' The author participated in the negotiations of Article 10, in Nagoya, as a representative of South Africa, and it should be noted in that context that Article 10 of the Nagoya Protocol was in, in fact, a compromise after the majority of states argued that the scope of Nagoya could not cover areas beyond national jurisdiction. For a discussion, see Tladi, *supra* note 7 at 107.

whether a new treaty was the best pathway to promote the common heritage of mankind. While some members of the G77 and China championed the idea of an implementing agreement, other members were less supportive.[41] Without the G77 and China, the states in favour of a new treaty could not muster a sufficient majority to move the process, even if by inches, in the direction of a new treaty.

Dynamics changed in 2011 when the G77 adopted a position in favour of an implementing agreement under UNCLOS as the appropriate path to clarify that the legal regime applicable to marine genetic resources in the Area was the common heritage of mankind.[42] In that year, the Working Group recommended that the UNGA initiate a process 'with a view to ensuring that the legal framework' for conservation effectively addresses the issues under consideration by the Working Group 'by identifying gaps and ways forward, including through the implementation of existing instruments and possible development of a multilateral agreement under the United Nations Convention on the Law of the Sea.'[43] Although the language seems rather tame, it was significant because it marked the first time that the Working Group as a whole, not individual states or groups of states, had acknowledged the possibility of a new treaty as an option to addressing the issue of conservation and the sustainable use of marine biological diversity in areas beyond national jurisdiction. This recommendation, and the subsequent UNGA resolution giving effect to it,[44] were catalysts for world leaders in the UN Conference on Sustainable Development's outcome document, *The Future We Want*, to 'commit to address, on urgent basis' and before the end of 2015, 'the issue of conservation and sustainable use of marine biological diversity . . . including by taking a decision on the development of an international instrument under UNCLOS.'[45]

What was particularly noteworthy about the 2011 recommendation, especially for the purposes of this article, was the manner in which the package of issues to be considered within this process was described. In what became known as the '2011 package deal,' the issues to be considered in the process were described as 'together and as a whole, marine genetic resources, including the question of the

[41] During the initial phases, the main champion for a new treaty within the G77 and China was South Africa. During the meeting of the Working Group in 2009, the author, who at the point was the legal counsellor to the South African Permanent Mission in New York, made the following statement: 'We believe that an implementing agreement to the UN Convention on the Law of the Sea would be the most appropriate way to deal with the identified gaps.' See Statement by South Africa during the Meeting of the Ad Hoc Working Group on Biodiversity in Areas beyond National Jurisdiction, Agenda Item 5(c) (28 April 2009) [on file with the author].

[42] See generally on the political dynamics of the Working Group deliberations, Tladi, *supra* note 7, where the legal and policy issues are addressed against the canvass of the political dynamics with the intention to create a portrait of state practice in the contested areas.

[43] Recommendations of the Ad Hoc Open-ended Informal Working Group to Study Issues Relating to the Conservation and Sustainable Use of Marine Biological Diversity in Areas beyond National Jurisdiction, Doc A/66/119 (2011) at para 1(a).

[44] UNGA, Resolution on Oceans and the Law of the Sea, Doc A/Res/66/231 (2011) at para 167.

[45] *The Future We Want,* Doc A/Res/66/288 (27 July 2012) at para 162.

sharing of benefits, measures such as area-based management tools, including marine protected areas, and environmental impact assessments, capacity-building and the transfer of marine technology.'[46] It is this package deal that most delegates accept will form the basis of the negotiations for a future treaty. Despite the centrality of the common heritage of mankind principle to the deliberations in the Working Group, it was not included as an issue for discussion. Instead, the phrase common heritage of mankind was replaced by what was seen as a pragmatic and less controversial, phrase 'benefit sharing.' Thus, already at this early stage of the process, the notion of the common heritage of mankind had been excluded as a critical issue and replaced by the more pragmatic 'benefit sharing.'

This package deal formed the basis of every subsequent decision aimed at launching negotiations, including the UNGA's decision to initiate the process recommended by the Working Group.[47] In January 2015, pursuant to a request by the UNGA,[48] the Working Group made a recommendation to the UNGA to launch negotiations. Similarly, the recommendations identified the package deal of 2011 as the issues to be addressed in the negotiations.[49] The phrase common heritage of mankind does not appear in this recommendation. The resolution adopted by the UNGA on 3 June 2015 reproduces *verbatim* the language in the recommendation with respect to the issues to be covered.[50] While this does not mean that the common heritage of mankind will not be introduced during the negotiations, it does signify that its champions, the developing world, may be willing to trade it off for some sort of benefit-sharing regime.

To be sure, developing states continue to promote, as a basic position, the common heritage of mankind.[51] However, it appears that for many of the states

[46] *Ibid* at para 1(b).

[47] UNGA, *supra* note 44 at para 167, including the Annex thereto.

[48] In UNGA, Resolution on Oceans and the Law of the Sea, Doc A/Res/69/245 (2014), the UNGA requested the Working Group to make recommendations to do it on the scope, parameters, and feasibility of an international instrument under UNCLOS.

[49] Paragraph 6 of the recommendation stated that the UNGA decide 'that negotiations shall address the topics identified in the package agreed in 2011, namely the conservation and sustainable use of marine biodiversity in areas beyond national jurisdiction, in particular, together and as a whole, marine genetic resources, including questions on the sharing of benefits, measures such as area-based management tools, including marine protected areas, environmental impact assessments and capacity building and the transfer of marine technologies.' See Recommendations of the Ad Hoc Open-ended Informal Working Group to Study Issues Relating to the Conservation and Sustainable Use of Marine Biological Diversity Beyond Areas of National Jurisdiction to the Sixty-Ninth Session of the General Assembly Doc A/69/780 (23 January 2015).

[50] See UNGA, *supra* note 1.

[51] In its very detailed submission to the Working Group, for example, Costa Rica identifies the common heritage of mankind principle as one that should be reflected in any new treaty, stating that it is 'it is a principle of international law' and that it 'includes the ocean floor and its subsoil.' See Informal Working Document Compiling the Views of Member States, Prepared in Accordance with General Assembly Resolution 68/70 (4 December 2014) at 9, para 201. Thailand, for its part, asserted that marine biological diversity in areas beyond national jurisdiction, not just on the seabed, is governed by the common heritage of mankind (at 28). Trinidad and Tobago, in its submissions, also seems to suggest the application of the common heritage of mankind to all of marine biological diversity in areas beyond national jurisdiction (at 31).

supporting the common heritage of mankind, the principle can be whittled down to benefit sharing. The Mexican submission, which is extensive and detailed, illustrates this approach. Mexico stresses that the freedom of the high seas and the common heritage of mankind principles 'are complementary and harmonious.'[52] Nonetheless, proceeding from this basis, Mexico asserts that the new implementing agreement 'must be negotiated under *a pragmatic and benefit-sharing approach.*'[53] Explaining what all this would mean, the Mexican submission states that marine genetic resources 'will be a common heritage of mankind whilst they will be regulated *under a benefit-sharing approach* that adequately incentives (*sic*) economic exploitation by States.'[54] On the one hand, Mexico remains at least rhetorically attached to the common heritage of mankind, but, on the other hand, the common heritage of mankind seems to be limited to benefit sharing.

At the same time, some of the states that oppose the common heritage of mankind have suggested avoiding the doctrinal debates about common heritage and argued, instead, that the focus should be on practical aspects of benefit sharing. In its statement of May 2014, for example, the EU stated that it 'has always supported a pragmatic approach' to the marine genetic resources issue, 'avoiding counterproductive theoretical discussions.'[55] The report of the co-chairs summarized the discussion as follows:

> Several delegations expressed the view that [marine genetic resources] were the common heritage of mankind and that regime (*sic*) should therefore apply. Some delegations indicated that the freedom of the high seas applied to those resources. Several other delegations stressed that, while they could not accept that marine genetic resources were the common heritage of mankind ... they were nevertheless open to discussing practical measures for benefit sharing.[56]

Thus, states supporting the common heritage of mankind see it as being reducible to benefit sharing, while some states that object to it are willing to consider practical mechanisms for the sharing of benefits. It is this dynamic that has resulted in the complete removal of the common heritage of mankind from the scope of the negotiations. The question that this article explores is whether benefit sharing is a suitable replacement for the common heritage or whether, by replacing the common heritage of mankind with benefit sharing, the negotiations will be losing something important.

[52] *Ibid* at 15.
[53] *Ibid* at 16 [emphasis added].
[54] *Ibid* [emphasis added].
[55] See Statement by Greece (on Behalf of the European Union and Its Member States) (May 2014) at para 14 [on file with the author].
[56] See Co-Chairs Summary of the Discussions at the Ad Hoc Working Group to Study Issues Relating to the Conservation and Sustainable Use of Marine Biological Diversity in Areas beyond National Jurisdiction, Doc A/69/82 (5 May 2014) at para 50.

IV. UNPACKING THE COMMON HERITAGE OF HUMANKIND

1. Underlying Concepts of the Common Heritage of Mankind

The notion that the common heritage of mankind is reducible to benefit sharing has contributed to the trend in the Working Group's deliberations of minimizing the common heritage of mankind in favour of benefit sharing. Benefit sharing may be ideologically more neutral. However, it is not clear at all that benefit sharing is an apt replacement for the common heritage of mankind principle. In fact, the following review of the key elements of the common heritage principle demonstrates how it extends well beyond benefit sharing.

The common heritage of mankind principle has its roots in the pursuit of an appropriate framework to govern areas over which no state exercises jurisdiction—commonly referred to as the commons. Alexandre Kiss notes that from early times it has been accepted that certain spaces—the commons—were not *res nullius*—an area not controlled by any country but open to national appropriation.[57] The high seas and the seabed, for example, were seen as *res communis*—areas held in common by everyone—since while their resources could be appropriated, they themselves could not be appropriated.[58] As *res communis*, the high seas and the seabed could be used by all without the possibility of appropriation. However, the resources of the high seas could be freely appropriated and exploited.[59] This idea of the high seas as a *res communis*—not being subject to national appropriation but whose resources may be—risked the possibility of re-enacting Hardin's tragedy of the commons on the oceans.[60] Since the resources of the commons are to be exploited freely, those with the ability are likely to pursue a policy of maximum exploitation. With the realization that the resources of the oceans are not infinite came the recognition that 'a simple regime of non-appropriation' of the high seas qualified by free use of its resources was not sufficient for the governance of marine areas beyond national jurisdiction.[61] The common heritage of mankind, therefore, seeks to move beyond the free use paradigm of *res communis.*

2. Constituent Elements of the Common Heritage of Mankind

Certain common constituent elements of the common heritage of mankind can be gleaned from the literature. These have, for the most part, been synthesized from treaties incorporating the common heritage of mankind.[62] While it has

[57] Alexandre Kiss, *The Common Heritage of Mankind: Utopia or Reality?* 40 Intl J 423 at 423–24 (1985).

[58] See *Fisheries Jurisdiction Case (United Kingdom of Great Britain and Northern Ireland v Iceland)*, Merits, [1974] ICJ Rep 3 at 8 (separate opinion of Judge de Castro). See also Larschan and Brennan, *supra* note 5 at 320.

[59] See Kiss, *supra* note 57 at 423. See also Larschan and Brennan, *supra* note 5 at 312–18.

[60] Tladi, *supra* note 18 at 104.

[61] Kiss, *supra* note 57 at 424.

[62] Treaties that reflect, in some way, the common heritage of mankind include, in addition to Part XI of UNCLOS, *supra* note 1, the 1979 Agreement Governing the Activities of States on the Moon and

been suggested that, though mystical, the phrase 'common heritage of mankind' has dubious legal significance and 'symbolizes nothing,'[63] it is generally agreed that the 'mankind' in the phrase does not denote states.[64] Kiss, for example, states that what is at stake 'is not the immediate interests of a State or States, but a more remote concern . . . for all mankind.'[65] Similarly, Christopher Joyner asserts that the application of the common heritage of mankind principle would seek to 'expunge national interests from' the governance.[66] This does not mean that there is no role for states. However, whatever role states may play, they do so as the 'representative agents of all mankind.'[67]

There is also general agreement on the normative elements, though certainly not on the legal status, of the common heritage of mankind principle.[68] The first element of the principle is that of non-appropriation.[69] In principle, non-appropriation should present few difficulties since it is implied even in the application of *res communis.*[70] Thus, even a *res communis* approach, such as the freedom of the high seas, is based on an understanding that a common area, such as the high seas, is not subject to appropriation. However, as the current

Other Celestial Bodies 1363 UNTS 79 (1992) and the 1967 Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies 610 UNTS 205 (1967)

[63] Martin A Harry, *The Deep Seabed: The Common Heritage of Mankind or Arena for Unilateral Exploitation,* 40 Naval L Rev 207 at 226 (1992). Cf Oduntan, *supra* note 5 at 192, who says that the approach of undermining the legal content of the common heritage of mankind is 'a very clever approach because once the legal validity is successfully undermined, there presumably exists no need to respect any restrictions on the exercise of property rights.'

[64] Cf Rüdiger Wolfrum, *The Principle of the Common Heritage of Mankind* 43 Zeitschrif für Ausländisches Öffentliches Recht und Völkenrecht 312 at 318 (1983). It should be pointed out, however, that in Arvid Pardo's speech of 1967 at the United Nations—the speech most closely associated with the emergence of the common heritage of mankind—the Maltese ambassador himself seems to accept, and indeed base his propositions, on the national interests. At one point, for example, the Maltese ambassador speaking about the agency to oversee the management of the oceans and the seabed, states that such an agency would not act as a sovereign 'but as a trustee for *all countries* over the oceans and the ocean floor' [emphasis added]. See UNGA, 22nd Session, Official Records, First Committee, 1516th Meeting, Doc A/C.1/PV.1516 (1 November 1967) at para 8.

[65] Kiss, *supra* note 57 at 427.

[66] Joyner, *supra* note 5 at 191. See also Singh Rana, *supra* note 23 at 229, who states that '"Mankind" is a transcendent, separate and distinct collection of interests, not merely the sum total of all States' national interests.'

[67] See Joyner, *supra* note 5 at 191.

[68] John E Noyes, *The Common Heritage of Mankind: Past, Present and Future* 40 Denver J Intl L & Policy 447 at 450 (2011–12).

[69] See Statement by the Maltese Ambassador, Arvid Pardo to the General Assembly, United Nations General Assembly, 22nd Session, Official Records, First Committee, 1515th Meeting, Doc A/C.1/PV.1515 (1 November 1967) at paras 57ff. Jennifer Frakes, *The Common Heritage of Mankind Principle and the Deep Seabed, Outer Space and Antarctica: Will Developed and Developing Nations Reach a Compromise?* 21 Wisconsin Intl LJ 409 at 411 (2003).

[70] In what may be interpreted as an assertion of *jus cogens* status for non-appropriation, Lauterpacht has stated that 'the absence of protest' in response to a proclamation of 'exclusive right of navigation, jurisdiction of exploitation [. . . over] the high seas . . . would hardly make any difference to the legal position.' See Hersch Lauterpacht, *Sovereignty over Submarine Areas* 27 British YB Intl L 388 at 398 (1950).

debate about the applicability of Part XI to marine genetic resources shows, non-appropriation does create difficulties in relation to its application to the resources of the common area. Thus, while there may be no difficulty with the idea of non-appropriation of the high seas and the seabed, it is contentious whether this can apply to resources in those areas, in particular, marine genetic resources.

The second, and potentially even more contentious, element is that there should be a common management of areas subject to common heritage. Since the area subject to the common heritage of mankind is not subject to appropriation by any one state,[71] it makes sense that it should be managed by, or at least on behalf, of all mankind. The more formal and central the institutional arrangements for the management or administration of the common area are, the more likely the resistance to it, particularly from the states that have the capability to exploit the resources in the area.[72] Despite its potential contentiousness, the common management idea is perhaps the most central element of the common heritage of mankind principle.[73] The idea of an agency for the management of the high seas and the seabed was central to Arvid Pardo's famous speech to the UNGA that led to the launching of the third UN Conference on the Law of the Sea.[74] In his statement, the ambassador of Malta called for a 'special agency with adequate powers to administer in the interest of mankind the oceans and the ocean floor beyond national jurisdiction.'[75]

The third element, the sharing of benefits, is the element for which the common heritage of mankind is best known. Benefits under the common heritage of mankind principle include both monetary and non-monetary benefits. This third element, particularly as it relates to monetary benefits, is responsible for the greatest controversy.[76] The sharing of monetary benefits is seen as discouraging innovation and resource development.[77] Indeed, the controversy of this element may be linked to its roots in the new international economic order (NIEO) movement, which was rejected by Western states. However, as John Noyes observes, benefit sharing reflects the uncontroversial idea of the need to promote the development of developing countries—an idea that is reflected in a multitude of international law instruments.[78] The rationale for a benefit-sharing element of the common heritage of mankind is captured in Pardo's statements, warning against the failure to implement the common heritage of mankind:

> [There would be] intolerable injustice that would reserve the plurality of the world's resources for the exclusive benefit of less than a handful of nations. The strong would

[71] See Noyes, *supra* note 68 at 470.
[72] See Singh Rana, *supra* note 23 at 237.
[73] See Kiss, *supra* note 57 at 431.
[74] See Pardo's statement, *supra* note 69 at para 105 and Pardo's speech, *supra* note 64 at paras 8ff.
[75] Pardo's speech, *supra* note 64 at para 8.
[76] Kiss, *supra* note 57 at 435.
[77] See Singh Rana, *supra* note 23 at 231.
[78] Noyes, *supra* note 68 at 470.

get stronger, the richer would get richer, and among the rich themselves there would arise an increasing and insuperable differentiation between two or three and the remainder.[79]

Pardo's argument, and, indeed, the foundation of the common heritage of mankind principle's benefit-sharing component, is based on the pursuit of a more equitable framework.

The fourth element of the common heritage of mankind principle is that the area may only be used for peaceful purposes.[80] While it may not be clear whether a particular activity constitutes non-peaceful use,[81] it is generally agreed that the stationing of military personnel or weaponry on common heritage areas would be prohibited by this principle.[82]

The fifth, and final element, is that the area subject to the common heritage of mankind should be preserved for posterity or for future generations as implied by the word 'heritage.'[83] Kiss, for example, observes that the common heritage principle implies 'the need to manage natural resources in a rational way so that they could be transmitted to future generations.'[84] This final element integrates into the common heritage of mankind, the idea of inter-generational equity.[85] The common heritage of mankind, therefore, would require the adoption of conservation measures because, as Joyner correctly observes, to fail in the protection, conservation, preservation and prudential management of the region and its resources would breach the trust and legal obligation implicit in responsibly supervising the earth's heritage for mankind in the future.[86]

[79] Pardo's statement, *supra* note 69 at para 91. It has been reported that, even prior to Pardo's speech, then US president made the following statement: 'Under no circumstances, we believe, must we ever allow the prospects of a rich harvest of mineral wealth to create a new form of colonial competition amongst the maritime nations . . . We must ensure that the deep seas and the ocean bottom are, and remain, the legacy of all human beings.' Words of President Johnson, quoted in Harry, *supra* note 63 at 209.

[80] See Pardo's statement, *supra* note 69 at para 48ff, first detailing the apparent advantages and then dangers of permitting the ocean and ocean floor for military purposes. See also Edwin Egede and Peter Sutch, The Politics of International Law and International Justice, at 329 (2013).

[81] Kiss, *supra* note 57 at 433, regards this element, which he terms 'non-destructive—that is, peaceful.'

[82] See, eg, Frakes, *supra* note 69 at 413. Cf *Legality of the Threat or Use of Nuclear Weapons*, Submission of the United Kingdom of Great Britain and Northern Ireland in the Proceedings before the International Court of Justice in the Request for an Advisory Opinion [1996] ICJ Rep at 53, para 3.10.

[83] See Joyner, *supra* note 5 at 195, stating that the 'concept of "heritage" conveys the proposition that common areas should be regarded as inheritances transmitted down to heirs, or as estates which by birth right are passed down from ancestors to present and future generations.' See also Singh Rana, *supra* note 23 at 230; Wolfrum, *supra* note 64 at 318.

[84] Kiss, *supra* note 57 at 424.

[85] On inter-generational equity, see Edith Brown Weiss, In Fairness to Future Generations: International Law, Common Patrimony and Intergenerational Equity (1989).

[86] Joyner, *supra* note 5 at 195. Cf Frakes, *supra* note 69 at 415, asserting that 'developing nations are not arguing for conservation.'

V. COMMON HERITAGE OF MANKIND AS AN AVENUE FOR SUSTAINABLE DEVELOPMENT

It should be clear from the earlier discussion that the common heritage of mankind principle includes more than just benefit sharing. It is also true that the non-appropriation element, which is entrenched in oceans governance whether one applies the common heritage of mankind principle or the freedom of the high seas, is implicit in UNCLOS. Both the Area and the high seas are not subject to appropriation.[87] It may thus be argued that even without the explicit inclusion of the common heritage of mankind principle, non-appropriation remains an integral part of the law governing the ocean and the ocean floor. Similarly, the idea of peaceful use is arguably an integral part of the law relating to high seas and the seabed such that its application is not dependent on the inclusion of the common heritage of mankind.[88]

The element of preservation for posterity would, in the absence of the common heritage of mankind, remain unaccounted for. Inter-generational equity, the idea that there is a duty of trust to preserve the common area for future generations, will be lost to the new treaty if the common heritage of mankind principle is replaced with benefit sharing. Rules can be created to prohibit the non-peaceful use of the ocean and ocean floor, and an institutional arrangement can be put in place—or the mandate of an existing entity expanded—to administer marine biological diversity in areas beyond national jurisdiction. However, the richness of the inter-generational equity principle, in the context of marine biological diversity in areas beyond national jurisdiction, cannot so easily be replaced by the adoption of rules. The inter-generational equity element reminds us that, more than just being about benefit sharing, the common heritage of mankind requires us to protect, conserve, and preserve marine biological diversity in areas of the ocean and ocean floor beyond national jurisdiction.

While inter-generational equity provides important lessons pertaining to conservation, it is not just about the adoption of conservation rules, although these are certainly important. It is an ethical principle that serves to constrain us, in our decision making, ensuring that we do not use our 'temporary control over the earth's resources' wholly for our benefit without consideration of the needs of future generations.[89] It reminds us not only that we have the right to enjoy the riches of our earth and, in the context of the ocean, the richness of the ocean and

[87] UNCLOS, *supra* note 1, Article 89 provides as follows: 'No State may validly purport to subject any part of the high seas to its sovereignty.' Similarly, Article 137 provides that no 'State may claim or exercise sovereignty or sovereign rights over any parts of the Area or its resources, nor shall any State or natural or juridical person appropriate any part thereof.'

[88] *Ibid*, Article 88 provides that the 'high seas shall be reserved for peaceful purposes.' Similarly Article 141 provides that the 'Area shall be open to use exclusively for peaceful purposes by all States.'

[89] Edith Brown Weiss, *In Fairness to Future Generations and Sustainable Development* 8 Am U Intl L Rev 19 at 19 (1992).

the ocean floor but also that we have responsibilities to ensure that we conserve and protect these riches, both for the enjoyment of the current generation and for generations yet to come.[90] Inter-generational equity infuses a forward-looking approach into decision making.[91] In this sense, inter-generational equity embraces other forward-looking principles of international law relevant to the conservation and sustainable use of marine biological diversity such as the precautionary principle.[92]

Benefit sharing is certainly an important aspect of the common heritage of mankind. It represents the intra-generational equity side of the common heritage of mankind coin or, to put it another way, its distributional component within the current generation.[93] Seen in this light, the common heritage of mankind principle reflects the foundational elements of sustainable development, namely inter- and intra-generational equity and the integration of the two.[94] This serves to emphasize that, like sustainable development, the common heritage of mankind principle requires a paradigm shift in our thinking. As Edwin Egede and Peter Sutch observe, the idea of treating the ocean and ocean floor as the common heritage of mankind is in marked contrast to the Westphalian model of international law and promotes the idea of 'global and solidarist' perspective.[95] This more nuanced conceptualization of the common heritage of mankind principle is also reflected in the statement by South Africa during the UNGA session of 2009:

> [T]he common heritage of mankind principle is not solely about benefit sharing. [It] is just as much about conservation and preservation. The principle is about solidarity; solidarity in the preservation and conservation of a good we all share and therefore should protect. But also solidarity in ensuring that this good, which we all share, is for all our benefit.[96]

Sustainable development, similarly, was meant to usher in a new paradigm in which the concerns of the poor and the environment are given greater priority than was the case in the economic growth-centred paradigm of the 1970s.[97] Like the common heritage of mankind principle, sustainable development is

[90] *Ibid* at 20.

[91] Dire Tladi, Sustainable Development in International Law: An Analysis of Key Enviro-Economic Instruments, at 43 (2007).

[92] *Ibid.*

[93] See Charles S Pearson, Economics and the Global Environment, at 469 (2000). See also Thomas M Franck, Fairness in International Law and Institutions, at 395 (1995), stating that the common heritage of mankind 'advanced notions of distributive justice [in that it] broadens participation in the process of governance by which distributive and conservational decisions about the resource are made.'

[94] See Tladi, *supra* note 91 at 40–60.

[95] Egede and Sutch, *supra* note 80 at 329.

[96] Statement by South Africa to the UN General Assembly on Oceans and the Law of the Sea (4 December 2009). See also Sstatement by South Africa to the UN General Assembly on Oceans and the Law of the Sea (10 December 2010).

[97] For a conceptualization of sustainable as reflecting a paradigm shift, see Tladi, *supra* note 91 at 74–90.

constituted by inter- and intra-generational equity. The exclusion of the common heritage of mankind principle as an element of negotiations on a new treaty on ocean governance and its replacement with benefit sharing will have the effect of depriving this new treaty of the inter-generational elements of the sustainable development paradigm that is so central to modern international environmental law.

It may be argued that, since the 2011 package deal already contains area-based management tools and environmental impacts assessment, the inter-generational equity element of the common heritage of mankind is already addressed. However, sustainable development, particularly its inter-generational element, is not just about conservation. It is about the integration of environmental, social, and economic considerations—not about these considerations individually. Sustainable development is thus not about individual rules but, rather, about decision making in an integrated fashion with a long-term perspective of the common good. Having specific rules about conservation in a treaty, or even rules about benefit sharing or frameworks concerning the exploitation of resources in areas beyond national jurisdiction does not equate to sustainable decision making. In the implementation of the rules, processes, and regulations that the proposed treaty will put in place, the common heritage of mankind provides the theoretical and ethical framework for such decision making that is consistent with sustainable development.

The retention of the common heritage of mankind idea, and, in particular, its inter-generational and intra-generational equity dimensions, would thus ensure that any new treaty on marine biological diversity in areas beyond national jurisdiction would address both the distributive and conservationist concerns in an integrated fashion. However, the retention of the common heritage of mankind would do more. It would infuse into the decision-making process, both with respect to rule making and the application of any decision-making processes established by the treaty, sustainable development philosophy. Decision making in relation to natural resources invariably requires a cost-benefit assessment. The retention of the common heritage of mankind principle and its inter-generational dimension will serve as a constraint to ensure not only that the balancing takes into account the need for conservation of the marine biological diversity and its components but also that it does so in a way that meets the needs of the current generation without compromising the ability of future generations to meet their own needs.[98] This requires more than just conservation, which can be short-term conservation.[99] Since inter-generational equity is based on the 'ability of future generations to meet their own *needs*,' its application would require not only that biological diversity be protected but also that it be

[98] This is classic definition of inter-generational equity found in the Brundtland report. See World Commission on Environment and Development, Our Common Future, at 43 (1987).

[99] See Brown Weiss, *supra* note 89 at 19.

conserved in a way that preserves options for future generations to meet their own needs, even those that we cannot foresee at present.[100]

The standard of care implied by inter-generational equity is thus elevated above mere conservation that may be achieved by specific rules on marine protected areas or environmental impact assessment. Rules in a treaty establishing a governance system for the marine protected areas or environmental impact will not, of themselves, address qualitative and normative questions about the scope and approach of conservation. Sustainable development and its constituent elements, as reflected in the common heritage of mankind, could effectively contribute to such normativity.

CONCLUDING REMARKS

The process towards the negotiation and adoption of an implementing agreement under UNCLOS is potentially one of the most significant in international environmental law-making in the twenty-first century. It promises to address governance and regulatory gaps in UNCLOS. While one of the gaps that gave rise to the discussions about a possible new treaty concerned the common heritage of mankind, there is a trend in the negotiations towards its exclusion and replacement with benefit sharing. In this respect, the recommendations of the Working Group to the UNGA, and the resolution of the UNGA launching negotiations, which set out the scope and parameters of the negotiations, identify, *inter alia,* benefit sharing as an element to be addressed without referring to the common heritage of mankind. This article has argued that the common heritage of mankind principle is about more than just benefit sharing. The common heritage of mankind principle is the thread that binds the proposed elements of a new treaty together—that is, conservation and sustainable use, including benefit sharing, area-based management tools, impact assessment and capacity building, and technology transfer. The common heritage of mankind principle encapsulates inter- and intra-generational equity and, in this way, would infuse sustainable development into the envisaged treaty regime. These sentiments are captured by Arvid Pardo, in the speech that began it all, more than forty years ago:

> The dark oceans were the womb of life: from the protecting oceans life emerged. We still bear in our bodies—in our blood, in the salty bitterness of our tears—the marks of this remote past. Retracing the past, man, the present dominator of the emerged earth, is now returning to the ocean depths. His penetration of the deep could mark the beginning of the end for man, and indeed for life as we know it on this earth: it could also be

[100] See Tladi, *supra* note 91 at 46.

a unique opportunity to lay solid foundations for a peaceful and increasingly prosperous future for all peoples.[101]

A new treaty on the conservation and sustainable use of biological diversity in areas beyond national jurisdiction without the common heritage of mankind will mean less solidarity for the protection and collective enjoyment, now and in the future, of the womb (and its fruit) that gave, and continues to give us life.

[101] UN General Assembly, Official Records, First Committee, 1515th Meeting, Agenda Item 92, Examination of the question of the reservation exclusively for peaceful purposes of the seabed and the ocean floor, and the subsoil thereof, underlying the high seas beyond the limits of the present national jurisdiction, and the use of their resources in the interests of mankind, Doc A/C.1/PV.1515 (1967) at para 7.