

# THE COMMON HERITAGE OF MANKIND: AN ADEQUATE REGIME FOR MANAGING THE DEEP SEABED?

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*[The concept of the 'common heritage of mankind' governs the deep seabed. However, the principle of the common heritage of mankind has differing interpretations and consequently lacks legal force. This article attempts to give content to the common heritage of mankind principle, as it applies to the deep seabed, by examining existing principles in international law. It also draws analogies with the principle of the common heritage of mankind as it applies to Antarctica and outer space. The development of international environmental law is considered as a potential model by which the common heritage of mankind principle can develop further legal content.]*

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## I INTRODUCTION

In the late 19<sup>th</sup> century, scientists discovered polymetallic nodules on the deep seabed.<sup>1</sup> The quantities found were large enough to enable commercial mining operations,<sup>2</sup> and in the 1960s, developments in technology meant that accessing these new mineral resources became a real and imminent possibility.<sup>3</sup> The problem, however, was that the deep seabed did not lie within the jurisdiction of any state. Consequently, to regulate access to these resources, a legal regime had to be established. The regime adopted was the 'common heritage of mankind'.

The common heritage of mankind principle consists of four elements. It prohibits states from proclaiming sovereignty over any part of the deep seabed, and requires that states use it for peaceful purposes, sharing its management and the benefits of its exploitation.<sup>4</sup>

Due to the ideological differences of developed and developing states, the common heritage of mankind principle has been interpreted in various ways.<sup>5</sup> These interpretations have not been reconciled and there has been no juridical consideration of the common heritage of mankind principle to clarify them.<sup>6</sup> Therefore, the precise legal requirements of the principle of the common heritage of mankind remain undefined.

Although commercial deep seabed mining is unlikely to commence in the near future, there is still a need to establish an effective legal regime for the deep seabed. This need is demonstrated by, among other issues, the discovery of hydrothermal vents and the potential for military-based activities to occur on the deep seabed.

Hydrothermal vent sites are located on the seabed in areas within and beyond the limits of national jurisdiction.<sup>7</sup> Each site consists of chemical rich waters that support a diverse range of micro-organisms and marine species.<sup>8</sup> Scientific

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<sup>1</sup> Jack Barkenbus, *Deep Seabed Resources: Politics and Technology* (1979).

<sup>2</sup> *Ibid.* 5.

<sup>3</sup> Nico Schrijver, *Sovereignty over Natural Resources: Balancing Rights and Duties* (1997) 215.

<sup>4</sup> Martin Harry, 'The Deep Seabed: The Common Heritage of Mankind or Arena for Unilateral Exploitation?' (1992) 40 *Naval Law Review* 207, 226; Said Mahmoudi, *The Law of Deep Sea-Bed Mining: A Study of the Progressive Development of International Law concerning the Management of the Polymetallic Nodules of the Deep Sea-Bed* (1987) 130; Steven Molitor, 'The Provisional Understanding Regarding Deep Seabed Matters: An Ill-Conceived Regime for US Deep Seabed Mining' (1987) 20 *Cornell International Law Journal* 223, 228.

<sup>5</sup> Ram Prakash Anand, *Legal Regime of the Deep Sea-Bed and the Developing Countries* (1975) 205.

<sup>6</sup> The common heritage of mankind was referred to in *Delimitation of Maritime Areas (St Pierre and Miquelon) (Canada and France)* (1992) 31 *ILM* 1145, 1172.

<sup>7</sup> Lyle Glowka, 'Putting Marine Scientific Research on a Sustainable Footing at Hydrothermal Vents' (2003) 27 *Marine Policy* 303, 304.

<sup>8</sup> *Ibid.*

research, the exploitation of mineral deposits and tourism all have the potential to threaten these hydrothermal vent sites.<sup>9</sup>

In order to protect these sites, in January 2003 the World Conservation Union ('IUCN') hosted a workshop in Spain.<sup>10</sup> The workshop's purpose was to try to establish a framework for the protection of these hydrothermal vent sites by establishing Marine Protected Areas ('MPA').<sup>11</sup> Both the IUCN and the World Wildlife Fund recognised that the current legal regime in the areas beyond national jurisdiction left a 'critical gap' in the protected areas system and that high seas protected areas are 'urgently needed'.<sup>12</sup>

The lack of any effective legal regime for the deep seabed also has an impact on potential military uses of the deep seabed as part of the 'revolution in military affairs'<sup>13</sup> and the fight against terrorism. It has been recognised that modern warfare strategy relies on information rather than the mere use of force.<sup>14</sup> A potential source of this information is the use of intelligence gathering devices (such as tracking devices) on the deep seabed. Given that the present threats to global security include terrorism and the proliferation of weapons of mass destruction, the use of the deep seabed to conduct information-gathering activities may become widespread. It is not clear whether the use of information gathering devices on the deep seabed for military purposes conflicts with the common heritage of mankind principle.

These examples illustrate that current concerns about the deep seabed are very different to the concerns that existed in the 1970s regarding deep seabed mining. Previously, the debates over deep seabed mining concerned the right to exploit mineral deposits and the economic consequences of any exploitation.<sup>15</sup> However, mining was, and still is, constrained by both technological and economic factors. Therefore, the context of these discussions was very different to the context of current discussions. The current issues of environmental protection and global concern regarding national security demonstrate that states are now adopting a more holistic approach to the deep seabed. This is because environmental damage may occur from activities that states currently undertake on the deep seabed, and many nations are still coming to terms with the consequences of terrorism on a large scale. Despite this, the differences between the current deep seabed issues and those related to deep seabed mining in the 1970s do not negate the need for a legal regime to govern such activities.

This article examines whether the common heritage of mankind principle has the potential to become a juridical standard capable of managing activities relating to the deep seabed.

Initially, the development of the common heritage of mankind principle in international law is traced to provide an understanding of how the conflicting

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<sup>9</sup> Ibid.

<sup>10</sup> IUCN News Release, *Deep Thoughts for the High Seas* (2003) <[http://www.iucn.org/info\\_and\\_news/press/highseas2.pdf](http://www.iucn.org/info_and_news/press/highseas2.pdf)> at 1 October 2003.

<sup>11</sup> Ibid.

<sup>12</sup> Ibid.

<sup>13</sup> See generally *The RMA Debate* (2003) <<http://www.comw.org/rma/>> at 2 September 2003.

<sup>14</sup> See, eg, Leonard Litton, *The Information-Based RMA and the Principles of War* (2000) IWS: The Information Warfare Site <<http://www.iwar.org.uk/rma/resources/info-rma/litton.htm>> at 1 October 2003.

<sup>15</sup> See below Part III.

interpretations over its substance have arisen. This examination demonstrates the opposing positions taken by developing and developed states, prior to the principle's overall acceptance in the 1994 *Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea*.<sup>16</sup> It also evidences that, despite overall acceptance, the common heritage of mankind principle lacks precise legal obligations.

Subsequently, an attempt is made to give content to each element of the common heritage of mankind principle by considering existing international legal principles drawn from various sources. This demonstrates where the principle currently lacks content. More importantly, it also indicates the elements of the principle that require the most development to allow effective management of the deep seabed.

Finally, this article studies global commons regimes, such as the *Antarctic Treaty*<sup>17</sup> and the *Agreement governing the Activities of States on the Moon and Other Celestial Bodies*,<sup>18</sup> and international environmental law in order to determine by what means the common heritage of mankind principle could evolve into a juridical standard. By contrasting similar principles and regimes that have had varying success, it becomes possible to determine what approach is required to make the common heritage of mankind principle an effective standard.

## II THE EVOLUTION OF THE COMMON HERITAGE OF MANKIND PRINCIPLE

The advancement of the common heritage of mankind principle has been hindered by conflicting interpretations on the part of developing and developed states. It was not until the 1994 *Agreement* that there arose near universal support for the common heritage of mankind principle. To reach this point, there had been General Assembly resolutions and domestic legislation passed to promote discord and a global convention relating to the law of the sea. This section outlines how the differing approaches of states have shaped the current concept of the common heritage of mankind principle.

### A Initial Proposal

In 1967, the Secretary-General of the UN included a supplementary item in the agenda of the 22<sup>nd</sup> session of the General Assembly.<sup>19</sup> This note verbale outlined the need to establish a regime to govern the deep seabed.<sup>20</sup> In order to prevent military competition and technologically advanced states exploiting the deep seabed for their own interests, the proposal suggested both an international

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<sup>16</sup> Opened for signature 28 July 1994, 1836 UNTS 3, pt XI (entered into force 28 July 1996) ('1994 Agreement').

<sup>17</sup> Opened for signature 1 December 1959, 402 UNTS 71, art IV(1) (entered into force 23 June 1961).

<sup>18</sup> Opened for signature 5 December 1979, 1363 UNTS 3 (entered into force 11 July 1984) ('Moon Treaty').

<sup>19</sup> Barkenbus, above n 1, 32; Mahmoudi, above n 4, 119; Yuwen Li, *Transfer of Technology for Deep Sea-Bed Mining: The 1982 Law of the Sea Convention and Beyond* (1994) 17; Judge Shigeru Oda, *International Law of the Resources of the Sea* (1979) 109.

<sup>20</sup> Judge Shigeru Oda, *The Law of the Sea in Our Time: Part 1 — New Developments 1966–1975* (1977) 16.

treaty and an international agency to regulate activities on the deep seabed.<sup>21</sup> The international treaty was to regulate activities on the deep seabed by establishing it as the common heritage of mankind.<sup>22</sup> An international agency was to assume jurisdiction over the deep seabed, regulate and control activities undertaken on the deep seabed and enforce the treaty.<sup>23</sup> Reaction to the proposal was mixed. In general, developing states endorsed the principle and developed states rejected it.

Developing states endorsed the common heritage of mankind principle for two reasons. First, many developing states remain the land-based producers of the minerals found in seabed nodules,<sup>24</sup> while developed states generate the bulk of the world's demand for minerals.<sup>25</sup> Developing states were concerned that if developed states were to mine the deep seabed, the demand for minerals would lessen and, consequently, mineral prices would fall.<sup>26</sup> As the economies of many developing states are heavily reliant upon mineral exports for their income, they perceived the sharing of financial benefits gained from deep seabed mining as a means of recovering any lost income from a fall in mineral prices.

The second, and more influential reason, was the demand for change by developing states embodied in the New International Economic Order ('NIEO').<sup>27</sup> The NIEO aimed to establish a more equitable distribution of resources and income between developed and developing states.<sup>28</sup> By distributing economic benefits from the exploitation of the deep seabed between all parties, the advantages of those developed states with the technology to mine would be shared with developing states. Therefore, many developing states saw

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<sup>21</sup> Barkenbus, above n 1, 32–3; Kathy-Ann Brown, *The Status of the Deep Seabed beyond National Jurisdiction: Legal and Political Realities* (SJD Thesis, York University, 1991) 23; Sofiah Jewa, *How Has the United Nations Convention on the Law of the Sea Fared?* (1999) <<http://www.mlj.com.my/articles/sofiah.htm>> at 1 October 2003; Mahmoudi, above n 4, 119–20.

<sup>22</sup> Kathy-Ann Brown, above n 21, 23; Li, above n 19, 17; Mahmoudi, above n 4, 120; Oda, *The Law of the Sea in Our Time*, above n 20, 16.

<sup>23</sup> Anand, above n 5, 181–2.

<sup>24</sup> Donald Denman, *Markets under the Sea?: A Study of the Potential of Private Property Rights in the Seabed* (1984) 17; Wolfgang Hauser, *The Legal Regime for Deep Seabed Mining under the Law of the Sea Convention* (1983) 14–16; Molitor, above n 4, 226–7.

<sup>25</sup> Denman, above n 24, 17; Molitor, above n 4, 226–7.

<sup>26</sup> David Hegwood, 'Deep Seabed Mining: Alternative Schemes for Protecting Developing Countries from Adverse Impacts' (1982) 12 *Georgia Journal of International and Comparative Law* 173, 178.

<sup>27</sup> The NIEO was outlined at the 1964 UN Conference on Trade and Development by various declarations and was more comprehensively formulated in: *Declaration on the Establishment of a New International Economic Order*, GA Res 3201(S-V1), UN GAOR, 6<sup>th</sup> special session, 2229<sup>th</sup> plen mtg, Supp 1, UN Doc A/9599 (1974); *Programme of Action on the Establishment of a New International Economic Order*, GA Res 3202(S-V2), UN GAOR, 2229<sup>th</sup> plen mtg, Supp 1, UN Doc A/9599 (1974); *Charter of Economic Rights and Duties of States*, GA Res 3281 (XXIX), UN GAOR, 29<sup>th</sup> sess, 2315<sup>th</sup> plen mtg, Supp 31, UN Doc A/RES/3281(XXIX) (1975). It has also been included in subsequent multilateral conventions.

<sup>28</sup> Bernard Herber, 'The Common Heritage Principle: Antarctica and the Developing Nations' (1991) 50 *American Journal of Economics and Sociology* 391, 391; Lawrence Juda, 'UNCLOS III and the New International Economic Order' (1979) 7 *Ocean Development and International Law Journal* 221, 223–4.

the common heritage of mankind principle as a means of rectifying their economic situation.<sup>29</sup>

Developed states rejected the common heritage of mankind principle on two grounds. First, mainly due to its imprecision, they considered the concept to be devoid of any legal meaning.<sup>30</sup> Second, developed states argued that deep seabed resources could not belong to the world community.<sup>31</sup> Rather, developed states relied upon the freedoms of the high seas, outlined in the 1958 *Geneva Convention on the High Seas*,<sup>32</sup> as the governing regime.<sup>33</sup>

## B General Assembly Resolutions

To further develop the common heritage of mankind principle, the General Assembly passed *Resolution 2467A*,<sup>34</sup> which created a Committee on the Peaceful Uses of the Seabed and the Ocean Floor beyond the Limits of National Jurisdiction ('Seabed Committee'). The Seabed Committee drafted a number of resolutions, the most important being *Resolution 2574D*<sup>35</sup> and *Resolution 2749*.<sup>36</sup>

### 1 Moratorium Resolution

The effect of the *Moratorium Resolution* adopted in 1969 was to create a moratorium on deep seabed mining until an international regime had been established. The *Moratorium Resolution* declared that:

- 1 States and persons, physical or juridical, are bound to refrain from all activities of exploitation of the resources of the area of the sea-bed and ocean floor, and the subsoil thereof, beyond the limits of national jurisdiction;
- 2 No claim to any part of the area or its resources shall be recognized.

Developing states used the *Moratorium Resolution* to restrict the exploitation of the deep seabed by developed states. The intention behind the *Moratorium Resolution* was to *create legal uncertainty*, stalling any exploitation of the deep seabed.<sup>37</sup> This was to allow for further discussion before the issue was made redundant by the commencement of seabed activities.<sup>38</sup>

<sup>29</sup> Boleslaw Boczek, 'Ideology and the Law of the Sea: The Challenge of the New International Economic Order' (1984) 7 *Boston College International and Comparative Law Review* 1, 3; Juda, above n 28, 225; Mahmoudi, above n 4, 127.

<sup>30</sup> Mahmoudi, above n 4, 124–5; Division for Ocean Affairs and the Law of the Sea, Office of Legal Affairs, UN, *The Law of the Sea: Concept of the Common Heritage of Mankind: Legislative History of Articles 133 to 150 and 311(6) of the United Nations Convention on the Law of the Sea* (1996) 93.

<sup>31</sup> Mahmoudi, above n 4, 125.

<sup>32</sup> Opened for signature 29 April 1958, 450 UNTS 11 (entered into force 30 September 1962).

<sup>33</sup> Mahmoudi, above n 4, 126.

<sup>34</sup> GA Res 2467A (XXIII), UN GAOR, 23<sup>rd</sup> sess, 1752<sup>nd</sup> plen mtg, UN Doc A/RES/2467 (XXIII) (1968).

<sup>35</sup> GA Res 2574D (XXIV), UN GAOR, 24<sup>th</sup> sess, 1833<sup>rd</sup> plen mtg, UN Doc A/RES/2574 (XXIV) (1969) ('*Moratorium Resolution*').

<sup>36</sup> GA Res 2749 (XXV), UN GAOR, 25<sup>th</sup> sess, 1933<sup>rd</sup> plen mtg, UN Doc A/RES/2749 (XXV) (1970) ('*Declaration of Principles*').

<sup>37</sup> Kathy-Ann Brown, above n 21, 29; Li, above n 19, 25.

<sup>38</sup> Kathy-Ann Brown, above n 21, 29; Mahmoudi, above n 4, 130.

Developed states rejected the binding nature of the *Moratorium Resolution*. John Stevenson, the Legal Advisor of the United States State Department declared, in a letter to the Seabed Committee, the position of the US to be that:

The *Resolution* is recommendatory and not obligatory. The United States is, therefore, not legally bound by it. The United States is, however, required to give good faith consideration to the *Resolution* in determining its policies ... The United States is not, however, obligated to implement the recommendations and has made clear its opposition to the concept.<sup>39</sup>

Developed states believed that a moratorium would hinder the future development of technologies relating to deep seabed mining.<sup>40</sup> The *Moratorium Resolution* was argued to be counter-productive to the common heritage of mankind principle, as no state could benefit while a moratorium existed.<sup>41</sup> Developed states feared that, to gain access to the nodules, other states would make extended claims of national jurisdiction. This was possible based on the 1958 *Geneva Convention on the Continental Shelf*, which provided that the continental shelf could extend to the depth of any exploitable resources.<sup>42</sup>

## 2 Declaration of Principles

The General Assembly adopted the *Declaration of Principles* in 1970. This was an attempt to outline the principles governing the use of the deep seabed. It declared the seabed the common heritage of mankind,<sup>43</sup> but it did not resolve the divide between developed and developing states. This was due to two factors. First, the principles outlined in the *Declaration* were ambiguous. It was adopted as a compromise and, consequently, the principles were vague and uncontroversial.<sup>44</sup> This is evidenced by the failure of the *Declaration of Principles* to define the common heritage of mankind principle.<sup>45</sup> Second, states believed that the *Declaration of Principles* had different purposes. The developed states did not consider it to have any binding legal authority. They preferred to regard the common heritage of mankind principle as a facultative concept, which following elaboration, might be capable of governing the resources of the deep seabed. They argued that the lack of legal substance was rectifiable by the international regime.<sup>46</sup> By contrast, the developing states considered the *Declaration of Principles* as the basis of the international regime.<sup>47</sup> Thus, the *Declaration of Principles* had made the common heritage of mankind principle a normative and judicially enforceable means of regulating the deep seabed.

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<sup>39</sup> Edward Brown, *Sea-Bed Energy and Mineral Resources and the Law of the Sea: The Area beyond the Limits of National Jurisdiction* (1986) vol 2, II.2 22.

<sup>40</sup> Li, above n 19, 25; Mahmoudi, above n 4, 131.

<sup>41</sup> Kathy-Ann Brown, above n 21, 28.

<sup>42</sup> Opened for signature 29 April 1958, 499 UNTS 312, art 1 (entered into force 10 June 1964).

<sup>43</sup> *Declaration of Principles*, above n 36, [1].

<sup>44</sup> Anand, above n 5, 181.

<sup>45</sup> See *Declaration of Principles*, above n 36, [1].

<sup>46</sup> Li, above n 19, 27; Mahmoudi, above n 4, 135.

<sup>47</sup> *Ibid.*

## C UN Convention on the Law of the Sea

Contemporaneous with the *Declaration of Principles*, the General Assembly convened the Third United Nations Conference on the Law of the Sea ('Third Conference').<sup>48</sup> The purpose of this conference was to create a uniform codified regime, covering all aspects of the law of the sea, but in particular the regime governing the deep seabed.<sup>49</sup>

The Third Conference operated according to a 'gentleman's agreement', which provided that no voting would occur until all efforts to reach a consensus had failed.<sup>50</sup> The resulting *UN Convention on the Law of the Sea* also represented a 'package deal'.<sup>51</sup> As 'the problems of ocean space are closely interrelated',<sup>52</sup> states considered all issues simultaneously. Further, arts 309 and 311(6) of *UNCLOS* prohibit reservations. Therefore, states had to accept the *Convention* in its entirety. Laylin recognised that the consequence of these mechanisms was that 'the positions taken by many delegations reflected not their country's view as to the existing law or as to the desirable new law but a trading ploy'.<sup>53</sup> The content of the common heritage of mankind principle became secondary to its strength as a bargaining tool. The principle's subsequent lack of development was evidenced by the provisions of *UNCLOS*, which closely followed the initial proposal and the *Declaration of Principles*.

Part XI of *UNCLOS* embodies the deep seabed provisions. It refers to the seabed as the 'Area', which is defined in art 1(1) as 'the seabed, ocean floor and subsoil thereof, beyond the limits of national jurisdiction'. Article 133 establishes that part XI relates to polymetallic nodules. The Area is governed by the common heritage of mankind.<sup>54</sup> This prevents states claiming or exercising 'sovereignty or sovereign rights' and natural or juridical persons 'appropriating any part thereof'.<sup>55</sup> Article 140(1) provides that all activities must be undertaken for the benefit of mankind as a whole, without regard to whether states are coastal or landlocked, taking into 'particular consideration the interests and needs of developing States'. States must use the Area exclusively for peaceful purposes.<sup>56</sup> The International Seabed Authority ('ISA') is given authority to act on behalf of 'mankind as a whole', in whom the resources of the Area are vested.<sup>57</sup>

Prior to the conclusion of the Third Conference, many developed states indicated that they were not satisfied with the provisions of part XI and would

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<sup>48</sup> Li, above n 19, 37; Ivan Shearer, *Starke's International Law* (11<sup>th</sup> ed, 1994) 231.

<sup>49</sup> Li, above n 19, 37.

<sup>50</sup> Bernard Oxman, 'The Law of the Sea' in Christopher Joyner (ed) *The United Nations and International Law* (1997) 321; Hugo Caminos and Michael Molitor, 'Progressive Development of International Law and the Package Deal' (1985) 79 *American Journal of International Law* 871, 874.

<sup>51</sup> Opened for signature 10 December 1982, 1836 UNTS 3 (entered into force 16 November 1994) ('*UNCLOS*').

<sup>52</sup> *Ibid* preamble.

<sup>53</sup> John Laylin, 'Emerging Customary Law of the Sea' (1976) 10 *International Lawyer* 669, 670.

<sup>54</sup> *UNCLOS*, above n 51, art 136.

<sup>55</sup> *Ibid* art 137(1).

<sup>56</sup> *Ibid* art 141.

<sup>57</sup> *Ibid* art 137(2).



not sign *UNCLOS*. The most significant proponent of this attitude was the US. The Reagan administration rejected part XI claiming it would deter future development of deep seabed mineral resources and insisting that there was a lack of certainty regarding the granting of mining contracts.<sup>58</sup> The US government disagreed with artificial limitations placed on seabed production and what it perceived to be burdensome financial requirements.<sup>59</sup> It did not support the structure of the ISA since it would not give the US an adequate role in decision-making processes and would allow amendments to enter into force without US approval.<sup>60</sup> Furthermore, it would provide for the mandatory transfer of technology.<sup>61</sup> The Reagan administration also objected to the ISA on the grounds that a portion of funds received by the Authority might be used to fund national liberation movements.<sup>62</sup>

Consequently, many developed states did not sign *UNCLOS*. This undermined the desired universal acceptance of a codified law of the sea and more specifically, a unified acceptance of the common heritage of mankind principle.

#### D *Reciprocating States' Regime*

As an interim measure to develop discussion,<sup>63</sup> the US enacted the *Deep Seabed Hard Minerals Resources Act*.<sup>64</sup> France, Italy, Japan, the Soviet Union, the United Kingdom and West Germany passed similar legislation.<sup>65</sup>

The legislation provided for the licensing of any exploration and exploitation occurring on the deep seabed, outside the *UNCLOS* regime.<sup>66</sup> To prevent overlapping licenses, a reciprocating states' regime was entered into in order to recognise licenses issued by other legislating states.<sup>67</sup>

Developing states opposed the legal effect of the legislation and the reciprocating states' regime. In a letter dated 23 April 1979 to the Chairman of the Group of 77,<sup>68</sup> the Group of Legal Experts on the Question of Unilateral Legislation declared that '[t]he adoption of unilateral measures, draft legislation and limited agreements would merely be an event without international legal effect and hence incapable of being invoked vis-à-vis the international

<sup>58</sup> *Restatement of the Law (Third) Foreign Relations Law of the United States* (1987) §523.

<sup>59</sup> *Ibid.*

<sup>60</sup> *Ibid.*

<sup>61</sup> *Ibid.*

<sup>62</sup> *Ibid.* The US was particularly concerned about Cuba receiving benefits from the ISA.

<sup>63</sup> Edward Brown, above n 39, II.8 5–6; Kathy-Ann Brown, above n 21, 496–7.

<sup>64</sup> *Deep Seabed Hard Minerals Resources Act*, 30 USC § 1441 (1980).

<sup>65</sup> *Law on the Exploration and Exploitation of Mineral Resources of the Deep Seabed*, 21 ILM 808 (1982) (France); *Law on the Exploration and Exploitation of the Mineral Resources of the Deep Seabed 1985*, 24 ILM 983 (1985) (Italy); *Law on Interim Measures for Deep Seabed Mining*, 22 ILM 102 (1983) (Japan); *Edict on Provisional Measures to Regulate Soviet Enterprises for the Exploration and Exploitation of Mineral Resources*, 21 ILM 551 (1982) (Union of Soviet Socialist Republics); *Deep Sea Mining (Temporary Provisions) Act 1981* (UK) c 53; *Act of Interim Regulation of Deep Seabed Mining*, 20 ILM 393 (1981) (Federal Republic of Germany).

<sup>66</sup> Hauser, above n 24, 30.

<sup>67</sup> *Agreement concerning Interim Arrangements Relating to Polymetallic Nodules of the Deep Seabed*, opened for signature 2 September 1982, 21 ILM 950 (1982) (entered into force 2 September 1982).

<sup>68</sup> The collective body of developing states.

community.<sup>69</sup> This rejection was based on the argument that the freedoms of the high seas do not apply to the deep seabed, resulting in the *absence* of any legal regime. Consequently, the only applicable law was contained in the *Moratorium Resolution* and the *Declaration of Principles*. The legislation passed by the abovementioned developed states conflicted with these resolutions.<sup>70</sup> These states argued that the General Assembly resolutions were not binding, and that objections had been expressed in voting for both resolutions.<sup>71</sup>

#### E The 1994 Agreement

With the increasing number of ratifications of *UNCLOS* and its imminent entry into force, supporters of a codified law of the sea considered amendments to part XI of *UNCLOS* in order to gain universal support.<sup>72</sup> Consequently, the General Assembly drafted the *1994 Agreement*.<sup>73</sup>

The *1994 Agreement* and part XI are to be interpreted and applied as a single instrument, with the *1994 Agreement* prevailing where inconsistencies arise.<sup>74</sup> Any subsequent ratification of *UNCLOS* also binds a state to the *1994 Agreement*.<sup>75</sup> Further, states cannot accede to the *1994 Agreement* without also adopting *UNCLOS*.<sup>76</sup>

The *1994 Agreement* had the effect of modifying the provisions of *UNCLOS* to which the developed states objected.<sup>77</sup> These included the mandatory transfer of technology,<sup>78</sup> training of personnel<sup>79</sup> and the decision-making process of the ISA. The *1994 Agreement* provides that a review of *UNCLOS* may occur at any time and not only by a review conference.<sup>80</sup> Additionally, modifications have occurred to remove production limitations,<sup>81</sup> to establish an economic assistance fund for land-based producers,<sup>82</sup> and to alter the financial terms of contracts.<sup>83</sup>

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<sup>69</sup> Letter from R Herrera Cáceres, Chairman of the Group of Legal Experts to the Chairman of the Group of 77, 23 April 1979 (1979) 11 *Third United Nations Conference on the Law of the Sea: Official Records* 80–2.

<sup>70</sup> Edward Brown, above n 39, II.8 28.

<sup>71</sup> *Ibid* II.2 33.

<sup>72</sup> Bernard Oxman, 'The 1994 Agreement and the Convention' (1994) 88 *American Journal of International Law* 687, 688.

<sup>73</sup> Jewa, above n 21; L Dolliver Nelson, 'The New Deep Sea-Bed Mining Regime' (1992) 10 *International Journal of Marine and Coastal Law* 189, 192.

<sup>74</sup> *1994 Agreement*, above n 16, art 2(1).

<sup>75</sup> *Ibid* art 4(1).

<sup>76</sup> *Ibid* art 4(2).

<sup>77</sup> Louis Sohn, 'International Law Implications of the 1994 Agreement' (1994) 88 *American Journal of International Law* 696, 696.

<sup>78</sup> Jewa, above n 21; Nelson, above n 73, 196; see generally Oxman, 'The 1994 Agreement and the Convention' above n 72, 691–3; Bernard Oxman, 'The 1994 Agreement Relating to the Implementation of Part XI of the UN Convention on the Law of the Sea' in Davor Vidas and Willy Ostreng (eds), *Order for Oceans at the Turn of the Century* (1999) 24.

<sup>79</sup> Nelson, above n 73, 196.

<sup>80</sup> *Ibid* 198–9; see generally Oxman, 'The 1994 Agreement and the Convention', above n 72, 695.

<sup>81</sup> Nelson, above n 73, 199; see generally Oxman, 'The 1994 Agreement and the Convention', above n 72, 691; Oxman, 'The 1994 Agreement Relating to the Implementation of Part XI of the UN Convention on the Law of the Sea', above n 78, 23.

<sup>82</sup> Nelson, above n 73, 199.

The *1994 Agreement* finalised the operations of the Finance Committee<sup>84</sup> and clarified aspects of the Pioneer Investor Scheme.<sup>85</sup> The *1994 Agreement* does not alter the content of the common heritage of mankind principle. It merely reworks the provisions that were preventing universal acceptance.

Developed states were induced to enter into the *1994 Agreement* and consequently into *UNCLOS*. Despite support from the majority of states, Canada has signed both *UNCLOS* and the *1994 Agreement* but has not ratified either.<sup>86</sup> The US has not signed or ratified *UNCLOS* and has signed but not ratified the *1994 Agreement*.<sup>87</sup>

The *1994 Agreement* almost achieved universal acceptance. In order to attain this, developing states had to accede to the demands of developed states over the management of the deep seabed. The common heritage of mankind principle now binds a majority of states through *UNCLOS* and the *1994 Agreement*. However, the *1994 Agreement* has only affected the management regime. It has not altered the *content* of the common heritage of mankind principle. Consequently, the common heritage of mankind principle does apply to the deep seabed, but due to conflicting opinions, the substantive elements of the concept remain vague.

#### F Conclusion

When the common heritage of mankind principle was initially suggested as the regime to govern the deep seabed, developing and developed states took opposing positions. Developing states supported the common heritage of mankind principle as it favoured their economic interests. Developed states had more to gain from utilising pre-existing legal regimes and adapting them to the deep seabed.

The *Moratorium Resolution* and the *Declaration of Principles* did not add to the substance of the elements of the common heritage of mankind principle. The inclusion of the common heritage of mankind principle in *UNCLOS* was undermined by the negotiation processes. The subsequent attitude of the developed states involved in the reciprocating states' regime prevented any significant advances in defining the elements of the common heritage of mankind principle. The *1994 Agreement* did not affect this definition or any elements associated with it. It affected the machinery by which it would operate. As such, the *1994 Agreement* has not resolved the fundamental differences between the interpretation of the developed states and that of the developing states. Therefore, although there is almost uniform acceptance of the principle of

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<sup>83</sup> Ibid 199–200; see generally Oxman, 'The *1994 Agreement* and the *Convention*', above n 72, 693–4; Oxman, 'The *1994 Agreement* Relating to the Implementation of Part XI of the UN Convention on the Law of the Sea', above n 78, 27.

<sup>84</sup> Nelson, above n 73, 200; Oxman, 'The *1994 Agreement* Relating to the Implementation of Part XI of the UN Convention on the Law of the Sea', above n 78, 29.

<sup>85</sup> Nelson, above n 73, 200–1; Oxman, 'The *1994 Agreement* Relating to the Implementation of Part XI of the UN Convention on the Law of the Sea', above n 78, 31. The Pioneer Investors Scheme was established for those states that had invested in deep seabed technology. Any investment in deep seabed mining already made by states was factored into the regime governing the exploitation of deep seabed mineral resources.

<sup>86</sup> Ibid.

<sup>87</sup> Ibid.

the common heritage of mankind, it cannot be said that there is uniformity as to how states interpret the principle. Consequently, the content of the elements of the common heritage of mankind principle has not yet been affirmatively established.

Given that scientific studies are already occurring in relation to hydrothermal vents and that the deep seabed could be subject to widespread intelligence gathering activities, the lack of legal obligations governing these activities is disconcerting for any state wanting to challenge the legality of another state's actions.

### III LEGAL APPLICATION OF THE COMMON HERITAGE OF MANKIND PRINCIPLE

It would be extremely difficult for a state to argue convincingly that environmental damage or intelligence gathering on the deep seabed did not comply with the common heritage of mankind principle. One approach that states could take would be to try to rely on established principles of international law to provide the basic elements of the principle with some substance.

This part of the article attempts to determine what could constitute a breach of the four elements of the common heritage of mankind principle based on the corpus of international law as it currently stands:

- 1 the prohibition on the acquisition of the deep seabed;
- 2 the use of the deep seabed for peaceful purposes;
- 3 the equitable sharing of benefits gained from deep seabed mining; and
- 4 the international management regime.

#### A *Prohibition on the Acquisition of the Deep Seabed*

Article 137(1) of *UNCLOS* provides that:

No State shall claim or exercise sovereignty or sovereign rights over any part of the Area or its resources, nor shall any State or natural or juridical person appropriate any part thereof. No such claim or exercise of sovereignty or sovereign rights nor such appropriation shall be recognized.

This provision does not address which acts amount to an appropriation or sovereign claim.

#### 1 *Traditional Sovereign Claims*

A state may acquire territory in five recognised ways. These are, by the occupation of *res nullius*, prescription, conquest, accretion and cession.<sup>88</sup> Prescription, conquest and cession are not applicable to the deep seabed as they require a former sovereign, and sovereignty has never existed over the deep seabed. Accretion does not apply to the deep seabed, as it does not undergo the physical processes that would result in it becoming part of a state's territory. As such, the only legal ground for acquiring the deep seabed is by occupying it on the basis that it is *res nullius*.

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<sup>88</sup> Tim Hillier, *Sourcebook on Public International Law* (1998) 227; Peter Malanczuk, *Akehurst's Modern Introduction to International Law* (7<sup>th</sup> ed, 1997) 148–54. See generally Seokwoo Lee, 'Continuing Relevance of Traditional Modes of Territorial Acquisition in International Law and a Modest Proposal' (2000) 16 *Connecticut Journal of International Law* 1, 3–14.

*(a) Occupation of Res Nullius*

*Res nullius* refers to property belonging to no-one and exploitable by those who wish to and are capable of doing so.<sup>89</sup> The territory involved must be *res nullius* prior to any occupation.<sup>90</sup>

*Res nullius* claims over the deep seabed were tested in 1974. An American corporation, Deepsea Ventures Inc ('Deepsea'), filed a notice of discovery and claim of exclusive mining rights to the Clarion Clipperton Zone in the Pacific Ocean.<sup>91</sup> Deepsea asserted exclusive rights to develop, evaluate and mine the resources in an area of 60 000 square kilometres.<sup>92</sup> The company requested diplomatic protection in order to appear before an international tribunal if a dispute arose.<sup>93</sup> The claim was lodged with the US Secretary of State, the Secretary-General of the UN, and the Ambassadors of Australia, Belgium, Bulgaria, Canada, Czechoslovakia, France, Hungary, Japan, Poland and the Soviet Union, the UK, West Germany, as well as multinational corporations.<sup>94</sup>

Accompanying the claim was a legal brief.<sup>95</sup> The brief established the lack of occupation of the seabed as one of the grounds for the claim.<sup>96</sup> It was argued to be analogous to seabed claims occurring prior to the Truman Declaration of 1945.<sup>97</sup> States had previously made exclusive claims to seabed resources, including pearls, oysters, corals and sponges, which were located outside of their territorial jurisdiction.<sup>98</sup> Occupation gave recognition to these claims.<sup>99</sup> Occupation occurred when there had been 'reasonable diligence' in bringing the resources to the commercial market.<sup>100</sup> Deepsea argued that their investment in the project demonstrated occupation.<sup>101</sup>

The claim was not recognised by Australia, Canada, the UK or the US.<sup>102</sup> The US State Department responded by saying that it 'does not grant or recognise

<sup>89</sup> Rosalyn Higgins, 'International Law and the Avoidance, Containment and Resolution of Disputes' (1991) 230 *Recueil des Cours* 176; Li, above n 19, 45.

<sup>90</sup> *Western Sahara (Advisory Opinion)* [1975] ICJ Rep 12 [79].

<sup>91</sup> Barkenbus, above n 1, 37; Gonzalo Biggs, 'Deepsea's Adventures: Grotius Revisited' (1975) 9 *International Lawyer* 271, 271; Eduardo Jiménez de Aréchaga, 'International Law in the Past Third of a Century' (1978) 159 *Recueil des Cours* 228; Mahmoudi, above n 4, 98; Markus Schmidt, *Common Heritage or Common Burden?: The United States' Position on the Development of a Regime for Deep Sea-Bed Mining in the Law of the Sea Convention* (1989) 36; Kathryn Surace-Smith, 'United States Activity outside of the Law of the Sea Convention: Deep Seabed Mining and Transit Passage' (1984) 84 *Colombia Law Review* 1032, 1045.

<sup>92</sup> Barkenbus, above n 1, 37; Jiménez de Aréchaga, above n 91, 228; Mahmoudi, above n 4, 98. See generally Biggs, above n 91, 271–2.

<sup>93</sup> Barkenbus, above n 1, 37; Biggs, above n 91, 271–2.

<sup>94</sup> Biggs, above n 91, 272.

<sup>95</sup> Barkenbus, above n 1, 37.

<sup>96</sup> *Ibid* 37–8; Biggs, above n 91, 273–4; Mahmoudi, above n 4, 99–100.

<sup>97</sup> Barkenbus, above n 1, 37.

<sup>98</sup> *Ibid*; Biggs, above n 91, 273.

<sup>99</sup> Barkenbus, above n 1, 38.

<sup>100</sup> *Ibid*.

<sup>101</sup> *Ibid*.

<sup>102</sup> *Ibid*; Mahmoudi, above n 4, 101.

exclusive mining rights to the mineral resources of an area of the seabed beyond the limits of national jurisdiction.<sup>103</sup> Other states ignored the claim.<sup>104</sup>

The rejection of *res nullius* claims may have occurred for two reasons. First, it may have been made to curtail claims over the deep seabed. The rejection militated against developing states making excessive claims over the deep seabed to ensure that nodule rich areas were not within the control of developed states. This would also prohibit private corporations from making large claims over the deep seabed. Either type of claim would have prevented developed states from free access to the deep seabed and its resources. Second, developed states may not have wanted to pre-empt the results of the Third Conference. By suppressing all activities on the deep seabed, the developed states were in a position to assert more influence over both the content of the common heritage of mankind principle and the overall outcome of the Third Conference. The untested potential of the deep seabed increased the bargaining strength of the common heritage of mankind principle.

The effect of these rejections was to dismiss claims that the deep seabed was *res nullius*. Since the deep seabed is not *res nullius*, occupation is not a valid means of acquiring rights over it.

## 2 *The Compatibility of Sovereign Claims with the Common Heritage of Mankind Principle*

Traditional methods of claiming sovereignty do not appear to apply to the deep seabed. The common heritage of mankind principle excludes these means of acquiring territory by denying the application of other legal principles that allow for appropriation to the deep seabed. Therefore, it would appear that the prohibition on the appropriation of the deep seabed reflects an inherent aspect of the common heritage of mankind principle rather than an individual element that states must adhere to. Consequently, sovereign claims would not form part of any juridical standard that the common heritage of mankind principle embodies for other activities. Therefore, the common heritage of mankind principle is effective in this regard.

### B *The Use of the Seabed for Peaceful Purposes*

The phrase ‘peaceful purposes’ is used in art 141 of *UNCLOS* where it is stated that ‘the Area shall be open to use exclusively for peaceful purposes by all States, whether coastal or land-locked, without discrimination and without prejudice to the other provisions of this Part’. This provision reflects one of the main purposes of the original proposal for the deep seabed. However, its practical application has resulted in ambiguity.

#### 1 *Definitions of Peaceful Purposes*

The ambiguities arose in the debates of the Eighteen Nation Disarmament Committee.<sup>105</sup> The purpose of the Committee was to discuss deep seabed related

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<sup>103</sup> Biggs, above n 91, 276; Jiménez de Aréchaga, above n 91, 228; Surace-Smith, above n 91, 1045; Schmidt, above n 91, 37.

<sup>104</sup> Barkenbus, above n 1, 38.

military and arms control.<sup>106</sup> Again, the views of the developed and developing states differed. The developed states preferred the approach of the US, which sought an international agreement prohibiting the emplacement of weapons of mass destruction on the seabed and ocean floor, beyond a three nautical mile band.<sup>107</sup> The US thought that complete demilitarisation was not verifiable.<sup>108</sup> The developing states favoured the view of the Soviet Union, which proposed a complete demilitarisation of the seabed, beyond the 12 nautical mile limit.<sup>109</sup>

The compromise agreed to became art 1(1) of the *Emplacement Treaty*, which provides that:

The States parties to this Treaty undertake not to emplant or emplace on the seabed and the ocean floor and in the subsoil thereof beyond the outer limit of the seabed zone, any nuclear weapons or any other types of weapons of mass destruction as well as structures, launching installations or any other facilities specifically designed for storing, testing or using such weapons.<sup>110</sup>

The utility of this provision is limited. The treaty does not expressly define what peaceful purposes are. ‘Non-peaceful’ weapons are restricted to nuclear weapons and ‘other weapons of mass destruction’. The actions include only the emplacement of devices or facilities designed for the storage, testing or use of such weapons.

It is unclear whether restrictions also apply to other military weapons, and whether other activities may be undertaken for military purposes. Such other activities could include intelligence gathering and the use of tracking devices. This is significant given that intelligence gathering activities on the deep seabed could increase with the ‘revolution in military affairs’ and the fight against terrorism. The *Emplacement Treaty* does not specify whether the actions have to be for a solely military purpose or whether an incidental military purpose would be sufficient to bring them within the prohibition.

Consequently, the *Emplacement Treaty* insufficiently defines ‘peaceful purposes’. Its application is restricted to a narrow range of activities and it is only of limited assistance.

## 2 *Peaceful Purposes in Analogous Treaties*

‘Peaceful purposes’ provisions are also contained in the *Antarctic Treaty* and the *Moon Treaty*. The extent to which these provisions can clarify the scope of ‘peaceful purposes’ in *UNCLOS* is limited.

Article 1 of the *Antarctic Treaty* outlines that ‘Antarctica shall be used for peaceful purposes only.’ It then prohibits ‘[i]nter alia, any measures of a military

<sup>105</sup> The Committee was later known as the Conference on the Committee on Disarmament. A commentary on the Committee’s work and the events leading to the conclusion of the *Treaty on the Prohibition of the Emplacement of Nuclear Weapons and Other Weapons of Mass Destruction on the Sea-Bed and the Ocean Floor and in the Subsoil Thereof*, opened for signature 11 February 1971, 955 UNTS 115 (entered into force 18 May 1972) (*‘Emplacement Treaty’*), is available at Atomic Archive.com (2003) <<http://www.atomicarchive.com/Treaties/Treaty7fulltext.shtml>> at 1 October 2003.

<sup>106</sup> Atomic Archive.com, above n 105.

<sup>107</sup> Ibid.

<sup>108</sup> Ibid.

<sup>109</sup> Ibid.

<sup>110</sup> Above n 105, art 1(1).

nature, such as the establishment of military bases and fortifications, the carrying out of military manoeuvres, as well as the testing of any type of weapons'. Article 3 of the *Moon Treaty* states that:

- (2) Any threat or use of force or any other hostile act or threat of hostile act on the moon is prohibited. It is likewise prohibited to use the moon in order to commit any such act or engage in any such threat in relation to the earth, the moon, spacecraft, the personnel of spacecraft or man-made space objects.
- (3) States Parties shall not place in orbit around or trajectory to or around the moon objects carrying nuclear weapons or any other kinds of weapons of mass destruction or place or use such weapons on or in the moon.
- (4) The establishment of military bases, installations, fortifications, the testing of any weapons and the conduct of military manoeuvres on the moon shall be forbidden. The use of military personnel for scientific research or any other purposes shall not be prohibited. The use of any equipment or facility necessary for peaceful exploration and the use of the moon shall also not be prohibited.

The *Antarctic Treaty* and the *Moon Treaty* extend the meaning of peaceful purposes to prevent the establishment of military fortifications. This interpretation is wider than the extent of the provision in the *Emplacement Treaty*.

One reason for this distinction may be that the high seas adjacent to the deep seabed *can* be utilised for military activities. While military fortifications are incidental to the use of the high seas for military activities, the storage and testing of weapons on the deep seabed would go beyond what states would consider as incidental to that use. Consequently, states prohibited the storage and testing of weapons. In contrast, neither the *Antarctic Treaty* nor the *Moon Treaty* allows military activities in adjacent areas. Furthermore, the *Moon Treaty* prohibits the transportation of nuclear weapons, and the *Antarctic Treaty* prohibits any military activity on the continent. Therefore, the establishment of a military fortification would automatically contravene the 'peaceful purposes' provisions in these contexts. Consequently, it might be implied from the fact that military activities are allowed adjacent to the deep seabed that the establishment of military fortifications may come within 'peaceful purposes' for the deep seabed.

The *Antarctic Treaty* and *Moon Treaty* also prohibit military manoeuvres. This is less likely to be applicable to the deep seabed, as military manoeuvres are currently subject to the freedoms of the high seas. Therefore, this provision gives little guidance as to what 'peaceful purposes' could mean in the maritime context.

The *Moon Treaty* contains the element of the use of force or threat or use of force. This appears to reflect art 2(4) of the *UN Charter*, which would bind states as a separate obligation. However, in the context of outer space it may also reflect potential attacks on spacecraft and astronauts. Due to the current technology relating to the deep seabed, art 2(4) of the *UN Charter* appears to be a satisfactory means of preventing similar attacks.

The prohibition on carrying nuclear weapons and other weapons of mass destruction, similar to that in the *Moon Treaty*, would be inapplicable. Nuclear



marine craft can navigate the high seas above the seabed in accordance with art 90 of *UNCLOS*.<sup>111</sup>

### 3 *Peaceful Purposes and the Deep Seabed*

Article 1(1) of the *Emplacement Treaty* defines peaceful purposes. However, this provision has a limited scope. When provisions from the *Antarctic Treaty* and the *Moon Treaty* are studied, they provide further examples of what may, in some circumstances, constitute peaceful purposes. Yet, upon closer examination, these provisions either do not apply to the seabed or provide only minimal assistance in interpreting art 1(1) of the *Emplacement Treaty*. This creates difficulties for states wishing to undertake activities that could be interpreted as military in nature. However, until further debate occurs, the narrow definition of peaceful purposes in the *Emplacement Treaty* reduces the effectiveness of the common heritage of mankind principle as a legal standard, especially in relation to intelligence gathering devices.

#### C *Equitable Sharing of Benefits*

The original provisions relating to the distribution of the benefits of deep seabed activities were contained in art 160(2)(f)(i) of *UNCLOS*. The principles are now contained in s 7 of the annex to the *1994 Agreement*. The limits of these principles will only become clear when distribution commences on a case-by-case basis. The criteria applicable will vary depending on the extent to which the distribution of benefits is to assist developing states: it may be limited to direct economic consequences, or could extend to programs that have resulted from cutbacks due to the economic shortfall.

The internal procedure of the ISA governs the distribution of benefits, and litigation over distribution is therefore unlikely to occur. The amount of funding, however, will be a contentious issue that can only be determined when commercial deep seabed activities commence. Until then, the principles provide a useful framework.

#### D *International Management Regime*

The ISA was set up as the international management regime for the deep seabed. The *1994 Agreement* changed the decision-making system of the ISA, the result of which is a regime that allows the individual interests of states to override the interests of mankind.

The US was opposed to the original system of decision-making as it 'unfairly and unnecessarily granted a disproportionate voice to developing countries that have little or no investment in seabed mining operations'.<sup>112</sup> Other developed states shared this view.<sup>113</sup> Consequently, in order to gain universal acceptance of part XI, it was necessary for the *1994 Agreement* to alter the decision-making process.

<sup>111</sup> Warships are also immune from the jurisdiction of any state other than that of the flag state: *UNCLOS*, above n 51, art 95.

<sup>112</sup> Molitor, above n 4, 226.

<sup>113</sup> *Ibid.*

The ISA is composed of three principal organs: the plenary Assembly, a 36-member Council and a Secretariat.<sup>114</sup> The Assembly serves as the forum for the ISA and its main role is to formally adopt decisions.<sup>115</sup> The Assembly consists of all members of the ISA and each state has one vote.<sup>116</sup> The Council consists of 36 states representing certain categories of states such as consumers, investors and producers, developing states and landlocked states.<sup>117</sup>

The *1994 Agreement* has altered the relationship between the Assembly and the Council, by providing that ‘general policies shall be established by the Assembly in collaboration with the Council.’<sup>118</sup> Although the Assembly is the only organ in which all states can participate (and in which the voting system allows for equality of power), where both organs have competence, the Council initiates policies. The Assembly is left with only a residual power to return decisions to the Council.<sup>119</sup> The imbalance between the power of the Council and the Assembly results in states not being able to advocate interpretations of provisions that are likely to benefit them. An additional provision — that the state with the largest economy in terms of GDP is always on the Council — guarantees that the US has an input on the Council. Therefore, the policies of developed states dominate ‘mankind’.

This structure represents the proposals initially suggested by the developed states and reduces the involvement of developing states in creating policies and interpreting the provisions of part XI. These changes detract from the management regime reflecting the common heritage of mankind.

#### E Conclusion

The common heritage of mankind principle is composed of various elements to which states should adhere when conducting activities on the deep seabed. However, the content of these elements, and the nature of the activities they permit, is unclear. This is mostly due to the failure of states to fully articulate the scope of these elements.

First, the prohibition on sovereign claims and the appropriation of the deep seabed reflects the inherent nature of the common heritage of mankind principle rather than being an element of it. Second, ‘peaceful purposes’ is undefined in *UNCLOS* and the *Emplacement Treaty*, while the *Antarctic Treaty* and the *Moon Treaty* have limited definitions. Therefore, further elaboration is required. Third, equitable sharing is yet to commence and consequently there has been no juridical consideration of the guidelines for the distribution of benefits. When this occurs, the extent of assistance may be able to be determined. Fourth, the current distribution of power in the international management regime is inconsistent with the concept of the common heritage of mankind.

These difficulties illustrate that the common heritage of mankind principle is currently unable to effectively govern the resources of the deep seabed. On a

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<sup>114</sup> International Seabed Authority, *About the Authority* (2003) <<http://www.isa.org.jm/en/about/default.asp>> at 1 October 2003.

<sup>115</sup> *Ibid.*

<sup>116</sup> *Ibid.*

<sup>117</sup> *Ibid.*

<sup>118</sup> *1994 Agreement*, above n 16, annex 3(1).

<sup>119</sup> *Ibid* annex 3(4).

more positive note, however, the elements of the principle do establish a *framework* for its future operation. This framework does assist states when undertaking activities on the deep seabed, such as scientific research or intelligence gathering, but fails to provide adequate guidance regarding the legal limitations governing these activities.

#### IV GLOBAL COMMONS AND THE COMMON HERITAGE OF MANKIND PRINCIPLE

For the common heritage of mankind principle to effectively manage activities such as scientific research and intelligence gathering, the content of the principle will need to be developed.

Although the common heritage of mankind principle was initially outlined in the context of the deep seabed, analogous principles have formed the basis of other global commons. In particular, both Antarctic and outer space law have similar foundations. This section compares the common heritage of mankind principle with similar principles in international law, to determine how such a concept develops normative effect. Particular focus is given to the law governing outer space and Antarctica. A comparison of these regimes may highlight legal and structural differences, which may be of assistance in ascertaining whether the common heritage of mankind principle has the potential to effectively govern the deep seabed.

##### A *Outer Space Law*

In 1959, the UN General Assembly established the UN Committee on the Peaceful Uses of Outer Space ('COPUOS').<sup>120</sup> COPUOS drafted various General Assembly resolutions that, in 1969, became codified in the *Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies*.<sup>121</sup> This treaty established a basic framework for the international regime in outer space.<sup>122</sup>

The *Outer Space Treaty* predated the *Declaration of Principles*, which outlined the common heritage of mankind principle's elements. Although the *Outer Space Treaty* does not expressly include the common heritage of mankind principle, it declares that states are to explore and use outer space 'for the benefit and in the interests of all countries' and that outer space 'shall be the province of all mankind.'<sup>123</sup> Article II prohibits any means of appropriating outer space. The exploration and use of outer space is to be in accordance with international law in order to maintain 'international peace and security' and to promote 'international co-operation and understanding.'<sup>124</sup> Article IV prevents the carrying, installation, or stationing of nuclear weapons or other weapons of mass

<sup>120</sup> Joseph Bosco, 'International Outer Space Law: A Brief Overview' (1995) 9 *Air and Space Lawyer* 3, 3; Scott Ervin, 'Law in Vacuum: The Common Heritage Doctrine in Outer Space Law' (1984) 7 *Boston College International and Comparative Law Review* 403, 406.

<sup>121</sup> Opened for signature 27 January 1967, 610 UNTS 205 (entered into force 10 October 1967) ('*Outer Space Treaty*'). See Ervin, above n 120, 407–8; Heidi Keefe, 'Making the Final Frontier Feasible: A Critical Look at the Current Body of Outer Space Law' (1995) 11 *Santa Clara Computer and High Technology Law Journal* 345, 349.

<sup>122</sup> Gennady Danilenko, 'Outer Space and the Multilateral Treaty-Making Process' (1989) 4 *High Technology Law Journal* 217, 218.

<sup>123</sup> *Ibid* art I.

<sup>124</sup> *Ibid* art III.

destruction in orbit. The *Outer Space Treaty* further provides for the liability of states for objects launched into space,<sup>125</sup> and for the principles of cooperation and mutual assistance.<sup>126</sup>

In 1971, Russia and Argentina proposed an agreement for the moon,<sup>127</sup> and COPUOS finalised a draft in 1979.<sup>128</sup> This subsequently became the *Moon Treaty*, the objectives of which are ‘the safe development and rational management of lunar resources and the equitable sharing of the benefits derived from those resources’.<sup>129</sup>

Article 11 of the *Moon Treaty* provides that ‘the moon and its natural resources are the common heritage of mankind’. Article 11 further specifies that the moon is not subject to appropriation,<sup>130</sup> and that an international regime is to be established when exploitation becomes feasible.<sup>131</sup> Article 11(7)(d) provides for the equitable distribution of benefits derived from these resources. When distribution occurs, special consideration is to be given to developing countries and those countries that have contributed, directly or indirectly, to the exploration of the moon.

The *Moon Treaty* has only been ratified by 10 states,<sup>132</sup> and signed by a further five states.<sup>133</sup> The lack of acceptance, especially by states that promote lunar activities, indicates that it is unlikely that the common heritage of mankind principle in the *Moon Treaty* will be defined. The fact that technological and economic factors currently prevent the exploitation of any mineral resources on the moon further reduces the likelihood that a definition will be formulated. As a result, the common heritage of mankind principle remains an inchoate principle in the context of outer space. This does not preclude the operation of the common heritage of mankind principle in the future. If mining or other systematic activities were to commence, rapid crystallisation of the legal limits might result. However, this has not yet occurred.

This uncertainty parallels the ambiguities present in the common heritage of mankind principle in relation to the deep seabed. For both outer space and the deep seabed, the lack of systematic utilisation has worked against the creation of a specific regime and the articulation of legal restrictions. For this reason, the examination of the common heritage of mankind principle in the context of outer

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<sup>125</sup> Ibid arts VI–VIII, XIII.

<sup>126</sup> Ibid arts IX–XII.

<sup>127</sup> Ervin, above n 120, 418; Keefe, above n 121, 353.

<sup>128</sup> Keefe, above n 121, 353.

<sup>129</sup> Barbara Ellen Heim, ‘Exploring the Last Frontiers for Mineral Resources: A Comparison of International Law Regarding the Deep Seabed, Outer Space, and Antarctica’ (1990) 23 *Vanderbilt Journal of Transnational Law* 819, 833–4.

<sup>130</sup> *Moon Treaty*, above n 18, art 11(2).

<sup>131</sup> Ibid art 11(5).

<sup>132</sup> The treaty has been ratified by Australia, Austria, Chile, Kazakhstan, Mexico, Morocco, Netherlands, Pakistan, Philippines and Uruguay. It has not been ratified by states who have been the principal proponents of lunar activities, such as the US: UN Office for Outer Space Affairs, *Agreement governing the Activities of States on the Moon and Other Celestial Bodies* <<http://www.oosa.unvienna.org/SpaceLaw/moon.html>> at 1 October 2003.

<sup>133</sup> Ibid. The treaty has been signed by France, Guatemala, India, Peru and Romania. It has not been signed by states who have been the principal proponents of lunar activities, such as the US.

space is of little assistance in determining how the principle might develop in the context of the deep seabed.

## B *Antarctica*

Prior to the adoption of the *Antarctic Treaty*, seven states had made sovereign claims over sections of Antarctica.<sup>134</sup> These states were Argentina, Australia, Chile, France, New Zealand, Norway and the UK.<sup>135</sup> These states founded their claims on factors including discovery, proclamations of sovereignty, geographical proximity and occupation through the establishment of scientific bases.<sup>136</sup>

During the early part of the Cold War, the US and the Soviet Union expressed interest in the continent due to its potential military significance.<sup>137</sup> This was followed by the establishment of the Scientific Committee on Antarctic Research ('SCAR') and the declaration that 1957–58 was the International Geophysical Year.<sup>138</sup> This led to increased scientific interest in the Antarctic and the negotiation of the *Antarctic Treaty* in 1959.

As issues arose, especially following an increased understanding of the Antarctic ecosystem and the prospect of exploitable mineral resources, new international agreements resulted in the '*Antarctic Treaty System*'. This consists of the *Antarctic Treaty* and Recommendations,<sup>139</sup> the 1972 *Convention for the Conservation of Antarctic Seals*,<sup>140</sup> the 1980 *Convention for the Conservation of Antarctic Marine Living Resources*,<sup>141</sup> the 1988 *Convention on the Regulation of Antarctic Mineral Resource Activities*<sup>142</sup> and the 1991 *Protocol on Environmental Protection to the Antarctic Treaty*.<sup>143</sup>

<sup>134</sup> Donald Rothwell, *The Polar Regions and the Development of International Law* (1996) 54; Donald Rothwell, 'The *Antarctic Treaty*: 1961–1991 and Beyond' (1992) 14 *Sydney Law Review* 62, 62; Gillian Triggs, 'Australian Sovereignty in Antarctica' (Pt 1) (1981) 13 *Melbourne University Law Review* 123, 123; Olav Stokke and Davor Vidas, *Governing the Antarctic: The Effectiveness and Legitimacy of the Antarctic Treaty System* (1996) 36.

<sup>135</sup> Rothwell, *The Polar Regions and the Development of International Law*, above n 140, 54; Rothwell, 'The *Antarctic Treaty*: 1961–1991 and Beyond', above n 134; Triggs, 'Australian Sovereignty in Antarctica: Pt 1', above n 134; see generally Gillian Triggs, 'Australian Sovereignty in Antarctica' (Pt 2) (1982) 13 *Melbourne University Law Review* 302, 302–14; Stokke and Vidas, above n 134, 36.

<sup>136</sup> Christopher Joyner, *Governing the Frozen Commons: The Antarctic Regime and Environmental Protection* (1998) 14–19; Rothwell, *The Polar Regions and the Development of International Law*, above n 134, 54–8.

<sup>137</sup> Rothwell, *The Polar Regions and the Development of International Law*, above n 134, 63–6; Triggs, 'Australia Sovereignty in Antarctica: Pt 1', above n 134, 124.

<sup>138</sup> Rothwell, *The Polar Regions and the Development of International Law*, above n 134, 67.

<sup>139</sup> Article IX(1) provides that measures may be taken for the 'furtherance of the principles and objectives of the *Treaty*.' When the measures are approved by the *Antarctic Treaty* Consultative Parties they become recommendations. The subject matter of recommendations is outlined in art IX(4).

<sup>140</sup> Opened for signature 1 June 1972, 1080 UNTS 175 (entered into force 11 March 1978).

<sup>141</sup> Opened for signature 20 May 1980, 1329 UNTS 247 (entered into force 7 April 1982).

<sup>142</sup> Opened for signature 2 June 1988, 27 ILM 868 (1988) (not yet in force).

<sup>143</sup> Opened for signature 24 April 1991, 30 ILM 1461 (1991) (not yet in force).

## 1 Sovereign Claims

As mentioned above, seven states have asserted sovereign claims over the Antarctic. While the US and the former Soviet Union have not made such claims, they have indicated their interest in the continent. The basis of the common heritage of mankind principle is that no state can appropriate, or make sovereign claims over, the area governed by the principle. Although all existing and potential claims over the Antarctic are suspended for the duration of the *Antarctic Treaty*,<sup>144</sup> the presence of these claims may undermine the suitability of the Antarctic context for an analysis of the common heritage of mankind principle. However, the Antarctic has a more developed regime than that governing outer space. This is due to the history of cooperation between states and the possibility of feasible development precipitating a regime. Therefore, an examination of the common heritage of mankind principle in the context of Antarctica may provide assistance.

## 2 Ban on Mineral Exploitation

Article 7 of the *Protocol on Environmental Protection to the Antarctic Treaty*<sup>145</sup> states that:

Any activity relating to mineral resources, other than scientific research, shall be prohibited.

The prohibition on mining is in contrast to the purpose of part XI of *UNCLOS*. The purpose of the common heritage of mankind principle was to equitably share financial benefits from any exploitation. Whilst the permitted activities on Antarctica differ, this does not preclude a comparison between aspects of the regimes that have been successful. The common heritage of mankind principle still applies to the deep seabed and outer space even though no exploitation has occurred. Therefore, the remaining aspect of the international management regime may provide guidance for the common heritage of mankind principle.

## 3 Exclusive Membership

The *Antarctic Treaty* establishes a hierarchy to govern Antarctica. Article IX creates three different groups of state parties, only two of which are entitled to attend Antarctic Treaty Consultative Meetings.<sup>146</sup> These are the 12 states that negotiated the *Antarctic Treaty*, and those states that have acceded to the *Antarctic Treaty* and fulfilled the requirements outlined in art IX(2). Both of these groups comprise the Antarctic Treaty Consultative Parties ('ATCPs').<sup>147</sup> The third group consists of those states that have acceded to the *Antarctic Treaty* but have not fulfilled the requirements of art IX(2).<sup>148</sup>

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<sup>144</sup> *Antarctic Treaty*, above n 17, art IV(2).

<sup>145</sup> Opened for signature 4 October 1991, 30 ILM 1461 (entered into force 14 January 1998).

<sup>146</sup> Rothwell, *The Polar Regions and the Development of International Law*, above n 134, 86; Stokke and Vidas, above n 134, 45.

<sup>147</sup> Rothwell, *The Polar Regions and the Development of International Law*, above n 134, 86–7; Stokke and Vidas, above n 134, 45–6.

<sup>148</sup> Rothwell, *The Polar Regions and the Development of International Law*, above n 134, 86–7; Stokke and Vidas, above n 134, 45–6.

This situation has invoked criticisms relating to the management of Antarctica. Many states view the ATCPs as a 'self-designated exclusive club without any clear legal authority to manage Antarctica for the rest of mankind'.<sup>149</sup> This led to the involvement of the UN in 1985. Malaysia introduced a resolution requesting the ATCPs to make information regarding Antarctica generally available to the UN.<sup>150</sup>

In comparison, the common heritage of mankind principle provides that all states are to share in the management of the deep seabed. The *Antarctic Treaty* does not contain the same principle as it was established prior to the enunciation of the common heritage of mankind principle. However, the establishment of a management regime that differentiates between states, and limits their participation, does not represent an equitable model of management envisaged by the common heritage of mankind principle. Consequently, the common heritage of mankind principle should not follow this aspect of the *Antarctic Treaty* nor adopt a similar system, based on the criticisms it has received.

#### 4 Conclusion

The *Antarctic Treaty* differs on two of the elements outlined by the common heritage of mankind principle. States have previously made sovereign claims over Antarctica and there is a prohibition on mineral exploitation. However, these differences do not preclude some comparisons as both systems have international management regimes. The creation of the ATCPs was established prior to the common heritage of mankind principle. It does not represent equitable management and has been criticised. Although this does not indicate how the common heritage of mankind principle should proceed to become a workable standard, it does emphasise the aspects that have been less successful in the management of Antarctica. Generally, the *Antarctic Treaty* regime is effective, as it has resulted in international cooperation. It also demonstrates the processes of crystallisation that may occur when development dictates a legal regime. However, the structural and developmental differences make it difficult to transfer this success to the deep seabed.

### V INTERNATIONAL ENVIRONMENTAL LAW AND THE COMMON HERITAGE OF MANKIND PRINCIPLE

Global commons regimes have not, so far, provided guidance in ascertaining whether the common heritage of mankind principle can become a legal standard. The translation of principles from the *Declaration of the United Nations Conference on the Human Environment*<sup>151</sup> and the *United Nations Declaration on Environment and Development*<sup>152</sup> into international law may indicate the future viability of the common heritage of mankind principle as an international legal standard. The *Stockholm Declaration* and the *Rio Declaration* contain principles that relate to the effects of transboundary pollution. These principles

<sup>149</sup> Joyner, above n 136, 241.

<sup>150</sup> *Question of Antarctica*, GA Res 40/156, UN GAOR, 40<sup>th</sup> sess, 117<sup>th</sup> plen mtg, Supp 53, UN Doc A/RES/40/156 (1985); Joyner, above n 136, 241.

<sup>151</sup> UN Doc A/CONF.48/14/Rev.1 (1973) ('*Stockholm Declaration*').

<sup>152</sup> UN Doc A/CONF.151/5/Rev.1 (1992) ('*Rio Declaration*').

lack substantive content like the common heritage of mankind principle, but have nevertheless become effective in international law.

Three factors may indicate why principles from the *Stockholm Declaration* and *Rio Declaration* have been successfully translated into the corpus of international law. First, the negotiation methods of the *Stockholm Declaration* and the *Rio Declaration*, and the conventions that stemmed from the Conferences, differ from the methods adopted for the law of the sea. Second, states have considered international environmental law for a longer period than the common heritage of mankind principle. This has resulted in a substantial body of 'soft law'.<sup>153</sup> Third, judicial consideration has been given to the principles, due to the serious consequences of breaching international environmental law.

#### A Development of International Environmental Law

The development of international environmental law initially proceeded by way of isolated treaties, rather than by a comprehensive study.<sup>154</sup> Subsequent to the *Report on the Problems of the Human Environment* conducted by the Secretary-General of the UN, the UN General Assembly convened the Stockholm Conference on the Human Environment of 1972 ('Stockholm Conference').<sup>155</sup>

The Stockholm Conference was the first conference to deal with environmental issues in a comprehensive manner. The Conference produced:

- 1 a condemnation of nuclear testing;
- 2 the creation of World Environment Day;
- 3 an 'action plan' consisting of recommendations for international action;
- 4 the adoption of the *Stockholm Declaration*;
- 5 recommendations for new international machinery (the UN Environment Programme);
- 6 a recommendation that the draft articles for the *Convention on Ocean Dumping* be referred for adoption; and
- 7 a decision that a second conference should be convened.<sup>156</sup>

The most important of these outcomes was the adoption of the *Stockholm Declaration*. This consisted of a series of principles intended to influence how states were to conduct activities with regard to the environment.<sup>157</sup>

In 1992, Rio de Janeiro hosted the UN Conference on Environment and Development ('UNCED').<sup>158</sup> This built upon the foundation established by the Stockholm Conference. The main outcomes of UNCED were:<sup>159</sup>

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<sup>153</sup> Soft law refers to general principles of international law that are not necessarily binding upon states, but that restrain state conduct.

<sup>154</sup> Wolfgang Burhenne and Richard Tarasofsky, 'Codification and Progressive Development of International Law: An Example from the Field of the Environment' (1998) 28 *Environmental Policy and Law* 77, 77; Shearer, above n 48, 362.

<sup>155</sup> Hillier, above n 88, 795; Schrijver, above n 3, 122; Shearer, above n 48, 362.

<sup>156</sup> Shearer, above n 48, 364–7; Schrijver, above n 3, 122–5.

<sup>157</sup> Shearer, above n 48, 365.

<sup>158</sup> Ibid 374; Hillier, above n 88, 804; Schrijver, above n 3, 135.

<sup>159</sup> Hillier, above n 88, 805; Shearer, above n 48, 375–6.



- 1 the creation of the preparatory document *Agenda 21*;
- 2 the opening for signature of the *UN Framework Convention on Climate Change*,<sup>160</sup>
- 3 the opening for signature of the *Convention on Biological Diversity*;<sup>161</sup>
- 4 the adoption of the *Non-Legally Binding Authoritative Statement of Principles for a Global Consensus on the Management, Conservation and Sustainable Development of All Types of Forests*;<sup>162</sup> and
- 5 the adoption of the *Rio Declaration*.

Both the *Stockholm Declaration* and the *Rio Declaration* contained similar broad-based principles. The international community has generally accepted these principles,<sup>163</sup> despite the fact that they contain undefined terms, and impose obligations upon both developing and developed states.

### B *Negotiation Methods in International Environmental Law*

The basis of negotiations at the Stockholm Conference and the UNCED was the 'framework approach'.<sup>164</sup> This process involves defining the scope of the legal obligation in general language, while subsequent protocols outline the specific details.<sup>165</sup> This approach results in a progressive specification of commitments,<sup>166</sup> at a rate that is acceptable to states and allows them to concur on the substance of the obligations. The initial principle acts as a framework, guiding the development of the obligation. Therefore, the legal documentation that UNCED produced merely forms the basis of future regimes.

The *Rio Declaration* demonstrates the effectiveness of the framework approach. General principles were contained in the *Stockholm Declaration*, following the elaboration of which, through treaties and state practice, the content was gradually established. This progressive approach gave states the opportunity to compromise on contentious issues. The *Rio Declaration* further outlined state obligations based on the developments that had occurred. Consequently, the acceptance of the *Rio Declaration* is partly due to the balance of policies of both developed and developing states.<sup>167</sup> By way of compromise, principles such as the precautionary principle<sup>168</sup> and the 'polluter pays' principle<sup>169</sup> were allowed by developing states, while developed states allowed

<sup>160</sup> Opened for signature 9 May 1992, 1771 UNTS 107 (entered into force 21 March 1994) ('*Framework Convention on Climate Change*').

<sup>161</sup> Opened for signature 5 June 1992, 1760 UNTS 79 (entered into force 29 December 1993).

<sup>162</sup> *Report of the UN Conference on Environment and Development*, UN Doc A/CONF.151/26(Vol III) (1992) annex III.

<sup>163</sup> *Dissemination of the Principles of the Rio Declaration on Environment and Development*, GA Res 49/113, UN GAOR, 49<sup>th</sup> sess, 92<sup>nd</sup> plen mtg, UN Doc A/RES/49/113 (1995) refers to the *Rio Declaration* as containing 'fundamental principles for the achievement of sustainable development, based on a new and equitable global partnership.'

<sup>164</sup> Peter Sand, 'UNCED and the Development of International Environmental Law' (1992) 3 *Yearbook of International Environmental Law* 3, 6.

<sup>165</sup> *Ibid.*

<sup>166</sup> *Ibid* 7; Burhenne and Tarasofsky, above n 154, 78.

<sup>167</sup> Sand, above n 164, 8.

<sup>168</sup> *Rio Declaration*, above n 152, principle 15. This imposes a duty on states to prevent environmental damage despite a lack of scientific verification.

<sup>169</sup> *Ibid* principle 16. This imposes a duty on states that cause environmental damage to make reparations for the damage.

'common but differentiated responsibilities'<sup>170</sup> and the right to develop.<sup>171</sup> Such compromise may not have occurred if states had attempted to outline a comprehensive regime in 1972.

In contrast, *UNCLOS* initially established a single comprehensive regime. Obligations were included for the sake of completeness and states could not always achieve compromise on their content. In order to reach agreement on the common heritage of mankind principle, the *1994 Agreement* altered the mechanism by which the principle would operate, rather than develop its content. Consequently, states still have differing interpretations. The aim of universal acceptance led to the difficulty of defining the common heritage of mankind principle.

### C Existence of 'Soft Law'

The framework approach also has the potential to result in the creation of 'soft law'. States consider the specifics of international environmental law principles, and the resulting resolutions, protocols, and treaties contribute to its corpus. Thus, the combination of formal international environmental law instruments with 'soft law' leads to the establishment of binding international law. Compared with international environmental law, the law relating to the deep seabed has had little consideration. There is, therefore, a lack of 'soft law' governing the deep seabed, which has prevented the common heritage of mankind principle from being fully developed. Combined with the deep seabed's lack of utilisation, the common heritage of mankind principle's negotiation was abstract. Consequently, it remains merely a framework.

### D Judicial Consideration

Until recently, the abstention by states from undertaking activities on the deep seabed has hindered the development of the common heritage of mankind principle. In contrast, the global community has felt the consequences of activities that have detrimentally affected the environment. This experience has resulted in litigation when states have breached environmental obligations. The subsequent judicial consideration has assisted in the development of international environmental law.

In 1996, two advisory opinions of the International Court of Justice ('ICJ') were sought: *Legality of the Use of Nuclear Weapons in Armed Conflict*<sup>172</sup> and *Legality of the Threat or Use of Nuclear Weapons*.<sup>173</sup> This was followed in 1997 by the decision of the ICJ in *Gabčíkovo-Nagymaros Project (Hungary v Slovakia)*.<sup>174</sup>

In the first of these opinions, the ICJ held that it did not have jurisdiction to give an advisory opinion, as had been requested by the World Health

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<sup>170</sup> Ibid principle 7. This concept recognises that the developed states were not subject to the environmental restrictions that currently exist when they were developing. The standard is lowered for developing states on this basis.

<sup>171</sup> Ibid principle 3.

<sup>172</sup> [1996] ICJ Rep 66 ('*Legality of the Use of Nuclear Weapons*').

<sup>173</sup> [1996] ICJ Rep 226 ('*Legality of the Threat or Use of Nuclear Weapons*').

<sup>174</sup> [1997] ICJ Rep 7 ('*Danube Dam*').

Organisation. However, in dissent, Judge Weeramantry discussed the progress of international environmental law. He stated that:

From rather hesitant beginnings, environmental law has progressed rapidly under the combined stimulus of ever more powerful means of inflicting irreversible environmental damage and an ever increasing awareness of the fragility of the environment.<sup>175</sup>

Therefore, the increase in scientific understanding of how the environment operates and the effects of environmental damage were considered as fundamental to the development of international environmental law and provided a context for the development of environmental standards. This can be contrasted with the deep seabed, in the case of which scientific knowledge is still developing and the effects of utilising the deep seabed are not wholly known due to the absence of long term activities.

In the second of these advisory opinions, the ICJ recognised that

the environment is not an abstraction but represents the living space, the quality of life and the health of human beings, including generations unborn. The existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment.<sup>176</sup>

The most recent juridical consideration of international environmental law was in *Danube Dam*. Although this case failed to strengthen international environmental law substantially, Judge Weeramantry, in his separate opinion, considered the development of environmental law principles. He considered the past and present sustainable development practices from Sri Lanka, India and Iran. He also referred to international treaties, the *Stockholm Declaration* and the *Rio Declaration*, and domestic environmental law. From this analysis, he outlined two principles: continuing environmental impact assessment and contemporaneity in the application of environmental norms. The principles have emerged as the understanding of the interrelationship between environmental principles and other principles in international law has increased. They require states to further incorporate environmental considerations into their decisions, and they further define the environmental obligations of states by giving more specific content to general concepts, such as sustainable development.

The establishment of these principles was arguably due to the large number of 'soft' and 'hard' law instruments that had resulted from both the framework approach and the previous consideration of environmental principles. Judicial consideration, combined with 'soft law', could similarly enhance the specific content of the common heritage of mankind principle. Such a process has assisted the development of the precautionary principle, as will be discussed below.

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<sup>175</sup> *Legality of the Use of Nuclear Weapons (Advisory Opinion) (Preliminary Objections)* [1996] ICJ Rep 66, 140.

<sup>176</sup> *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)* [1996] ICJ Rep 226, [29].

### E Precautionary Principle

The precautionary principle was initially codified at an international level as principle 15 in the *Rio Declaration*. Principle 15 provides that:

In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.

The specific obligations encompassed by the precautionary principle are not outlined in the *Rio Declaration*. Their subsequent development is a result of the endorsement of the principle by states in treaties,<sup>177</sup> domestic legislation<sup>178</sup> and domestic court decisions.<sup>179</sup> This endorsement has assisted in the development of a series of standards that indicate whether or not the precautionary principle has been complied with.

Although there is still doubt as to whether the precautionary principle is a principle of customary international law, its content has developed as a result of inclusion in various treaties.<sup>180</sup> In this regard, the precautionary principle has achieved the status of a recognised principle of international environmental law. The same process could be utilised to give content to the common heritage of mankind principle.

### F Conclusion

The way in which negotiations were conducted at the Stockholm and Rio Conferences resulted in declarations that represented the views of both developed and developing states. This was achieved by working until a compromise was reached, rather than aiming for a complete regime right from the start.<sup>181</sup> This also created a substantial body of legal instruments that have assisted judicial bodies to establish environmental principles in international law. States also have a substantial incentive to incorporate these principles into international environmental law as they will suffer the consequences if they

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<sup>177</sup> These include the *UN Agreement for the Implementation of the Provisions of the UN Convention of the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks*, opened for signature 4 December 1995, [2001] ATS 8, art 6 (entered into force 11 December 2001); *Framework Convention on Climate Change*, above n 160, art 3; *UN Convention on Biological Diversity*, above n 161, preamble.

<sup>178</sup> See, eg, *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s391; *Environmental Code Act of 1998* (Sweden).

<sup>179</sup> See, eg, *Director-General of National Parks and Wildlife Service v Shoalhaven City Council* [1993] NSWLEC 191 (Unreported, Stein J, 23 November 1993).

<sup>180</sup> See Owen McIntyre and Thomas Mosedale, 'The Precautionary Principle as a Norm of Customary International Law' (1997) 9 *Journal of Environmental Law* 221, 235:

Opinion remains divided as to whether the precautionary principle may have crystallized into a binding norm of customary international law. However, the prevalence of the principle in recent environmental treaties, declarations and resolutions ... suggests that it may indeed have attained this status.

See also Arie Trouwborst, *Evolution and Status of the Precautionary Principle in International Law* (2002).

<sup>181</sup> Sand, above n 164.

breach environmental obligations. This is reflected by the development of the precautionary principle.

By contrast, the negotiation of part XI of *UNCLOS* did not represent a compromise. Rather, it only reflected the views of both developed and developing states to the extent that both groups recognised the elements of the common heritage of mankind principle. The absence of 'soft law' has prevented the gradual development of the common heritage of mankind principle, and thus the *Moratorium Resolution* and the *Declaration of Principles* have not contributed significantly to development of the principle, particularly as the developed states rejected their content. Inactivity on the deep seabed has also worked against any elaboration of the elements of the common heritage of mankind principle. This inactivity has similarly precluded any juridical consideration of the principle.

Nevertheless, part XI of *UNCLOS* does establish a framework for further development of the common heritage of mankind principle. By utilising this framework, states could reach compromises on each element of the principle, and by convening regular sessions in which to discuss the principle, resolutions and other 'soft law' could develop. Even if states could not initially reach a compromise, this process would establish a body of 'soft law.' Reference to this law would assist in defining the content of the common heritage of mankind principle.

The practical effect of breaches of environmental obligations has been to create judicial statements relating to the status of international law principles. Such a process could only enhance the development of the common heritage of mankind principle.

## VI CONCLUSION

Presently, the common heritage of mankind principle is no more than an inchoate concept, consisting of as yet undeveloped standards. Contrasting ideologies and inconsistent interpretations have plagued development of the common heritage of mankind principle. It was not until the adoption of the *1994 Agreement*, which modified *UNCLOS*, that the principle achieved near universal acceptance. However, the *1994 Agreement* did not reconcile the differing approaches of the developed and the developing states; it only modified the administrative aspects of deep seabed activities. Therefore, the common heritage of mankind principle remains undefined.

Established international law does not assist in defining the elements of the common heritage of mankind principle. First, conventional means of claiming sovereignty do not appear to apply to the deep seabed. Therefore, sovereignty becomes an irrelevant consideration. Second, the requirement that the deep seabed is used only for peaceful purposes requires elaboration. Third, the ISA's distribution of the economic benefits is governed by principles that have not yet been tested. Fourth, the decision making procedures of the ISA were altered by the *1994 Agreement* so as to favour the interests of developed states. This has detracted from the international management regime representing the common heritage of mankind. Therefore, although the common heritage of mankind principle has basic elements, they are not sufficiently defined to be a legal standard.

Principles similar to the common heritage of mankind principle have been enunciated in other areas of international law. Both the *Outer Space Treaty* and the *Moon Treaty* contain principles that parallel the common heritage of mankind principle. However, the utility of comparing the deep seabed and outer space is limited as neither has had its legal regimes tested. The *Antarctic Treaty* also contains similar principles to those contained in the common heritage of mankind principle. Although Antarctica differs from the deep seabed in relation to sovereignty and mineral exploitation, this should not automatically preclude the transfer of any relevant principles to the deep seabed. The problems with the international management regime provide guidance for the common heritage of mankind principle. However, neither regime indicates how the common heritage of mankind principle could become a legal standard.

Principles of international environmental law, outlined in the *Stockholm Declaration* and the *Rio Declaration*, may provide a means by which the common heritage of mankind principle can develop. States negotiated the *Stockholm Declaration* and *Rio Declaration* using a framework approach. The Declarations merely outlined general principles. States then discussed the implications of the principles and reached a compromise. Subsequently, much 'soft law' developed to support the principles. This gave them the potential to become workable standards. The influence of judicial consideration also helped to establish these principles. A similar method could be used to determine the substance of the common heritage of mankind principle.

In summary, although the common heritage of mankind principle is not currently a legal standard, it does present a possible means of governing the deep seabed. Consequently, it will need to establish content to be enforceable. This content cannot be drawn from existing international law. Other regimes that use similar principles do not assist in determining the ways in which this can occur. However, the methods used in international environmental law may provide a model for developing the common heritage of mankind principle to a point where it could become an enforceable standard. Even though commercial deep seabed mining is unlikely to commence in the near future, the discovery of hydrothermal vents and the possibility of the widespread use of intelligence gathering devices suggest that other uses may be made of the deep seabed in years to come. That use of the deep seabed is now foreseeable means that a management regime is required that will be able to effectively determine which activities states are permitted to undertake. Consequently, the deep seabed requires a management regime that can effectively determine the activities states are permitted to undertake. The model offered by international environmental law may be one by which the development of an adequate legal regime can occur.