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Abstract

This article explores the potential contribution of the Common Concern of Humankind (CCH) concept in the ongoing negotiations towards an International Legally Binding Instrument (ILBI) on the conservation and sustainable use of biodiversity in marine areas beyond national jurisdiction (BBNJ). Even though the CCH concept was discussed in the early stages of the negotiation process, it does not appear in the Zero Draft text. This article revisits the CCH concept and traces its historical evolution, including its incorporation in modern environmental treaty regimes. An analysis is undertaken of its scope and fundamental characteristics to ascertain whether the protection of BBNJ meets the CCH threshold. This article also reflects on the potential role of the CCH concept under the ILBI and whether it could bridge the gap between proponents of freedom of the seas and those defending the common heritage of mankind.

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Forget Me Not: Revisiting the Common Concern of Humankind Concept in the BBNJ context

Dr Sarah Lothian*

This article explores the potential contribution of the common concern of humankind (CCH) concept in the ongoing negotiations towards an international legally binding instrument (ILBI) on the conservation and sustainable use of biodiversity in marine areas beyond national jurisdiction (BBNJ). Even though the CCH concept was discussed in the early stages of the negotiation process, it does not appear in the zero draft text. This article revisits the CCH concept, tracing its historical evolution, including its incorporation in modern environmental treaty regimes. An analysis is undertaken of its scope and fundamental characteristics to ascertain whether the protection of BBNJ meets the CCH threshold. This article also reflects on the potential role of the CCH concept under the ILBI and whether it could hold the key to bridging the gap in the long-standing debate between proponents of freedom of the seas and those defending the common heritage of mankind.

INTRODUCTION

At the United Nations, the international community is negotiating an International Legally Binding Instrument (ILBI) under the 1982 United Nations Convention on the Law of the Sea (UNCLOS)¹ for the conservation and sustainable use of biodiversity in marine areas beyond national jurisdiction (BBNJ). After nine years of discussions by an Ad Hoc Open-ended Informal Working Group, four sessions of a Preparatory Committee (PrepCom) and three meetings of an Intergovernmental Conference (IGC), BBNJ negotiations have come to a critical juncture. On 18 November 2019, the President of the IGC, Mrs Rena Lee, presented a revised zero draft of an ILBI (zero draft) featuring twelve parts and two annexes.² While the zero draft enables delegates to envision the final shape of the instrument, it also highlights glaring omissions.

During the PrepCom process, the International Union for Conservation of Nature (IUCN) put forward the Common Concern of Humankind (CCH) concept as a viable governing principle for the conservation and sustainable use of BBNJ.³ Since then, however, the CCH concept has not generated much

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¹ United Nations Convention on the Law of the Sea, opened for signature 10 December 1982, 1833 UNTS 397 (entered into force 16 November 1994) (UNCLOS).

² Revised draft text of an agreement under UNCLOS on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction UN Doc A/CONF.232/2020/3 (18 November 2019) ('Zero Draft').

³ See, eg, Chair's overview of the second session of the Preparatory Committee, 13.

discussion and is only fleetingly referred to in subsequent BBNJ documents.⁴ Significantly, it is absent from the zero draft. This article revisits the CCH concept and reflects upon its potential contribution in the BBNJ context.

The article first introduces the BBNJ negotiation process, including the ILBI's geographical and material scope. It then turns to the CCH principle,⁵ tracing its historical evolution, including its incorporation in modern environmental treaty regimes. An analysis is undertaken of its scope and fundamental characteristics to ascertain whether the protection of BBNJ meets the CCH threshold. Lastly, this article reflects on the potential role of the CCH concept under the ILBI and whether it could hold the key to bridging the gap in the long-standing debate between proponents of freedom of the seas and those defending the common heritage of mankind. Overall, this article argues that the CCH concept offers a strong basis for international cooperation to protect BBNJ.

I. AN INTRODUCTION TO THE BBNJ NEGOTIATION PROCESS

The first part of this article is designed primarily to introduce the BBNJ process, provide an overview of the current state of play with ILBI negotiations and consider the main drivers behind its development.

A. The Geographical Scope

The zero draft of the ILBI provides that it will apply to 'areas beyond national jurisdiction'⁶ (ABNJ) which are defined to mean 'the high seas and the Area.'⁷ Under UNCLOS, these distinct maritime zones are subject to different regulatory regimes which complicates ABNJ management. Pursuant to Part VII of UNCLOS, the high seas encompass the water column beyond the exclusive economic zone of coastal States and are governed by the freedom of the seas principle.⁸ In contrast, Part XI of UNCLOS and the 1994 Agreement Relating to the Implementation of Part XI establishes a regime for the Area, which comprises the seabed, ocean floor and subsoil beyond the continental shelf of a coastal State.⁹ The Area and its mineral resources are designated the common heritage of mankind.¹⁰

<https://www.un.org/Depts/los/biodiversity/prepcom_files/Prep_Com_II_Chair_overview_to_MS.pdf>; *Chair's non-paper on elements of a draft text of an international legally-binding instrument under UNCLOS on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction*, (28 February 2017) 4.

<https://www.un.org/depts/los/biodiversity/prepcom_files/Chair_non_paper.pdf>; *Chair's Streamlined non-paper on elements of a draft text of an international legally binding instrument under UNCLOS on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction PrepCom 4* (10-21 July 2017) 4.

<https://www.un.org/depts/los/biodiversity/prepcom_files/Chairs_streamlined_non-paper_to_delegations.pdf>.

⁴ See, eg, *President's Aid to Negotiations*, UN Doc A/CONF.232/2019/1 (3 December 2018) Pt III, 2(k).

⁵ Whilst opinion remains divided on whether the CCH has crystallised into a binding norm of customary international law, this article proceeds on the basis that the CCH is a principle of international environmental law. See, further, Jutta Brunnée, 'Common Areas, Common Heritage, and Common Concern,' in Daniel Bodansky, Jutta Brunnée and Ellen Hey (eds), *The Oxford Handbook of International Environmental Law* (Oxford University Press, 2008) 550-573.

⁶ Zero Draft, art 3(1).

⁷ Zero Draft, art 1(4).

⁸ UNCLOS, arts 86 and 87.

⁹ UNCLOS, arts 1(1) and 76.

¹⁰ UNCLOS, art 133(a).

B. The Material Scope

ABNJ cover approximately 64 per cent of the ocean by surface area and more than 70 per cent by volume.¹¹ As one of Earth's largest reservoirs of biodiversity, ABNJ are home to a rich and diverse web of life, with biodiversity found in the ocean's pelagic and benthic realms.¹²

Biological diversity (biodiversity) is one of the most cited terms in ecological research, environmental management and conservation.¹³ The 1992 Convention on Biological Diversity (CBD)¹⁴ introduced this concept into international law, almost a decade after the adoption of UNCLOS.¹⁵ Article 2 of the CBD defines 'biological diversity' as:

the variability among living organisms from all sources, including, inter alia, terrestrial, marine and other aquatic ecosystems and the ecological complexes of which they are part; this includes diversity within species, between species and of ecosystems.

As the CBD's definition applies to biodiversity in all its manifestations, including in the marine environment, marine biodiversity can be understood as encompassing the variability of marine life in all its forms, levels and combinations.¹⁶

A definition of marine biodiversity is another key element missing in the zero draft. It appears that BBNJ negotiators have taken for granted that its meaning and scope is understood. As the term forms the subject matter of the ILBI and is not referenced in UNCLOS, it is preferable to include a clear and precise definition in the new instrument. The adoption of a definition in conformity with the CBD is prudent, as it would offer consistency between the two biodiversity-related instruments. Moreover, the CBD has reached almost universal acceptance and its definitions have received widespread approval.¹⁷

While the CBD is the legal instrument for biodiversity conservation within national waters,¹⁸ the international community has recognized the need for a new comprehensive legal framework to protect BBNJ.

¹¹ Lisa M. Campbell and Noella J. Gray, 'Area expansion versus effective and equitable management in international marine protected areas goals and targets' (2019) 100 *Marine Policy* 192, 195; A.D. Rogers et al, 'The High Seas and Us: Understanding the Value of High-Seas Ecosystems' (Global Ocean Commission, 2014) 4.

¹² The Pew Charitable Trusts, 'Underwater Treasures of the High Seas' (Briefing Booklet, March 2016) 1.

¹³ Sabine K.J. Cochrane et al, 'What is Marine Biodiversity? Towards Common Concepts and Their Implications for Assessing Biodiversity Status' (2016) 3 *Frontiers in Marine Science* 248, 248.

¹⁴ Convention on Biological Diversity, opened for signature 5 June 1992, 1760 UNTS 143 (entered into force 29 December 1993) ('CBD').

¹⁵ Robin Warner, 'Conserving Marine Biodiversity in Areas Beyond National Jurisdiction: Co-Evolution and Interaction with the Law of the Sea' in Donald Rothwell et al (eds), *The Oxford Handbook of the Law of the Sea* (Oxford University Press, 2015) 753, 756.

¹⁶ P. Birnie, A. Boyle and C. Redgwell, *International Law and the Environment* (Oxford University Press, 3rd ed, 2009) 588.

¹⁷ As at 17 May 2021, the CBD has 196 Parties.

¹⁸ CBD, art 4.

C. Main drivers behind the development of an ILBI

There are, in effect, two main drivers behind the development of an ILBI. The first is the declining environmental health of the ocean generally, and ABNJ in particular. Anthropogenic activities in ABNJ have grown exponentially since the adoption of UNCLOS.¹⁹ Scientific and technological advancements coupled with an increasing demand for raw materials and a depletion in terrestrial and coastal resources, has increased interest in ABNJ, driving exploration and exploitation.²⁰ Due to their remote nature ABNJ were long considered protected from anthropogenic impacts.²¹ However, the once popular view that the ocean was too big to be affected by human actions 'has been replaced by the reality of the Anthropocene Ocean'²² and BBNJ is falling victim to an unprecedented list of pressures.

Gaps and limitations in the existing international law framework is the other main driver behind the development of an ILBI. Rules, regulations and institutional structures have not kept pace with the substantial increase in anthropogenic activities in ABNJ.²³ This is particularly true of the overarching legal framework of UNCLOS, which was hailed as a 'Constitution for the Oceans' upon its adoption.²⁴ UNCLOS intended to settle 'all issues relating to the law of the sea.'²⁵ However, UNCLOS drafters could not have foreseen the rapid surge in activity in ABNJ and were unaware of the abundance of life beneath the waves. While UNCLOS undoubtedly remains the most important instrument in the law of the sea, the expansion of the human footprint in ABNJ has exposed gaps and limitations in its framework.²⁶ For example, UNCLOS lacks modern governance principles and conservation tools. Neither the precautionary principle or ecosystem approach are explicitly referenced in the Convention, nor are there detailed provisions for the establishment of area-based management tools, including marine protected areas and environmental impact assessments, which are crucial mechanisms for protecting BBNJ.²⁷

¹⁹ Glen Wright et al, 'The Long & Winding Road: Negotiating a treaty for the conservation and sustainable use of marine biodiversity in areas beyond national jurisdiction' (Study No. 8/2018, IDDRI, August 2018) 16.

²⁰ Eva Ramirez-Llodra, 'Deep-sea ecosystems: Biodiversity and Anthropogenic impacts' in Catherine Banet, *The Law of the Seabed: Access, Uses and Protection of Seabed Resources* (Brill, 2020) 36, 50; Glen Wright and Julien Rochette, 'Sea change: Negotiating a new agreement on the conservation and sustainable use of marine biodiversity in areas beyond national jurisdiction' (Issue Brief No. 4/16, IDDRI, March 2016) 1.

²¹ Elisabeth Druel et al, 'A Long & Winding Road - International Discussions on the Governance of Marine Biodiversity in Areas Beyond National Jurisdiction' (Study No. 7/2013, IDDRI, September 2013) 1.

²² Jean-Baptiste Jouffray et al, 'The Blue Acceleration: The Trajectory of Human Expansion into the Ocean' (2020) 2(1) *One Earth* 43, 48.

²³ Catherine Blanchard, Carole Durussel and Ben Boteler, 'Socio-ecological resilience and the law: Exploring the adaptive capacity of the BBNJ Agreement' (2019) 108 *Marine Policy* e103612, 1-10, 3.

²⁴ T.B. (Tommy) Koh, 'A Constitution for the Oceans' (Statements made on 6 and 11 December 1982 at the Final Session of UNCLOS III at Montego Bay) reprinted in Myron H. Nordquist, *United Nations Convention on the Law of the Sea, 1982: A Commentary* (Martinus Nijhoff, 1995) vol 1, 11.

²⁵ UNCLOS, preamble.

²⁶ A. Eassom et al, 'Horizon scan of pressures on Biodiversity Beyond National Jurisdiction' (The UN Environment World Conservation Monitoring Centre, 2017) 4.

²⁷ The Pew Charitable Trusts, 'Potential Elements of an UNCLOS Implementing Agreement' (Press Release and Statement, 2012)

<<http://www.pewtrusts.org/en/about/news-room/press-releases/2012/04/25/potential-elements-of-an-unclos-implementing-agreement>>.

D. The BBNJ Negotiation Process

Since the turn of the 21st century, the international community has become increasingly concerned with the challenges facing ABNJ. Although BBNJ-related issues had been raised within various fora,²⁸ the process to develop the ILBI emerged from the UN Open-ended Informal Consultative Process on Oceans and the Law of the Sea (UNICPOLOS).²⁹ In 2003, UNICPOLOS suggested the UN General Assembly (UNGA) invite relevant international bodies to consider how to better address the threats to BBNJ.³⁰ The recommendations from UNICPOLOS prompted the UNGA to take action.³¹ On 17 November 2004, the UNGA established an Ad Hoc Open-ended Informal Working Group to study issues relating to the conservation and sustainable use of BBNJ.³² This event marks the birth of the BBNJ process.

The Working Group held nine meetings between February 2006 and January 2015. Discussions focused on weaknesses and gaps in the existing law framework and whether these necessitated the adoption of a new instrument under UNCLOS.³³ The first couple of meetings did not achieve any significant outcomes,³⁴ however, the fourth meeting marked an important turning point, when delegations agreed for all future discussions to be structured around a package deal of four thematic topics, consisting of:

1. Marine genetic resources, including questions on the sharing of benefits;
2. Measures such as area-based management tools, including marine protected areas;
3. Environmental impact assessments; and
4. Capacity-building and the transfer of marine technology.

From 2013 to 2015, the Working Group engaged in substantive debates on the scope, parameters and feasibility of an ILBI.³⁵ After intense discussions, a consensus was reached at the final meeting and

²⁸ Including the UN Secretariat, UNEP, FAO, UNESCO, IMO, CBD Secretariat, IUCN, WWF, Deep-Sea Conservation Coalition and processes including the Joint group of experts on the scientific aspects of marine environmental protection – see, generally, Julien Rochette and Raphaël Billé, 'Governance of marine biodiversity beyond national jurisdictions: Issues and perspectives Report of the international seminar "Towards a new governance of high seas biodiversity" (Principality of Monaco, March 20-21, 2008)' (2008) 51 *Ocean and Coastal Management* 779, 780.

²⁹ Warner, n 15, 765.

³⁰ Alice Bisiaux, Prisca Nuengsigkapan and Charlotte Salpin, 'Summary of the Fourth Meeting of the Open-ended Informal Consultative Process on Oceans and the Law of the Sea: 2-6 June 2003' *Earth Negotiations Bulletin* (online, 9 June 2003) 7 <<https://enb.iisd.org/download/pdf/enb2506e.pdf>>.

³¹ *Report on the work of the United Nations Open-ended Informal Consultative Process on Oceans and the Law of the Sea at its fifth meeting*, UN Doc A/59/122 (1 July 2004) [1].

³² *Oceans and the law of the sea*, GA Res 59/24, UN Doc A/RES/59/24 (4 February 2005, adopted 17 November 2004) [73].

³³ Wright and Rochette, n 20, 2.

³⁴ Druel et al, n 21, 22.

³⁵ Elisa Morgera et al, 'Summary of the First Session of the Intergovernmental Conference on an International Legally Binding Instrument under the UN Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine Biodiversity of Areas Beyond National Jurisdiction 4-17 September 2018' *Earth Negotiations Bulletin* (online, 20 September 2018) 2 <<https://enb.iisd.org/download/pdf/enb25179e.pdf>>.

delegations took the historic step of recommending to the UNGA that an ILBI should be developed.³⁶ The recommendations of the Working Group were approved in UNGA resolution 69/292 of 19 June 2015, which also established a PrepCom to make substantive recommendations on the elements of a draft ILBI text.³⁷

The PrepCom met on four occasions between 2016 and 2017. An outcome report was adopted by consensus at PrepCom 4 which recommended for the UNGA to take a decision on the convening of an Intergovernmental Conference (IGC), with a view to developing an ILBI as soon as possible. On 24 December 2017, the UNGA, in resolution 72/249, decided to convene an IGC to consider PrepCom recommendations.³⁸

Four meetings of the IGC were scheduled and the zero draft was released in preparation for IGC 4, which was scheduled to begin on 23 March 2020. However, in light of the situation concerning the coronavirus disease 2019, IGC 4 was postponed.³⁹ IGC 4 has been rescheduled to take place from 16 to 27 August 2021.⁴⁰

Now that negotiations have reached an advanced stage, it appears an appropriate time to take stock of the BBNJ process and reflect on whether the zero draft is missing a key component in the CCH concept.

II. HISTORY AND EVOLUTION OF THE CCH CONCEPT

Since the early 1990s, the *common concern of humankind* phrase has appeared in international treaties, UNGA resolutions, case law and an increasing number of conferences, declarations and international reports.⁴¹ However, related concepts, such as *common interest* or *interest of mankind*, can be found in earlier treaties addressing problems concerning shared jurisdiction and resources.⁴² For example, tuna and other fish were considered to be '*of common concern*' in the 1949 Convention

³⁶ *Recommendations of the Ad Hoc Open-ended Informal Working Group to study issues relating to the conservation and sustainable use of marine biological diversity beyond areas of national jurisdiction to the sixty-ninth session of the General Assembly* (23 January 2015) [5]

<https://www.un.org/Depts/los/biodiversityworkinggroup/documents/AHWG_9_recommendations.pdf>.

³⁷ *Development of an international legally binding instrument under UNCLOS on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction*, GA Res 69/292, UN Doc A/RES/69/292 (6 July 2015, adopted 19 June 2015) para 1 (a).

³⁸ *International legally binding instrument under UNCLOS on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction*, GA Res 72/249, UN Doc A/RES/72/249 (19 January 2018, adopted on 24 December 2017) para 1.

³⁹ *International legally binding instrument under UNCLOS on the Conservation and Sustainable Use of Marine Biological Diversity of Areas Beyond National Jurisdiction* (GAOR, 74th sess., Suppl. no. 49, Vol.II) UN Doc A/DEC/74/543 (11 March 2020).

⁴⁰ *Oceans and the law of the sea*, GA Res 75/239, UN Doc A/RES/75/239 (5 January 2021, adopted on 31 December 2020).

⁴¹ Laura Horn, 'The implications of the Concept of Common Concern of a Human Kind on a Human Right to a Healthy Environment' (2004) 1(2) *Macquarie Journal of International and Comparative Environmental Law* 233; Chelsea Bowling, Elizabeth Pierson and Stephanie Ratte, 'The Common Concern of Humankind: A Potential Framework for a New International Legally Binding Instrument on the Conservation and Sustainable Use of Marine Biological Diversity in the High Seas' <http://www.un.org/depts/los/biodiversity/prepcom_files/BowlingPiersonandRatte_Common_Concern.pdf>.

⁴² Thomas Cottier, *The Principle of Common Concern of Humankind* in Thomas Cottier (ed) *The Prospects of Common Concern of Humankind in International Law* (Cambridge University Press, 2021) 32.

for the Establishment of an Inter-American Tropical Tuna Commission, while the preamble to the 1946 International Convention for the Regulation of Whaling recognized that 'it is in the *common interest* to achieve the optimum level of whale stocks as rapidly as possible without causing widespread economic and nutritional distress.'⁴³ The 1959 Antarctic Treaty also emphasized that 'it is in the *interest of all mankind* that Antarctica shall continue forever to be used exclusively for peaceful purposes...'⁴⁴

The idea of common concern was also alluded to in the 1987 Brundtland Report,⁴⁵ which acknowledged 'a *common concern* for the planet and interlocked ecological and economic threats.'⁴⁶ Shortly thereafter, in 1988, the UNGA explicitly recognized 'that climate change is a *common concern of mankind*, since climate is an essential condition which sustains life on Earth.'⁴⁷

While it is important to acknowledge these earlier references, it is really the parallel negotiations of the United Nations Framework Convention on Climate Change (UNFCCC)⁴⁸ and the CBD that mark the birthplace of the CCH concept as it is understood today.⁴⁹

A. The Dawn of the CCH concept

CCH terminology was introduced during CBD negotiations to express a sense of shared responsibility for a global environmental issue.⁵⁰ It was also seen as a viable alternative to the related principle of common heritage of mankind (CHM).

The CHM principle has been a source of international controversy for decades.⁵¹ While there is no concise or fully agreed definition of CHM,⁵² it is generally understood to consist of four elements: (1) non-appropriation; (2) international management; (3) exclusively peaceful use; and (4) benefit-

⁴³ 1946 International Convention for the Regulation of Whaling, opened for signature 2 December 1946, 161 UNTS 72 (entered into force 10 November 1948).

⁴⁴ Antarctic Treaty, opened for signature 1 December 1959, 402 UNTS 71 (entered into force 23 June 1961).

⁴⁵ Thomas Cottier, 'The Principle of Common Concern of Humankind' in Thomas Cottier (ed) *The Prospects of Common Concern of Humankind in International Law* (Cambridge University Press, 2021) 37.

⁴⁶ United Nations, *Our Common Future: Report of the World Commission on Environment* (New York: United Nations, 1987), www.un-documents.net/our-common-future.pdf (accessed 28 Aug. 2018).

⁴⁷ Protection of Global Climate for Present and Future Generations of Mankind, GA Res. 43/53, UN Doc. A/RES/43/53 (6 Dec. 1988).

⁴⁸ United Nations Framework Convention on Climate Change, opened for signature 9 May 1992, 1771 UNTS 165 (entered into force 21 March 1994) (UNFCCC).

⁴⁹ Edith Brown Weiss, 'Nature and the Law: The Global Commons and the Common Concern of Humankind' (Paper presented at the Sustainable Humanity, Sustainable Nature: Our Responsibility Joint Workshop of the Pontifical Academy of Sciences and the Pontifical Academy of Social Sciences, Vatican City, 2-6 May 2014, 11

<<http://www.pas.va/content/dam/accademia/pdf/es41/es41-brownweiss.pdf>>. Both of these Conventions were prepared for the 1992 UN Conference on Environment and Development (Rio Conference).

⁵⁰ Bowling, Pierson and Ratte, n 41.

⁵¹ Jennifer Frakes, 'The common heritage of mankind principle and the deep seabed, outer space, and antarctica: will developed and developing nations reach a compromise?' (2003) 21(2) *Wisconsin International Law Journal* 409, 410.

⁵² Natalie Y Morris-Sharma, 'Marine Genetic Resources in Areas Beyond National Jurisdiction: Issues with, in and outside of UNCLOS' (2017) 20(1) *Max Planck Yearbook of United Nations Law Online* 71, 81.

sharing.⁵³ The prescription for equitable benefit-sharing, implying distributive justice, has always been the most controversial feature of the common heritage concept, particularly amongst developed States, who stand to lose out under such a system.⁵⁴ During BBNJ negotiations, the United States, Japan, South Korea and Russia have vehemently opposed the application of CHM to BBNJ, in particular to marine genetic resources (MGRs). Yet, this opposition to CHM is not new nor is it unique to the BBNJ context.

Since UNCLOS was adopted the CHM concept 'has failed to find traction beyond the seabed.'⁵⁵ The CHM regime for 'the moon and other celestial bodies never took full effect, and the initial conceptualization of plant genetic resources as common heritage was almost immediately retracted.'⁵⁶ Arguments for climate change and biodiversity also to be subject to a CHM regime have not progressed.⁵⁷ Nor is the CHM principle given effect in relation to Antarctica, despite its designation as 'a nature reserve, devoted to peace and science' under the 1991 Madrid Protocol.⁵⁸ Consequently, some consider the CHM concept 'to be out of fashion due to its lack of use in practice and its subsequent rejection by modern environmental treaty regimes.'⁵⁹ Others consider it to be a general principle of international law with enduring significance.⁶⁰ It is evident from BBNJ discussions that CHM remains the point of departure for a majority of developing States.⁶¹ This bloc, led by the G77/China coalition, take the view that the CHM principle should lie at the core of the ILBI and provide the legal foundation for a fair and equitable regime of conservation and sustainable use of BBNJ, including the access and benefit sharing (ABS) of MGRs. For example, in their opening statement at IGC 3, the G77/China bloc asserted that the protection of BBNJ 'can only be achieved when guided by the bedrock principle of CHM.'⁶²

⁵³ Jimena Murillo, 'Common Concern of Humankind and Its Implications in International Environmental Law' (2008) 5 *Macquarie Journal of International and Comparative Environmental Law* 5(2) 133, 135. These elements are drawn from UNGA Resolution 2749 (17 December 1970) and reflected in Part XI of UNCLOS.

⁵⁴ John E. Noyes, 'The Common Heritage of Mankind, Past, Present and Future' (2011) 40 *Denver Journal of International Law and Policy* 447, 451; Colm Hastings, 'Time to Set the Record Straight: The Legal Status of Marine Genetic Resources found within the Deep Seabed Area The Freedom of the High Seas, the Common Heritage of Mankind - or Neither?' (LLM Thesis, University of Iceland, 2018) 92.

⁵⁵ Duncan French, 'Common concern, common heritage and other global(-ising) concepts: rhetorical devices, legal principles or a fundamental challenge?' in Michael Bowman, Peter Davies and Edward Goodwin (eds), *Research Handbook on Biodiversity and Law* (Edward Elgar Publishing, 2016) 334, 342.

⁵⁶ French, n 55, 342.

⁵⁷ French, n 55, 342.

⁵⁸ Protocol on Environmental Protection to the Antarctic Treaty, opened for signature 4 October 1991, (1991) 30 ILM 1461 (entered into force 14 January 1998) (Madrid Protocol). The Antarctic Treaty does not expressly include CHM language, although elements of the concept appear in the text, and in the other instruments that comprise the Antarctic Treaty System, see generally, Carol R. Buxton, 'Property in Outer Space: The Common Heritage of Mankind Principle vs. the First in Time First in Right, Rule of Property' (2004) 69(4) *Journal of Air Law and Commerce* 689, 696.

⁵⁹ Prue Taylor, 'The Common Heritage of Mankind: A Bold Doctrine Kept Within Strict Boundaries' in David Bollier and Silke Helfrich (eds), *The Wealth of the Commons: A World Beyond Market & State* (Levellers Press, 2012) 566, 566.

⁶⁰ Taylor, n 59, 566.

⁶¹ See, 'Interventions on behalf of G77 and China by Mr. Emad Morcos Mattar, Counsellor, Permanent Mission of Egypt to the United Nations, on Agenda Item 7: Marine Genetic Resources, including questions on the sharing of benefits at IGC 1' (13 September 2018) <<https://www.g77.org/statement/getstatement.php?id=180913>>.

⁶² 'Statement on Behalf of the Group of 77 and China by H.E. Ambassador Feda Abdelhady-Nasser, State of Palestine, at the opening of the third session of the Intergovernmental conference on an international legally binding instrument under UNCLOS on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction' (19 August 2019) <<http://statements.unmeetings.org/media2/21996878/palestine-obo-g77-and-china.pdf>>.

In stark contrast, the reports that emerged from CBD negotiations revealed a strong resistance to 'the notion of biological diversity as a common resource of mankind.'⁶³ Some delegates perceived the CHM as carrying certain benefit-sharing obligations,⁶⁴ while others were concerned it would infringe upon the principle of permanent sovereignty over natural resources.⁶⁵ A majority of delegates expressed a preference for alternative expressions, such as 'common interest or concern.'⁶⁶ In the end, the phrase *common concern of humankind* was agreed upon.⁶⁷ The 'heritage' of the CHM principle was effectively replaced with 'concern' in order to avoid the controversial connotation of exploitation and sharing of resources or benefits.⁶⁸ As special rapporteur, Shinya Murase recently noted in his second report on the protection of the atmosphere, the CCH concept is appealing because it:

conveys the appropriately strong sense of purpose without potentially creating burdensome implementation requirements à la UNCLOS or disagreement about overreach, which has been a problem in the past when implementation of a "common heritage" standard has been attempted.⁶⁹

The CBD preamble affirms the conservation of biodiversity as a CCH, thereby recognizing its intrinsic value.⁷⁰ The UNFCCC equally affirms that the adverse effects of climate change is a CCH.⁷¹ Since 1992, plant genetic resources⁷² and the safeguarding of intangible cultural heritage⁷³ have also been declared common concerns. In total, there are now four references to the CCH concept in international treaties, and recent publications suggest that other issues will soon follow.⁷⁴ Brown-Weiss argues that the availability and use of fresh water should be recognized as a CCH, while Jaeckel makes the case for the conservation of plant biodiversity to be acknowledged as such.⁷⁵ This article argues that the concept should be further extended to include the conservation and sustainable use of BBNJ.

⁶³ Ad Hoc Working Group of Experts on Biological Diversity, *Report of the Ad Hoc Working Group on the Work of its First Session, Geneva, 16-18 November 1988* (1988) Para 21; Ad Hoc Working Group of Experts on Biological Diversity, *Report of the Ad Hoc Working Group on the Work of its Second Session in Preparation for a Legal Instrument on Biological Diversity of the Planet, Second Session, Geneva, 19-23 February 1990* (1990) para 11.

⁶⁴ Ad Hoc Working Group of Experts on Biological Diversity, n 63.

⁶⁵ Cottier, n 45, 37.

⁶⁶ Ad Hoc Working Group of Experts on Biological Diversity, *Report of the Ad Hoc Working Group on the Work of its Third Session in Preparation for a Legal Instrument on Biological Diversity of the Planet, Third Session, Geneva, 9-13 July 1990* (1990) Para 18.

⁶⁷ Bowling, Pierson and Ratte, n 41.

⁶⁸ Antonio Augusto Cancado Trindada and Hague Academy of International Law, 'Conceptual Constructions: Common Heritage of Mankind and Common Concern of Mankind', *International Law for Humankind Towards a New Jus Gentium* (Martinus Nijhoff Publishers, 2010) vol 6, 327-352, 351

⁶⁹ International Law Commission, 67th sess., Geneva, 4 May – 5 June and 6 July – 7 Aug. 2015, second report on the protection of the atmosphere by Shinya Murase, Special Rapporteur, A/CN.4.681 (2 Mar. 2015) 19, para 29.

⁷⁰ Bevis Fedder, *Marine Genetic Resources, Access and Benefit Sharing Legal and Biological Perspectives* (Routledge, 2013) 86.

⁷¹ This has subsequently been reinforced in the preamble to the 2015 Paris Agreement and the 2017 Declaration of Ethical Principles in relation to Climate Change.

⁷² The preamble to International Treaty on Plant Genetic Resources for Food and Agriculture states that plant genetic resources are a common concern of all countries, in that all countries depend very largely on plant genetic resources for food and agriculture that originated elsewhere.

⁷³ The UNESCO Convention for the safeguarding of the Intangible Cultural Heritage states that 'being aware of the universal will and the common concern to safeguard the intangible cultural heritage of humanity.'

⁷⁴ Nadia Sanchez Castillo-Winckels, 'Why "common concern of humankind" should return to the work of the International Law Commission on the atmosphere' (2016) 29(1) *Georgetown Environmental Law Review* 132, 136.

⁷⁵ Aline Jaeckel, 'Intellectual Property Rights and the Conservation of Plant Biodiversity as a Common Concern of Humankind' (2013) 2(1) *Transnational Environmental Law* 167, 173.

III. SCOPE OF THE CCH CONCEPT

The CCH concept has never been fully defined,⁷⁶ yet it 'is rich in implications.'⁷⁷ First, it is notable for what it does not include, which is a reference to States.⁷⁸ Instead, the CCH concerns issues relating to humanity as a whole.⁷⁹ This appears to accord with recent opinions from the International Court of Justice. For example, in his separate opinion in the *Gabcikovo/Nagymaros Project* case, Justice Weeramantry speculated that:

we have entered an era of international law in which international law subserves not only the interests of individual States, but looks beyond them and their parochial concerns to the greater interests of humanity and planetary welfare.... International environmental law will need to proceed beyond weighing the rights and obligations of parties within a closed compartment of individual State self-interest, unrelated to the global concerns of humanity as a whole.⁸⁰

The CCH concept aligns with this reasoning. Depicting a problem as a CCH acknowledges the existence of a shared unresolved issue that cannot be addressed by a single State on its own,⁸¹ but requires international cooperation in response.⁸²

There are three dimensions to the CCH concept.⁸³ Spatially, it encompasses elements of the global environment that, by virtue of their significance, require collective action to protect them.⁸⁴ The temporal dimension concerns the long-term effects of the common concern, which will affect the rights and obligations of present and future generations.⁸⁵ Lastly, the social dimension of the concept, requires the engagement of all sectors of society (governmental organisations, NGOs, the business sector, civil society and individuals)⁸⁶ in an 'equitable sharing of burdens in the protection of the environment, rather than benefits of exploitation from common resources.'⁸⁷

⁷⁶ Edith Brown Weiss, 'The Coming Water Crisis: A Common Concern of Humankind' (2012) 1(1) *Transnational Environmental Law* 153, 164.

⁷⁷ Dinah Shelton, 'Common Concern of Humanity' (2009) 39(2) *Environmental Policy and Law* 83, 84.

⁷⁸ Shelton, n 77.

⁷⁹ Shelton, n 77.

⁸⁰ *Gabcikovo-Nagymaros Project* (Hungary v. Slovakia), [1997] ICJ Reports, Separate opinion of Vice-President Weeramantry, at 115.

⁸¹ Thomas Cottier et al, 'The Principle of Common Concern and Climate Change' (2015)

<https://www.researchgate.net/profile/Philipp_Aerni/publication/273507418_The_Principle_of_Common_Concern_and_Climate_Change/links/550abe6d0cf290bdc11012ca/The-Principle-of-Common-Concern-and-Climate-Change.pdf>.

⁸² Friedrich Soltau, 'Common Concern of Humankind' in Cinnamon P Carlarne, Kevin R Gray and Richard Tarasofsky (eds), *The Oxford Handbook of International Climate Change Law* (Oxford University Press, 2016) 205.

⁸³ Laura Horn, 'Climate Change and the Future Role of the Concept of the Common Concern' (2015) 2(1) *Australian Journal of Environmental Law* 24, 27.

⁸⁴ Soltau, n 82, 204.

⁸⁵ Horn, n 83.

⁸⁶ Horn, n 83.

⁸⁷ Murillo, n 53, 138.

A. Fundamental Characteristics of the CCH Concept

Against this background, it is necessary to determine whether the protection of BBNJ meets the CCH threshold. To assist, Soltau identifies the following as fundamental characteristics of a common concern:

- (a) The interests concerned extend beyond those of individual states and touch on values or ethics of global significance;
- (b) Threats to the interests concerned are marked by their gravity and potential irreversibility of impacts; and
- (c) Safeguarding the interests involved requires collective action and entails collective responsibility.⁸⁸

Clearly, the conservation and sustainable use of BBNJ meets the above criteria. ABNJ are the biophysical 'engines of our planet'⁸⁹ and provide invaluable ecosystem services for human survival. The ocean's phytoplankton, kelp and algae plankton produce more than half of the world's oxygen as a by-product of photosynthesis.⁹⁰ The ocean also moderates global climate conditions. As the largest sink for CO₂ on the planet,⁹¹ the ocean absorbs over one-quarter of the anthropogenic CO₂ emitted into the atmosphere each year and stores 93 per cent of the resultant heat.⁹² The economic value of carbon storage by high seas ecosystems is estimated at US \$148 billion a year.⁹³ In addition, the ocean provides sources of protein for human consumption, energy resources and biomedical products, as well as cultural services through recreation and leisure activities.⁹⁴ It also plays a vital role in the traditions, customs and identity of coastal communities.⁹⁵ Failure to address threats to BBNJ could therefore compromise the ocean's capacity to provide essential ecosystem services that deliver societal and economic benefits of global significance.⁹⁶

In terms of the gravity and potential irreversibility of impacts, BBNJ is being undermined not only by the multiple impacts of climate change but also from the cumulative impacts of ongoing activities such as

⁸⁸ Soltau, n 82, 208-209.

⁸⁹ Jeffrey Marlow, 'The High Seas Are Being Exploited. Exploration Must Keep Pace' UNDARK (Web Page, 3 June 2018) <<https://undark.org/2018/03/06/high-seas-conservation-exploration/>>.

⁹⁰ IUCN, 'Governing Areas Beyond National Jurisdiction' (Issues Brief, March 2019) 2.

⁹¹ Dr. L Woodall, Dr. C Stewart, Professor A Rogers, 'Function of the High Seas and Anthropogenic Impacts Science Update 2012-2017' (University of Oxford for High Seas Alliance, July 2017) 7.

⁹² Kristina M. Gjerde, Nichola A. Clark and Harriet R. Harden-Davies, 'Building a Platform for the Future: the Relationship of the Expected New Agreement for Marine Biodiversity in Areas beyond National Jurisdiction' (2019) 33(1) *Ocean Yearbook Online* 1, 7; *Summary of the First Global Integrated Marine Assessment*, UN Doc A/70/112 (22 July 2015) [12].

⁹³ José María Figueres, Trevor Manuel and David Miliband, 'From Decline to Recovery: A Rescue Package for the Global Economy' (Report, Global Ocean Commission, 2014) 5.

⁹⁴ Meryl Williams et al, 'Scientific Results to support the sustainable use and conservation of marine life - A summary of the Census of Marine Life for Decision Makers' (Census of Marine Life International Secretariat Consortium for Ocean Leadership, 2011) 2.

⁹⁵ Robert Blasiak and Nobuyuki Yagi, 'Governing the High Seas' in Alistair Scrutton (ed), *Our Future on Earth* (Future Earth, 2020) 36, 37.

⁹⁶ Angel Borja et al, 'Bridging the Gap between Policy and Science in Assessing the Health Status of Marine Ecosystems' (2016) 3 *Frontiers in Marine Science* 271, 271.

overfishing, habitat destruction, pollution and species introduction. As a result, BBNJ is being lost at a rate that not only jeopardizes the sustainability of the oceans' ecosystems in the long-term but could have irreversible and potentially devastating effects for future generations.⁹⁷ The erosion of biodiversity is also 'seamlessly linked to the erosion of genetic diversity, that is to say the depletion of the infinite variety of genes and genotypes between species or within species.'⁹⁸ If a species becomes extinct it 'may take with it forever an unsuspected genetic characteristic,' that could play a significant role in natural cycles and ocean health.⁹⁹ This could have irreversible consequences as 'modern technology cannot reproduce biological diversity artificially.'¹⁰⁰

The conservation of BBNJ is a global challenge that requires cooperation and collaboration.¹⁰¹ Under the UNCLOS umbrella framework, ABNJ are currently governed, regulated and or managed by a patchwork of governance organizations and bodies, each with their own mandates and priorities. None of these organizations and bodies have a core focus on BBNJ.¹⁰² While some sectors have taken steps to implement measures to protect BBNJ, their mandates extend to specific regions or activities and often their jurisdictions overlap. There are also coverage gaps with some regions and resources not covered by any regulatory framework, there is weak implementation of and compliance with existing arrangements and cooperation is generally lacking.¹⁰³ The BBNJ process was launched to find 'durable solutions' to these issues within the current international law framework.¹⁰⁴ As there is no single instrument that deals with BBNJ in a comprehensive manner,¹⁰⁵ the development of an ILBI offers the chance 'to write a new chapter for ocean governance' one that places the protection of BBNJ at its centre.¹⁰⁶

The CCH concept should be an integral component of the ILBI. By designating the conservation and sustainable use of BBNJ as a CCH, an ILBI 'can create a strong foundation for ongoing global efforts to protect the oceans'¹⁰⁷ and effectively set a new course to sustain, protect and restore BBNJ across the 21st century.¹⁰⁸

⁹⁷ Florian Rabitz, *The Global Governance of Genetic Resources Institutional Change, Structural Constraints* (Routledge, 2017) 132.

⁹⁸ Bleuenn Guilloux, *Marine Genetic Resources, R&D and the Law 1: Complex Objects of Use* (ISTE Ltd, 2018) 139.

⁹⁹ Guilloux, n 98, 140.

¹⁰⁰ Yoshifumi Tanaka, *The International Law of the Sea* (Cambridge University Press, Second ed, 2015) 335.

¹⁰¹ IUCN, *Submission by IUCN following the Second Session of the Preparatory Committee on the Development of an International Legally Binding Instrument under UNCLOS on the Conservation and Sustainable Use of Marine Biological Diversity of Areas Beyond National Jurisdiction*, 5 December 2016, 4.

¹⁰² The Pew Charitable Trusts, 'Path to Creating the First Generation of High Seas Protected Areas' (Report, 31 March 2020) 5.

¹⁰³ Blanchard, Durussel and Boteler, n 23, 3; Emily Barritt and Jorge E Viñuales, 'Legal Scan: A Conservation Agenda for Biodiversity Beyond National Jurisdiction' (Cambridge Centre for Environment, Energy and Natural Resource Governance, University of Cambridge, May 2016) 7.

¹⁰⁴ Blanchard, Durussel and Boteler, n 23, 3.

¹⁰⁵ Barritt and Viñuales, n 103, 7.

¹⁰⁶ Gillian Anderson, 'This is crunch point for our oceans – let's do the right thing' *The Guardian* (UK, 19 August 2019).

¹⁰⁷ Bowling, Pierson and Ratte, n 41.

¹⁰⁸ IUCN, n 101, 5.

IV. THE POTENTIAL ROLE OF THE CCH CONCEPT UNDER THE ILBI

The incorporation of the CCH concept in the ILBI would make a powerful environmental statement.¹⁰⁹ Designating the conservation of BBNJ as a common concern would recognize its vital importance to humanity, and the ‘necessity of a cooperative approach involving all States.’¹¹⁰ In this way, the ILBI would be following in the footsteps of other significant environmental treaty regimes, including the CBD and the UNFCCC. Mirroring the UNFCCC, the ILBI could even incorporate the following wording into its preamble: *The conservation and sustainable use of BBNJ calls for the widest possible cooperation by all countries and their participation in an effective and appropriate international response.*

Bowman notes that the UNFCCC and the CBD did not emerge in ‘isolation or at random, but as key components of the overall package of measures endorsed at the Rio Summit in 1992.’¹¹¹ These instruments formed ‘part of a carefully crafted and coherent set of global policy initiatives’ and notably each have reached almost universal acceptance.¹¹² This demonstrates the extent to which the CCH concept has already crept into the public consciousness. The main benefit of employing the CCH concept in these environmental treaty regimes ‘has been to encourage participation, collaboration and action rather than discord,’¹¹³ which is particularly important in the BBNJ context.

The application of the CCH concept could therefore ‘forge a meaningful, logical and necessary link’ between the ILBI, the CBD and efforts to combat climate change.¹¹⁴ The CBD was never intended to stand alone in the biodiversity field.¹¹⁵ It was ‘designed to be complemented by a network of ancillary instruments’ focusing on other aspects of biodiversity conservation.¹¹⁶ As the CBD affirms biodiversity conservation as a CCH, it would be most appropriate for BBNJ to be governed by the same guiding principle as biodiversity found within national waters.

A. A Promising Middle Ground

The CCH concept could also hold the key to resolving a real sticking point in the BBNJ negotiations concerning the legal status and governing principle applicable to marine genetic resources (MGRs) in ABNJ.

¹⁰⁹ Bowling, Pierson and Ratte, n 41, 2.

¹¹⁰ Soltau, n 82, 210.

¹¹¹ M J Bowman, ‘Environmental Protection and the Concept of Common Concern of Humankind’ in Malgosia Fitzmaurice, David M. Ong and Panos Merkouris (eds), *Research Handbook on International Environmental Law* (Edward Elgar Publishing, 2010) 494, 504.

¹¹² Bowman, n 111, 504.

¹¹³ International Law Commission, 67th sess., Geneva, 4 May – 5 June and 6 July – 7 Aug. 2015, second report on the protection of the atmosphere by Shinya Murase, Special Rapporteur, A/CN.4.681 (2 Mar. 2015) 19, para 29.

¹¹⁴ Bowling, Pierson and Ratte, n 41.

¹¹⁵ Bowman, n 111, 504.

¹¹⁶ Bowman, n 111, 504.

UNCLOS is silent on MGRs, as the concept had not penetrated the international community's awareness at the Third United Nations Conference on the Law of the Sea (UNCLOS III). The belief, however, that MGRs could be the source of considerable wealth,¹¹⁷ has resulted in the adoption of contrary positions in the BBNJ negotiations. So far, the main point of contention has been the legal regime and governing principle applicable to the Area's MGRs.

A number of BBNJ delegations, most forcefully the United States, Japan and Russia, have maintained that the freedom of the seas principle applies to MGRs in ABNJ.¹¹⁸ These States argue that MGRs are governed under the high seas regime of Part VII of UNCLOS, thereby ensuring open access by all States. This group, whose nationals, corporations and flag vessels are most likely to engage in MGR collection and utilization, are particularly reluctant to see the imposition of rules that will hinder MGR access and look to avoid limitations being placed on what they perceive to be guaranteed high seas freedoms.¹¹⁹

States that maintain that Part VII applies to MGRs in the Area point to Article 133 of UNCLOS.¹²⁰ For the purposes of Part XI, Article 133 defines 'resources' as *all solid, liquid or gaseous mineral resources in situ in the Area at or beneath the seabed, including polymetallic nodules*. On its face, Article 133 excludes living resources from the CHM regime in Part XI.¹²¹ Even Article 140 of UNCLOS, which provides that '[a]ctivities in the Area...shall be for the benefit of mankind' is qualified by including 'as provided for in this Part [Part XI].'¹²² Based on a literal interpretation of these provisions, developed States (including Japan, Iceland and South Korea) argue that Part XI only applies to the Area's mineral

¹¹⁷ Joanna Mossop, 'Marine Bioprospecting' in Donald Rothwell et al (eds), *The Oxford Handbook of the Law of the Sea* (Oxford University Press, 2015) 837.

¹¹⁸ See, eg, 'Views Expressed by the US Delegation Related to Certain Key Issues Under Discussion at PrepCom 2 on the Development of an International Legally Binding Instrument under UNCLOS on the Conservation and Sustainable Use of Marine Biological Diversity' (9 September 2016) 1

<https://www.un.org/depts/los/biodiversity/prepcom_files/USA_Submission_of_Views_Expressed.pdf>; Elisa Morgera et al, 'Prepcom 4 Highlights: Monday 10 July 2017' *Earth Negotiations Bulletin* (online, 11 July 2017) 2 <<https://enb.iisd.org/download/pdf/enb25132e.pdf>>; Elisa Morgera et al, 'Summary of the Third Session of the Preparatory Committee on Marine Biodiversity beyond Areas of National Jurisdiction 27 March - 7 April 2017' *Earth Negotiations Bulletin* (online, 10 April 2017) 3 <<https://enb.iisd.org/download/pdf/enb25129e.pdf>>.

¹¹⁹ See, eg, Written submission of Iceland to PrepCom (December 2016) 1 <https://www.un.org/depts/los/biodiversity/prepcom_files/rolling_comp/Iceland.pdf> 1; Tallash Kantai et al, 'Summary of the Second Session of the Intergovernmental Conference on the Conservation and Sustainable Use of Marine Biodiversity of Areas Beyond National Jurisdiction: 25 March – 5 April 2019' *Earth Negotiations Bulletin* (online, 8 April 2019) 3 citing Japan's submission 'that access to MGRs should not be restricted.'

¹²⁰ Dire Tladi, 'Conservation and Sustainable Use of Marine Biodiversity in Areas Beyond National Jurisdiction: Towards an Implementing Agreement' in Rosemary Rayfuse (ed), *Research Handbook on International Marine Environmental Law* (Edward Elgar Publishing, 2015) 261.

¹²¹ Craig H. Allen, 'Protecting the Oceanic Gardens of Eden: International Law Issues in Deep-Sea Vent Resource Conservation and Management' (2001) 13 *Georgetown International Environmental Law Review* 563, 630.

¹²² Tladi, n 120, 261 discussing UNCLOS, art 140(1).

resources¹²³ and that Part VII is the default regime 'in the absence of an explicit indication to the contrary in UNCLOS.'¹²⁴

In stark contrast, the G77/China bloc has consistently maintained that the Area's MGRs are CHM and rely on a purposive approach to Article 136 of UNCLOS.¹²⁵ They contend that Article 136 makes the CHM principle not only applicable to the Area's resources, but to the Area itself.¹²⁶ As Article 1 of UNCLOS defines the 'Area' as the *seabed, ocean floor and subsoil*, this bloc argues that these terms should be given their ordinary meaning which would encompass their living and non-living resources.¹²⁷ Developing States argue that the freedom of the seas argument is flawed because:

it ignores the fundamental logic of the Convention [UNCLOS], namely that the regulation of various resources...is dependent on the maritime zone in which the resource is found and not on the nature of the resource...Part VII and the rights contained therein apply only to the high seas and not to the deep seabed.¹²⁸

Instead, these States argue for a CHM approach in furtherance of the UNCLOS preamble which provides for 'equitable and efficient utilization' of oceanic resources.

Even though the zero draft does not explicitly refer to the CHM or freedom of the seas concepts in its provisions concerning MGRs, these two camps continue to retreat to their 'traditional trench warfare positions.'¹²⁹ Clearly, BBNJ negotiators will need to either resolve the conflict between these traditional principles or find a way to navigate between them. This article contends that the CCH concept could act as a potential circuit-breaker in this long-standing dispute.

The CCH concept could represent a promising middle ground between proponents of freedom of the seas and those defending the CHM principle,¹³⁰ whilst providing a rationale and legal foundation for an ABS regime for MGRs.¹³¹ The CCH concept implies a legal obligation for the whole community to

¹²³ Tallash Kantai et al, 'BBNJ IGC-3 Highlights: Wednesday 28 August 2019' *Earth Negotiations Bulletin* (online, 29 August 2019) <<https://enb.iisd.org/download/pdf/enb25216e.pdf>>; Written submission of Iceland to PrepCom, n 119; Elisa Morgera et al, 'Summary of the Second Session of the Preparatory Committee on Marine Biodiversity Beyond Areas of National Jurisdiction: 26 August – 9 September 2016' *Earth Negotiations Bulletin* (online, 12 September 2016) 4 <<https://enb.iisd.org/download/pdf/enb25118e.pdf>>.

¹²⁴ Elisa Morgera, 'Do We Need a New Treaty to Protect Biodiversity in the Deep Seas?', SDG Knowledge Hub (Online Commentary, 20 January 2015) <<http://sdg.iisd.org/commentary/policy-briefs/do-we-need-a-new-treaty-to-protect-biodiversity-in-the-deep-seas/>>.

¹²⁵ *Letter dated 5 May 2014 from the Co-Chairs of the Ad Hoc Open-ended Informal Working Group to the President of the General Assembly*, UN Doc A/69/82 (5 May 2014) annex ('Co-Chairs' Summary of discussions') [50].

¹²⁶ Alex Oude Elferink, 'The Regime of the Area: Delineating the Scope of Application of the Common Heritage Principle and Freedom of the High Seas' (2007) 22(1) *The International Journal of Marine and Coastal Law* 143, 144, 150.

¹²⁷ See, eg, Written submission of Bangladesh to PrepCom: Proposal on the Scope of Marine Genetic Resources (5 December 2016) <https://www.un.org/depts/los/biodiversity/prepcom_files/rolling_comp/Bangladesh-marine_genetic_resources.pdf>.

¹²⁸ Tladi, n 120, 262.

¹²⁹ David Leary and S Kim Juniper, 'Addressing the Marine Genetic Resources Issue: Is the Debate Heading in the Wrong Direction?' in Clive Schofield, Seokwoo Lee and Moon-Sang Kwon (eds), *The Limits of Maritime Jurisdiction* (Koninklijke Brill, 2014) 769, 785.

¹³⁰ Thomas Greiber, 'Access and Benefit Sharing in Relation to Marine Genetic Resources from Areas Beyond National Jurisdiction: A Possible Way Forward' (Research Project, Federal Agency for Nature Conservation, 2011) 37.

¹³¹ Fedder, n 70, 85-86.

cooperate in a matter of international concern.¹³² Applying CCH to the BBNJ context, the international community would essentially have one right and one duty. The former being a legitimate interest in biodiversity and its MGRs and the latter being a common responsibility to assist in their protection.¹³³ The CCH concept could therefore act as an anchor in BBNJ negotiations and underpin a renewed sense of, and duty, to cooperate without diminishing the importance of or impinging upon other key principles in the international law of the sea.

Promisingly, several developing States have signalled a willingness to move away from the CHM principle, 'in exchange for tangible gains under a pragmatic benefit-sharing' arrangement.¹³⁴ In terms of operationalizing the CCH principle under an ILBI, the IUCN suggests that benefit-sharing provisions should focus on facilitating marine scientific research, not only to increase understanding of BBNJ but to sustain the biodiscovery pipeline.¹³⁵ As only a limited number of States have the technical and financial means to access and utilize MGRs derived from ABNJ, BBNJ negotiators should focus on building scientific and technological capacity. To provide greater access to the MGR knowledge pool, researchers and bioprospectors should be required to share samples and raw data in open-source databases, biorepositories or biobanks.¹³⁶ This would promote the involvement of users from developing countries and accord with what is already a common practice within the deep-sea research community with data being shared through multiple online data-sharing platforms, including the Ocean Biogeographic Information System.¹³⁷

Whilst a common domain approach to benefit-sharing could provide an important source of non-monetary benefit-sharing under an ILBI, it may not appeal to the commercial sector as they consider the data, samples and information to be business sensitive.¹³⁸ A way to circumvent this could be via an embargo period.¹³⁹ Under an embargo period, collectors and researchers would be able to keep material and data private for a certain (reasonable) period to enable them to publish research results; advance their research and apply for intellectual property rights.¹⁴⁰ The collector or researcher would undertake these activities on the understanding that MGRs derived from ABNJ are a common concern. On this basis, the international community, as a whole, would maintain a legitimate interest in these oceanic resources while also sharing a common responsibility to assist in their protection.

¹³² Murillo, n 53, 143.

¹³³ Murillo, n 53, 141.

¹³⁴ Rabitz, n 97, 131.

¹³⁵ IUCN, n 101, 19.

¹³⁶ IUCN, n 101, 19.

¹³⁷ Deep Ocean Stewardship Initiative, 'Deep-Sea Marine Scientific Research and Genetic Resources in Areas Beyond National Jurisdiction', Submission to PrepCom 1 (22 March 2016) 2
<https://www.un.org/depts/los/biodiversity/prepcom_files/DOSI.pdf>.

¹³⁸ Gaute Voigt-Hanssen, 'Current 'Light' and 'Heavy' Options for Benefit-Sharing in the Context of the United Nations Convention on the Law of the Sea' (2018) 33(4) *The International Journal of Marine and Coastal Law* 683, 699. art 11(3)(a).

¹³⁹ Arianna Broggiato et al, 'Mare Geneticum: Balancing Governance of Marine Genetic Resources in International Waters' (2018) 33 *The International Journal of Marine and Coastal Law* 3, 8. See, also, Zero Draft (n 2)

¹⁴⁰ Broggiato et al, n 139, 8.

B. A Constant and Powerful Reminder

A keen observer of the BBNJ negotiations will be able to spot distinct similarities between the debate concerning MGRs and the problems that plagued UNCLOS III negotiators in developing a regime for the mining of mineral resources in the Area. For example, in both instances, ABS discussions have tended to focus on monetary benefits, being financial or economic outcomes (i.e. payments, royalties, intellectual property rights and patents)¹⁴¹ to be derived from the relevant oceanic resource. In the case of MGRs, Leary and Juniper suggest that a 'gold fever' has taken hold of the international community and academia, with many believing that MGRs are a 'pot of gold' at the bottom of the ocean.¹⁴² However, there is minimal evidence of commercial-scale development of MGRs from ABNJ.¹⁴³ While patents exist, they do not necessarily equate to marketable products.¹⁴⁴ A lengthy and costly research and development process is required before commercialization and the chances of success are extremely low.¹⁴⁵ As the prospects of monetary benefits are uncertain,¹⁴⁶ BBNJ negotiators should tread cautiously. As Leary and Juniper poignantly contend, 'one only needs to recall the so far unrealized potential of deep-sea manganese nodules to appreciate how gold fever can lead to the creation of marine resource regulatory regimes far ahead of any real-world requirement.'¹⁴⁷ The adoption of a 'gold fever' mentality could also result in the protection of BBNJ being sacrificed for the sake of much broader geopolitical imperatives, including the economic interests of States.

BBNJ delegations must not lose sight of the bigger picture. The overriding objective of the ILBI is to provide a comprehensive framework for the protection of BBNJ. As protection is the 'animating purpose'¹⁴⁸ of the CCH concept, its incorporation in an ILBI, as a guiding principle, could essentially serve as a constant and powerful reminder of the main purpose behind its development. To achieve this, the CCH concept should not only be anchored in the ILBI's preamble to guide in its overall interpretation but also integrated into its operative parts to underpin the mechanisms and tools of the BBNJ package deal.

¹⁴¹ Jessica Battle and Duncan Currie, 'Some Critical Issues to be Resolved on Marine Genetic Resources in the Context of the Marine Biological Diversity Preparatory Committee Discussions' (Discussion Paper, WWF International, March 2016) 5.

¹⁴² David Leary and S Kim Juniper, 'Addressing the Marine Genetic Resources Issue: Is the Debate Heading in the Wrong Direction?' in Clive Schofield, Seokwoo Lee and Moon-Sang Kwon (eds), *The Limits of Maritime Jurisdiction* (Koninklijke Brill, 2014) 769, 773.

¹⁴³ S Kim Juniper, 'Technological, Environmental, Social and Economic Aspects' (Information Paper 3, IUCN, May 2013) 20–1.

¹⁴⁴ Marjo Vierros et al, 'Emerging and Unresolved Issues: Marine Genetic Resources' in Salvatore Arico (ed), *Ocean Sustainability in the 21st Century* (Cambridge University Press, 2015) 212.

¹⁴⁵ David Leary, 'Agreeing to disagree on what we have or have not agreed on: The current state of play of the BBNJ negotiations on the status of marine genetic resources in areas beyond national jurisdiction' (2019) 99 *Marine Policy* 21, 27.

¹⁴⁶ Anja Morris, 'Marine Genetic Resources in Areas beyond National Jurisdiction: How Should the Exploitation of the Resources be Regulated' (2018) 22 *New Zealand Journal of Environmental Law* 57, 61.

¹⁴⁷ Leary and Juniper, n 142, 785.

¹⁴⁸ Soltau, n 82, 206

CONCLUSION

Discussion of the CCH concept has been fairly limited in the BBNJ process. A great deal of attention has naturally been paid to the package deal of issues, which has caused other key components of an ILBI to become somewhat side-lined as peripheral strands of discussion. However, it appears the CCH concept has completely fallen off the radar, with no mention of it in the zero draft. In an effort to remind BBNJ negotiators of the importance of this principle, this paper has sought to illustrate its potential role in an emerging regime for the protection of BBNJ. While it is acknowledged that the CCH concept, in itself, is not a standalone solution for the complex array of issues facing ABNJ, the development of an ILBI could represent a 'profound paradigm shift in the law of the sea,'¹⁴⁹ and as such the potential contribution of this principle to this evolutionary process warrants and deserves particular attention. More often than not, the idea and concept of CCH is put aside as 'a piece of wishful thinking,'¹⁵⁰ however, as this article has shown, its rejection in the BBNJ context could be an opportunity missed.

This paper has demonstrated that the conservation and sustainable use of BBNJ bears all the hallmarks of a CCH, being an issue that transcends the boundaries of a single State and requires collective action and international cooperation in response.¹⁵¹ The adoption of the CCH concept, in conformity with the CBD, would offer consistency between the two texts and demonstrate an awareness of the importance of the ILBI's coherence with existing biodiversity-related instruments. It could also act as an anchor in the new instrument, fostering a sense of stewardship, collaboration and partnership amongst State Parties as they confront the challenges facing BBNJ.¹⁵² Moreover, the incorporation of the CCH concept in an ILBI has the potential to reinforce important principles, including inter and intra-generational equity, international solidarity, shared decision-making, accountability and burden sharing through cooperation.¹⁵³ These principles not only reflect key concepts in UNCLOS¹⁵⁴ but should lie at the core of an ILBI, particularly when it comes to issues concerning the ABS of MGRs.

MGRs continue to be the most contentious area of BBNJ discussions, due in large part, to the vexed relationship between the CHM and freedom of the seas. The polarization of States on the issue of the legal status of MGRs is particularly acute and has the potential to derail the whole BBNJ process. It would be unfortunate if differing ideological commitments prevented the conclusion of an ILBI.¹⁵⁵ This article encourages BBNJ negotiators to revisit the CCH concept at IGC 4 in an attempt to avoid the negotiations from getting bogged down in this long-standing debate, which may impose inherent limitations on the adoption of an effective ILBI and ultimately spell failure for the BBNJ process.

¹⁴⁹ Katherine Houghton, 'Identifying new pathways for ocean governance: The role of legal principles in areas beyond national jurisdiction' (2014) 49 *Marine Policy* 118, 118.

¹⁵⁰ Cottier, n 45, 32.

¹⁵¹ Shelton, n 77, 83.

¹⁵² IUCN, n 101, 3.

¹⁵³ IUCN, n 101, 3; Bowling, Pierson and Ratte, n 41.

¹⁵⁴ IUCN, n 101.

¹⁵⁵ Leary, n 145, 24.