

# **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**

Chelsea Bowling<sup>1</sup>, Elizabeth Pierson<sup>1</sup>, Stephanie Ratte<sup>2</sup>

## **Executive Summary**

This white paper explores the potential application of the concept of the “common concern of humankind” as a framework for a new international legally binding instrument for the conservation and sustainable use of marine biological diversity in areas beyond national jurisdiction, currently being negotiated by States under the United Nations Convention on the Law of the Sea, as outlined in United Nations General Assembly Resolution 69/292. It reviews the history of the common concern of humankind concept, its relevance in international treaties and case law, and the potential legal and policy implications of the concept’s use in a new marine biodiversity agreement.

Although less examined than global principles such as the common heritage of mankind, the common concern of humankind concept has a significant history of use by the international community for global environmental issues. Environmental treaties throughout the 20th century referred to shared global problems using various phrases that foreshadow the common concern of humankind. By the end of the century, the Convention on Biological Diversity (1992) and the United Nations Framework Convention on Climate Change (1992) formally expressed the conservation of biological diversity and “change in the Earth’s climate and its adverse effects” as common concerns of humankind, respectively. Most recently, the Paris Agreement (2015) again acknowledged climate change as a common concern.

As States negotiate a new legal regime to govern the high seas, this paper suggests that reaffirming the conservation and sustainable use of marine biodiversity in ABNJ as a common concern of humankind—already acknowledged by Parties to the CBD—can emphasize certain key principles of interest to States, namely: intergenerational equity, international solidarity, shared decision making and accountability, and benefit and burden sharing through financial cooperation. Moreover, its use would forge a meaningful, logical, and necessary link between the new instrument, the CBD, and international efforts to combat climate change. This paper seeks to show that the current discussions around marine biodiversity in ABNJ present a unique opportunity for the international community to build on the successes of the recent climate change negotiations and reaffirm the critical value of marine biodiversity for humankind.

<sup>1</sup>Yale Law School ’18, <sup>2</sup>Yale School of Forestry & Environmental Studies ’17

## Table of Contents

|   |    |
|---|----|
| I. Introduction .....   | 2  |
| II. What is the “Common Concern of Humankind”?.....                       | 3  |
| III. The History of the Common Concern of Humankind .....                 | 4  |
| A. Laying the foundation .....  | 4  |
| B. Treaties where “common concern of humankind” appears .....             | 5  |
| 1. Convention on Biological Diversity (1992): CCH is born .....           | 5  |
| 2. United Nations Framework Convention on Climate Change (1992).....      | 6  |
| 3. The UNFCCC Paris Agreement (December 2015) .....                       | 6  |
| C. CCH in international case law .....                                    | 7  |
| IV. CBD: A case study in how to operationalize CCH.....                   | 8  |
| V. Legal implications of a CCH regime .....                               | 11 |
| A. Shared decision making and accountability.....                         | 11 |
| B. Sharing both benefits and burdens .....                                | 11 |
| C. Common but differentiated responsibilities: an imperfect solution..... | 12 |
| VI. Linking the oceans with climate change through common concern.....    | 13 |
| VII. Conclusion.....  | 15 |

### **I. Introduction**

For centuries, humankind believed the vast and mysterious oceans to be beyond our power to harm. Today, we know the truth: generations of intensive fishing, whaling, and waste dumping have undermined the integrity of delicate ocean ecosystems, and human-induced climate change now threatens their destruction. As States negotiate a new legal regime to govern the conservation and sustainable use of marine biodiversity in areas beyond national jurisdiction (ABNJ), they have the opportunity to set a new course for protection of ecosystems beyond national boundaries. A new implementing agreement could make a powerful environmental and social statement, and lay the groundwork for improved regulation of activities in a heretofore under-regulated space, by reaffirming the conservation and sustainable use of marine biodiversity in ABNJ as a “common concern of humankind.”

This language would forge a meaningful, logical, and necessary link between the United Nations Convention on the Law of the Sea (UNCLOS), the Convention on Biological Diversity (CBD), and international efforts to combat climate change. In December 2015, 196 nations agreed to the Paris Agreement, which reaffirmed the statement of the 1992 United Nations Framework Convention on Climate Change (UNFCCC) that climate change is a “common concern of humankind.” Although the Paris Agreement was not designed to address the governance gap on the high seas, Article 5 did stipulate that all Parties should take action to conserve and enhance

the oceans as a sink for greenhouse gases. The international community now finds itself at a critical time in which to build on the successes of the Paris Agreement.

## **II. What is the “Common Concern of Humankind”?**

The “common concern of humankind” concept, or CCH, provides a framework for approaching global problems. International law scholar Dinah Shelton explains that “issues of common concern are those that inevitably transcend the boundaries of a single state and require collective action in response.”<sup>1</sup> The CCH model is particularly suited to environmental problems, which do not respect national boundaries. At the very least, a CCH designation expresses the need for international cooperation through strong global institutions to face a shared problem.<sup>2</sup> Where it has appeared, CCH has fostered creative international cooperation and compliance mechanisms.<sup>3</sup> International administrative or governing bodies that act upon issues of common concern should be equally accountable to all member nations, because of the shared nature of the problem.<sup>4</sup>

The common concern of humankind concept is related to, but distinct from, the principle of the common heritage of mankind. The concept of the common heritage of mankind generally applies to geographic areas or resources, whereas the common concern of humankind concept applies to specific issues. The common heritage framework is thus better suited for managing the sustainable exploitation of shared resources, whereas the CCH framework provides a basis for protecting shared resources that are being threatened by a global problem.

Problems of common concern are almost by definition those that will have long-lasting adverse effects, potentially devastating to future generations. CCH therefore includes a strong focus on intergenerational equity. In fact, during negotiations for the Convention on Biological Diversity, the negotiators landed on the phrase “common concern of humankind” in part because, in their view, “it implied intergenerational equity and fair burden sharing.”<sup>5</sup>

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<sup>1</sup> Dinah Shelton, *Common Concern of Humanity*, Environmental Law and Policy 39/2 (2009), 83.

<sup>2</sup> *Id.* at 86. See also, F. Biermann, “‘Common Concerns of Humankind’ and National Sovereignty,’ in GLOBALISM: PEOPLE, PROFITS AND PROGRESS: PROCEEDINGS OF THE THIRTIETH ANNUAL CONFERENCE OF THE CANADIAN COUNCIL ON INTERNATIONAL LAW (Canadian Council on International Law, 2002) 158, at 177-8.

<sup>3</sup> Shelton, *supra* note 1 at 86.

<sup>4</sup> Scholar Frank Biermann calls this the “principle of equal representation in decision-making” and sees it theoretically present in treaties that use CCH, but does not believe it has materialized in practice. Biermann, *supra* note 2, at 177-8.

<sup>5</sup> Ad Hoc Working Group of Legal and Technical Experts on Biological Diversity, *Report of the Ad Hoc Working Group of Legal and Technical Experts on Biological Diversity on the Work of its Second Session* (March 7, 1991), 4. <https://www.cbd.int/doc/meetings/iccbd/bdn-02-awg-02/official/bdn-02-awg-02-05-en.pdf>

### **III. The History of the Common Concern of Humankind**

#### **A. Laying the foundation**

The phrase “common concern of humankind” has appeared in treaties and international case law since the early 1990’s. However, the global community has been discussing related ideas for over a century, in conventions, treaties, and other contexts. Dinah Shelton traces CCH to humanitarian and human rights law, which reflects “the notion of common concerns or a global set of values and interests independent of the interests of states.”<sup>6</sup>

Environmental treaties throughout the 20th century referred to shared global problems using various phrases that foreshadow CCH. The International Convention for the Regulation of Whaling (1946) states, “wild animals in their innumerable forms are an irreplaceable part of the earth’s natural system which must be conserved *for the good of mankind.*”<sup>7</sup> The whaling convention has 88 member nations.<sup>8</sup> The preamble of the 1959 Antarctic Treaty affirms: “it is in the *interest of all mankind* that Antarctica shall continue forever to be used exclusively for peaceful purposes.”<sup>9</sup> From the original twelve signatories to this treaty, membership has grown to 53 nations.<sup>10</sup> The Tokyo Convention for the High Seas Fisheries of the North Pacific Ocean (1952), the Bonn Convention on the Conservation of Migratory Species of Wild Animals (1979), and other regional treaties articulate similar ideas.<sup>11</sup>

The phrase “common concern” featured prominently in the 1987 Report of the World Commission on Environment and Development.<sup>12</sup> Chairwoman Gro Harlem Brundtland writes in the preface that commissioners from diverse nations united over “a *common concern for the planet* and the interlocked ecological and economic threats with which its people, institutions, and governments now grapple.”<sup>13</sup> Part I of the report, titled “Common Concerns,” discusses the need for the global community to unite in addressing shared problems. Throughout the report, the commissioners effectively communicate that environmental issues are the common concern of humankind, without using those precise words.

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<sup>6</sup> Shelton, *supra* note 1 at 83.

<sup>7</sup> Quoted in Shelton at 85.

<sup>8</sup> *Membership and Contracting Governments*, International Whaling Commission (last visited March 25, 2016), <https://iwc.int/members>.

<sup>9</sup> Quoted in Shelton at 84.

<sup>10</sup> *The Antarctic Treaty*, Secretariat of the Antarctic Treaty (last visited March 25, 2016), <http://www.ats.aq/e/ats.htm>

<sup>11</sup> *Id.*

<sup>12</sup> The United Nations had created the Commission by a general resolution in 1983, which called for the Secretary General to appoint a Chairman and Vice Chairman, who would appoint additional members, at least half of whom would come from the developing world. A/42/427. *Our Common Future: Report of the World Commission on Environment and Development* (1987), Annexe 2: The Commission and its Work, <http://www.un-documents.net/wcdec-ofc.htm>.

<sup>13</sup> *Id.* at Chairman’s Foreword. (Emphasis added.)

## B. Treaties where “common concern of humankind” appears<sup>14</sup>

### 1. Convention on Biological Diversity (1992): CCH is born

- a. Preamble: “Affirming that the conservation of biological diversity is a common concern of humankind.”

Negotiations for the CBD first produced the term “common concern of humankind,” a new expression of a sense of shared responsibilities for global environmental issues. In its first report to the UN, released in November 1989, the working group assigned to investigate the possibilities for a convention on biodiversity “did not reach a consensus on the notion of biological diversity as a *common resource* of mankind, some delegations stressing the principle of the sovereignty of states over their natural resources.”<sup>15</sup> The working group’s second report reveals continued resistance to a “common heritage” regime for biodiversity,<sup>16</sup> but also growing consensus around the need for some kind of shared conservation model: “The concept of ‘common responsibility’ for conservation and sustainable use of biodiversity should be developed to serve as an adequate definition for most areas, taking into account the need to keep the balance between different socio-economic interests.”<sup>17</sup>

In the working group’s third session in the summer of 1990, delegates raised the possibility of using “common interest or concern” instead of “common heritage” to refer to biodiversity.<sup>18</sup> By November 1990, a new Working Group of Legal and Technical Experts was drafting a possible legal instrument, proposing variations on a theme for incorporation: “Biological diversity as a (heritage of mankind)d [common responsibility of humankind]s [common interest of humankind]” (sic).<sup>19</sup>

Ultimately, the group landed on “common concern of humankind,” finding the phrase expressed the core values that animated the Convention. It is worth quoting at length the legal working group’s explanation of the importance of the concept:

The Executive Director drew attention to four of the complex issues covered by the draft convention that were of particular importance: the first concerned the fundamental

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<sup>14</sup> While this section focuses on uses of the actual phrase “common concern of humankind,” it is worth noting that similar language is quite common in international instruments. Phrases or language similar to “common concern of humankind” appear in the preambles to the UN Convention to Combat Desertification (1994), the UNFAO Plant Genetic Resources Treaty (2001), and the UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage (2003).

<sup>15</sup> Ad Hoc Working Group of Experts on Biological Diversity, *Report of the Ad Hoc Working Group on the Work of its First Session*, 6 (Nov. 9, 1989), <https://www.cbd.int/doc/?meeting=BDEWG-01>.

<sup>16</sup> 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 Biodiversity of the Planet*, 3 (Feb. 23, 1990), <https://www.cbd.int/doc/meetings/iccbd/bdewg-02/official/bdewg-02-03-en.pdf>.

<sup>17</sup> *Id.* at 10.

<sup>18</sup> 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 Biodiversity of the Planet*, 6, 15 (Aug. 13, 1990), <https://www.cbd.int/doc/meetings/iccbd/bdewg-03/official/bdewg-03-12-en.pdf>.

<sup>19</sup> Ad Hoc Working Group of Legal and Technical Experts on Biological Diversity, *Elements for Possible Inclusion in a Global Framework Legal Instrument on Biological Diversity*, 7 (Nov. 1990), <https://www.cbd.int/doc/meetings/iccbd/bdn-01-awg-01/official/bdn-01-awg-01-03-en.pdf>.

principle that the conservation of biological diversity was a *common concern of all people*. This principle required the participation of all countries and all peoples in a global partnership. It implied intergenerational equity and fair burden sharing. The common concern called for a balance between the sovereign rights of nations to exploit their natural resources and the interests of the international community in global environmental protection.<sup>20</sup>

It is clear that the working group carefully considered its language and settled on “common concern” as the best possible articulation of its shared values. Note that the language “requires” global cooperation. By February 1992, “all peoples” had changed to “humankind.”<sup>21</sup>

## **2. United Nations Framework Convention on Climate Change (1992)**

- a. Preamble: “Acknowledging that change in the Earth's climate and its adverse effects are a common concern of humankind....”

The UNFCCC came into effect in 1994. Originally it did not include strict requirements for member States, instead setting forth principles for further action and calling for cooperation and institution-building to address climate change.<sup>22</sup> It established important advisory and regulatory bodies, including the Subsidiary Body for Scientific and Technological Advice, and the Conference of the Parties (COP), which would work together to determine how best to address climate change.<sup>23</sup> In 1997, the Kyoto Protocol added emissions reductions targets and effective compliance mechanisms to the framework.<sup>24</sup>

## **3. The UNFCCC Paris Agreement (December 2015)<sup>25</sup>**

- a. Introductory text: “Acknowledging that climate change is a common concern of humankind, Parties should, when taking action to address climate change, respect, promote and consider their respective obligations on human rights, the right to health, the rights of indigenous peoples, local communities, migrants, children, persons with disabilities and people in vulnerable situations and the right to development, as well as gender equality, empowerment of women and intergenerational equity.”
- b. This language repeats itself in the agreement itself (annex).

The Paris Agreement has been widely hailed as a giant step forward in combating climate change. Although it would be hyperbolic to suggest that the gains of the Paris Agreement are due

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<sup>20</sup> Ad Hoc Working Group of Legal and Technical Experts on Biological Diversity, *Report of the Ad Hoc Working Group of Legal and Technical Experts on Biological Diversity on the Work of its Second Session*, 4 (March 7, 1991). <https://www.cbd.int/doc/meetings/iccbd/bdn-02-awg-02/official/bdn-02-awg-02-05-en.pdf>.

<sup>21</sup> Intergovernmental Negotiating Committee for a Convention on Biological Diversity, *Fourth Revised Draft Convention on Biological Diversity* (February 6-15, 1992), <https://www.cbd.int/doc/meetings/iccbd/bdn-06-inc-04/official/bdn-06-inc-04-02-en.pdf>.

<sup>22</sup> Jutta Brunnee, *The Global Climate Regime: Whither Common Concern?*, in COEXISTENCE, COOPERATION AND SOLIDARITY : LIBER AMICORUM RÜDIGER WOLFRUM (ed. Holger Hestermeyer), 727-8 (2012).

<sup>23</sup> *Id.* at 728.

<sup>24</sup> *Id.* at 729-30.

<sup>25</sup> We have focused our analysis on the Paris Agreement rather than the original UNFCCC, because of the Paris Agreement’s current salience in international discourse.

to the phrase “common concern of humankind,” it may be useful to note what provisions and principles have been adopted in conjunction with the use of that phrase. If climate change is a common concern of humankind, and the international community adopts certain strategies to address it, designating other problems as CCH may open the door to adopting the same or similar strategies, particularly when they build on those employed in the CBD.

Article 4 of the Agreement requires all parties to set and strive towards successive nationally determined contributions (NDCs) of greenhouse gas reductions. At the same time, it instructs developed countries to assist developing countries, “recognizing that enhanced support for developing country Parties will allow for higher ambition in their actions.” Harvard University Professor Robert Stavins notes that this is an improvement over the Kyoto Protocol, under which the “common but differentiated responsibilities” model was used to excuse developing nations from cutting their emissions.<sup>26</sup> Given that each state sets its own NDCs, Stavins considers the universal applicability of monitoring and reporting requirements to be “crucial” to the success of the agreement.<sup>27</sup>

The Paris Agreement relies on a hybrid model of governance, under which individual nations must take action to reach their own NDCs, and the UNFCCC COP evaluates their progress every five years. Such a hybrid model may not be as attractive or logical with regard to the issue of marine biodiversity. The Paris Agreement aims to reduce countries’ emissions, primarily within national borders.

### C. CCH in international case law

Although “common concern of humankind” or similar phrasing does not occur in any case that has been presented to the International Court of Justice (ICJ), the ICJ has made clear that many of the same principles that motivate “common concern” in an environmental context have risen to the status of customary international law. For example, the 1997 Gabčíkovo-Nagymaros Project case highlighted the obligation to carry out environmental impact assessments. In this dispute between Slovakia and Hungary, the ICJ reasoned that both sides had, to some degree, breached their obligations under a 1977 treaty concerning the construction of a series of locks.<sup>28</sup> The most enduring impact of the case has been the importance the ICJ gave to reconciling economic development with impact on the environment. In its decision, the ICJ implied that this reconciliation has become one of the standards which States must consider before planning new activities or carrying out existing commitments, particularly in an international or trans-boundary context.<sup>29</sup> Over time, the ICJ has continued to strengthen its doctrine on reconciling environmental and economic effects. In the Costa Rica and Nicaragua dispute of 2015 the ICJ noted that the requirement to conduct environmental impact assessments before commencing an

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<sup>26</sup> “The dichotomous distinction between the developed and developing countries in the Kyoto Protocol has made progress on climate change impossible, because growth in emissions since the Protocol came into force in 2005 is entirely in the large developing countries—China, India, Brazil, Korea, South Africa, Mexico, and Indonesia.” Robert Stavins, *Paris Agreement: A Good Foundation for Meaningful Progress*, An Economic View of the Environment (Blog) (Dec. 12, 2015) <http://www.robertstavinsblog.org/2015/12/12/paris-agreement-a-good-foundation-for-meaningful-progress/>.

<sup>27</sup> *Id.*

<sup>28</sup> *Gabcikovo-Nagymaros Project (Hungary/Slovakia)*, Judgment, I.C.J. Reports 1997 (Sep. 25), p. 81 (“In the present Judgment, the Court has concluded that both Parties committed internationally wrongful acts.”).

<sup>29</sup> *Id.* at p. 7.

activity likely to have transboundary environmental impacts on another State was customary international law.<sup>30</sup>

In 2011, the Seabed Disputes Chamber, a body within the International Tribunal on the Law of the Sea (ITLOS), released an advisory opinion on the duties and liabilities of States and mining companies when acting in the Area. The opinion consistently stressed the importance of conservation for future generations.<sup>31</sup> While the Tribunal was interpreting the common heritage of mankind framework of UNCLOS,<sup>32</sup> these principles of intergenerational equity and international cooperation are equally important to a CCH model.

In general, though, international environmental law has focused largely on how States impact other States, which may not be a model that is well suited to a doctrine such as CCH. Despite this shortcoming, there are some guidelines in past ICJ decisions for issues which are globally relevant and do not easily map to the current sovereignty-focused legal regime. In particular, the 1970 Barcelona Traction case discusses the particular difficulties of addressing global issues. Although the issue in this case was financial, in its opinion the Court noted that States have some obligations which are not owed to other States on account of national sovereignty, but are rather obligations owed toward all humankind, giving such examples as the outlawing of genocide and slavery.<sup>33</sup> These obligations, sometimes called *erga omnes* obligations,<sup>34</sup> are often codified through widely accepted treaties or other international instruments, or are so commonly thought to be legally required as to achieve a status of *de facto* international law (*jus cogens*).<sup>35</sup> The prohibition against carrying out activities that cause environmental harm in another state would certainly seem to be *jus cogens*. States are obligated to conduct transboundary impact assessments because of this prohibition, but whether any other environmental responsibilities rise to the same level of obligation is unclear.

#### IV. CBD: A case study in how to operationalize CCH

As one of the first formal, global expressions of the common concern of humankind, the Convention on Biological Diversity has been instrumental in helping to define the concept of CCH. While the gains of the recent climate agreement are still to be seen, the CBD offers an

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<sup>30</sup> *Case concerning the dispute regarding navigational and related rights (Costa Rica v. Nicaragua)*, Judgment, I.C.J. Report 2015 (15 December), p. 101. See also, *Case Concerning Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, I.C.J. Reports 2010 (April 20) (holding that States have an obligation to avoid activities in their own jurisdiction that cause significant environmental harm to territory in another State).

<sup>31</sup> Duncan French, *From the Depths: Rich Pickings of Principles of Sustainable Development and General International Law on the Ocean Floor—the Seabed Disputes Chamber’s 2011 Advisory Opinion*, *The International Journal of Marine and Coastal Law* 26: 525, 536 (2011).

<sup>32</sup> ITLOS Advisory Opinion, *supra* note 17, p. 70, paragraph 226.

<sup>33</sup> *Barcelona Traction, Light and Power Company, Limited*, Judgment, I.C.J. Reports 1970 (Feb. 5), p. 3 at paragraphs 33-34.

<sup>34</sup> AJ.J. de Hoogh, *The Relationship between Jus Cogens, Obligations Erga Omnes and International Crimes: Peremptory Norms in Perspective*, 42 Aus. J. PuB. & INT'L L. 183, 183-214 (1991).

<sup>35</sup> *North Sea Continental Shelf*, Judgment, I.C.J. Reports 1969 (Feb. 20), p. 3 at paragraph 77; Eva M. Kornicker Uhlmann, *State Community Interests, Jus Cogens and Protection of the Global Environment: Developing Criteria for Peremptory Norms*, 11 Geo. Int'l Envtl. L. Rev. 101, 102 (1998-1999).

opportunity to understand how CCH might be operationalized in a global agreement on marine biodiversity.

The CBD includes a strong emphasis on national sovereignty, but this emphasis is offset by the idea that the conservation of biodiversity is a common concern of humankind.<sup>36</sup> Because “most components” of biological diversity have tended to be located within national borders, as have activities that are likely to affect biodiversity, national action plans represent a significant focus for operationalizing CBD mandates.<sup>37,38</sup> At the same time, intellectual property law scholar Ikechi Mgbeoji notes that, “although state sovereignty over plant genetic resources reigns supreme, other States have a legitimate right of ‘common concern’ on how those resources are conserved and exploited.”<sup>39</sup> More specifically, CCH balances sovereignty and biodiversity through reporting obligations and obligations to meet global standards in conserving biodiversity. Despite the emphasis on nationally created strategies and plans in the CBD (*see Article 6a*), the designation of biodiversity as a common concern ensures that States are aware of their responsibility to “humankind” and provides for global involvement and interest, particularly through reporting and other requirements.

The CBD also affirms that customary international law already requires that States ensure that activities under their control do not damage the environment in ABNJ: Article 3 asserts that, “States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or *control* do not cause damage to the environment of other States or of *areas beyond the limits of national jurisdiction*” (emphasis added). Article 5 also requires that “Each Contracting Party shall, as far as possible and as appropriate, cooperate with other Contracting Parties, directly or where appropriate, through competent international organizations, in respect of *areas beyond national jurisdiction* and on other matters of mutual interest, for the conservation and sustainable use of *biological diversity*” (emphasis added). Theoretically, customary law and the CBD already provide some measure of protection for the environment and biodiversity in ABNJ and some expectation of international cooperation to ensure these protections, because of the global importance of biodiversity to humankind.<sup>40</sup>

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<sup>36</sup> Glowka at 3.

<sup>37</sup> Elisa Morgera and Elsa Tsionmani, *Yesterday, Today, and Tomorrow: Looking Afresh at the Convention on Biological Diversity*, 21 Yearbook of International Environmental Law 1, 6 (2010).

<sup>38</sup> Lyle Glowka, et al, *A Guide to the Convention on Biological Diversity*, IUCN Environmental Policy and Law Paper No 30, 3 (1994).

<sup>39</sup> Ikechi Mgbeoji, *Beyond Rhetoric: State Sovereignty, Common Concern, and the Inapplicability of the Common Heritage Concept to Plant Genetic Resources*, Leiden Journal of International Law 16, 837 (2003).

<sup>40</sup> Indeed, robust enforcement of the CBD on the high seas could potentially solve the problem of flag States failing to enforce treaty obligations on their vessels or other States enforcing such obligations against their nationals. Within the context of ABNJ, flag States are required to have a genuine link with and exercise control over the vessel flying their flag. If the flag States which have signed the CBD comply with the terms of the treaty, this does not present a problem, but some States have less institutional capacity for enforcing treaty obligations, allowing many vessels registered under those States to avoid regulation. However, if other States party to the CBD with enforcement capacity recognize their own nationals who engage with or finance activities which may harm biodiversity in ABNJ as under their jurisdiction, as opposed to only under the jurisdiction of the flag state, this issue could potentially be ameliorated.

Some scholars identify international financial cooperation as the manifestation of the common concern language employed in the CBD. Morgera and Tsioumani argue that “Financial co-operation under the CBD is thus seen as an expression of the common concern for biodiversity conservation.”<sup>41</sup> Xiang and Meehan also suggest that the designation of biodiversity, climate change, and desertification as common concerns of humankind forms the basis of the rationale for financial cooperation in the three “Rio Conventions” (CBD, UNFCCC, and Convention to Combat Desertification).<sup>42</sup> In Article 20, the CBD requires that developed countries “shall provide new and additional financial resources to enable developing country Parties to meet the agreed full incremental costs to them of implementing measures which fulfill the obligations of this Convention and to benefit from its provisions and which costs are agreed between a developing country Party and the institutional structure referred to in Article 21.”<sup>43</sup> Article 21 then lays out the requirements of the CBD financial mechanism and its accountability to the Conference of the Parties.

Moreover, the 2010 Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity emphasizes benefit sharing and technological support. Article 1 states that, “The objective of this Protocol is the fair and equitable sharing of the benefits arising from the utilization of genetic resources, including by appropriate access to genetic resources and by appropriate transfer of relevant technologies, taking into account all rights over those resources and to technologies, and by appropriate funding, thereby contributing to the conservation of biological diversity and the sustainable use of its components.” While the Nagoya Protocol does not reference the common concern of humankind, as an extension of the CBD, the protocol can be viewed as further operationalizing common concern through benefit sharing and financial cooperation. In the CBD, the use of the common concern language as the rationale for financial responsibility on the part of developed States is relatively clear. Since developed countries benefit from the conservation and protection of biodiversity *in-situ* in developing countries, they are required to financially and technologically support these protections. In this way, the use of the term common concern of humankind may carry with it expectations of global financial commitments, especially from developed countries.

A few additional areas of note in the preamble of the CBD include: 1) awareness of the lack of scientific information regarding biodiversity and the need for greater understanding to appropriately plan; 2) the use of the precautionary principle; 3) the importance of *in-situ* conservation; and 4) the need for international cooperation in biodiversity conservation. These elements are relevant to marine biodiversity in ABNJ and may be linked to the use of the idea of common concern. For example, the need for information and the importance of the precautionary principle in the absence of this information would be highly relevant to bioprospecting, fishing, and other activities in ABNJ. They may be linked to the use of “common concern,” since the importance of marine biodiversity for humankind necessitates the use of precautionary measures.

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<sup>41</sup> Morgera at 28.

<sup>42</sup> Yibin Xiang and Sandra Meehan, *Financial Cooperation, Rio Conventions and Common Concern*, 14 RECIEL 212, 212 (2005).

<sup>43</sup> Xiang and Meehan also note that in the case of the UNFCCC, developed countries are similarly “the financing engines for implementation” of the convention (*Id.* at 215).

## V. Legal implications of a CCH regime

### A. Shared decision making and accountability

The Convention on Biological Diversity and the International Treaty on Plant Genetic Resources for Food and Agriculture, both of which invoke CCH, have created international governing bodies to oversee the implementation of those treaties. The Paris Agreement, adopted under the UNFCCC, also refers to CCH, but it emphasizes regulatory actions by States and smaller units of governance instead of the creation of a separate international governing body.<sup>44</sup> However, it does implement extensive reporting requirements, under which Parties must report biennially on their national emissions and efforts to sink carbon.<sup>45</sup> The Paris Agreement thus includes a requirement for accountability measures in front of the global community while reserving more control for individual States than the CBD and Plant Genetic Resources Treaty. If biodiversity in ABNJ were designated a CCH, some kind of similar implementing mechanism would also need to be created to organize a strategy for dealing with this common concern. The exact form of this mechanism could range from a structured international body (such as that used for the CBD) to a looser cooperative system (such as that adopted under the UNFCCC). Ideally, a central international governing authority would apply the same policies and rules to all countries' activities in the ABNJ. This would likely produce more coherent and consistent results than a Paris-style system of each country formulating its own policies and submitting them to a central authority for review. However, a hybrid governance model, or smaller, regional authorities, can be effective if they include strong reporting and enforcement requirements.

National action plans could also be a mechanism for individual States to clarify their commitments to the international community. As discussed above, national action plans feature prominently in the CBD, and are also components of the Paris Agreement. National action plans may be less likely to have such importance when the place concerned is in an area beyond national jurisdiction, and when the issue concerned is less the correction of a problem, as in the case of the threat to biodiversity from the destruction of ecosystems in national jurisdictions, than the prevention of harm to undiscovered organisms in ABNJ.

### B. Sharing both benefits and burdens

A CCH regime is less concerned with sharing the benefits that may arise from an area than it is with sharing the burden of solving a problem. In this way, it is distinct from the more resource-oriented “common heritage of mankind” principle. Despite this difference in emphasis, CCH is not incompatible with benefit sharing (which is, after all, simply the other side of burden sharing). In the context of marine genetic resources (MGR), as scientific knowledge of those resources may help us conserve them, a CCH regime could support certain kinds of access and benefit sharing between developed and developing States, such as allowing scientists from developing countries to accompany research expeditions and access the data collected on those expeditions. As developed States gained more scientific knowledge about the resources in ABNJ, they would be obligated to share at least some of the benefit of that knowledge with developing

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<sup>44</sup> Richard Kinley, *What Now? Climate Change and Energy after Paris (Keynote Address)*, UNFCCC (January 26, 2016) <http://newsroom.unfccc.int/unfccc-newsroom/keynote-address-climate-change-and-energy-after-paris/>.

<sup>45</sup> Paris Agreement, FCCC/CP/2015/L.9 (Dec. 12, 2015), Article 13.

States to facilitate equal participation in decision making about how best to exploit and conserve those resources moving forward.

One scholar, Frank Biermann, has suggested that the CCH model also includes a principle of “international environmental solidarity.” This principle requires developed States to assist developing States, financially and otherwise, in their efforts to address common concerns of humankind, including by transferring needed technology. Biermann locates the principle in the ways that States have enacted the CBD and UNFCCC. He also points to the 1990 modifications to the Montreal Protocol, which specified that developed nations must do everything possible to effect the transfer of high-quality, environmentally safe technology to developing nations “under fair and most favorable conditions.” Similar language occurs in the UNFCCC. When developing nations must change their policies or enact new ones in order to combat a problem of common concern, they may face disproportionate economic burdens. Under the common concern regime, Biermann posits, the answer to this problem is not to relax the standards for developing nations, but to require developed nations to help them meet the high bar that has been set globally in response to a serious problem.

### C. Common but differentiated responsibilities: an imperfect solution

The common but differentiated responsibilities (CBDR) principle often appears in treaties that address a common concern. It has even been called “the other side of the common concern coin.”<sup>46</sup> The CBDR framework offers one way to address historical inequities that led to asymmetrical levels of pollution in the past, and the vastly different current resources States can commit to addressing the problems of current pollution.<sup>47</sup> Under the principle of CBDR, countries with fewer resources, which have historically contributed less to a problem, should have fewer responsibilities, while developed States bear more responsibility for addressing it. However, a global problem necessitates a solution that requires all nations to meet standards which would have a meaningful impact, with developed States assisting developing States in meeting those standards. The downsides of the CBDR approach in the climate change context became clear in the implementation of the Kyoto Protocol (see Part III.B(3) above): if all nations are not held to sufficiently high standards, the problem at hand may not be addressed as fully or as swiftly as needed.

The International Tribunal on the Law of the Sea expressed its reluctance about a CBDR regime for ABNJ in its 2011 Advisory Opinion on Activities in the Area. The Tribunal clarified the implications of the phrase, “according to their capabilities,” with regard to possible differences between the duties of developing and developed States. UNCLOS provides for special treatment of developing States in some circumstances. Developed States are required under UNCLOS to help developing States participate in activities in the Area, by cooperating internationally on scientific research, sharing technology, training personnel, and sharing benefits.<sup>48</sup> However, the Tribunal concluded that developing States do *not* face more lenient standards when it comes to

<sup>46</sup> Jutta Brunnée, *The Global Climate Regime: Wither Common Concern?*, Holger P. Hestermeyer et.al (eds.) in: COEXISTENCE, COOPERATION AND SOLIDARITY, LIBER AMICORUM FOR RÜDIGER WOLFRUM, Volume I, Martinus Nijhoff, 2012, 727.

<sup>47</sup> *Id.* at 724-732.

<sup>48</sup> *Responsibilities and obligations of States with respect to activities in the Area*, Advisory Opinion, ITLOS Reports 2011 (Feb. 1), p. 53, paragraph 157.

the duties of sponsoring States to ensure that their nationally registered companies or vessels adhere to environmental regulations: “none of the general provisions of the Convention concerning the responsibilities (or the liability) of the sponsoring State ‘specifically provides’ for according preferential treatment to sponsoring States that are developing States.”<sup>49</sup> The tribunal further notes that equality of treatment between States is necessary to prevent companies from deliberately incorporating in developing States in order to take advantage of lax environmental standards.<sup>50</sup> Although this opinion discusses the Area, and thus the common heritage of mankind principle instead of CCH, many of the same concerns about CBDR would apply to a CCH regime for ABNJ.

The ITLOS opinion suggests that the CBDR model may be ill-suited to a CCH vision of ocean governance. On a fundamental level, the freedoms of the high seas guaranteed by UNCLOS are inconsistent with the basic premise of CBDR. These freedoms only exist if a state fulfils its obligations, and development status does not alter these obligations.<sup>51</sup> The London Protocol, which incorporates some aspects of CBDR,<sup>52</sup> still does not excuse developing States from their responsibility to appropriately police ships flying their nation’s flag. A State without the resources to meet its obligations seems to face an undue burden, but while this burden may be shared, as under a CCH framework, it cannot be lessened without altering the terms of UNCLOS and the existing legal regime for the high seas.

## **VI. Linking the oceans with climate change through common concern**

In December 2015, 196 nations signed on to the Paris Agreement, which stated unequivocally that climate change is a “common concern of humankind.” This may be a unique moment in which the international community can build on the successes of climate change achievements, and direct some of that urgency into protections for the oceans. The Paris Agreement mentions oceans in its preamble: “Noting the importance of ensuring the integrity of all ecosystems, including oceans.”<sup>53</sup> While the Agreement declares the importance of protecting sinks for greenhouse gases, which include the oceans, its language and mission do not focus on the oceans, let alone in ABNJ. A new treaty could fill that gap.

Scientists have by now firmly established a strong link between climate change and the ocean, though they continue to refine their understanding of that link. The oceans have been identified

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<sup>49</sup> *Id.* at paragraph 158.

<sup>50</sup> *Id.* at paragraph 159.

<sup>51</sup> “The high seas are open to all States, whether coastal or land-locked. Freedom of the high seas is exercised under the conditions laid down by this Convention and by other rules of international law.” United Nations Convention on the Law of the Sea, Article 87, available at

[http://www.un.org/depts/los/convention\\_agreements/texts/unclos/unclos\\_e.pdf](http://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf).

<sup>52</sup> 1996 Protocol to the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, 1972, Article 2, available at

<http://www.imo.org/en/OurWork/Environment/LCLP/Documents/PROTOCOLAmended2006.pdf> (“Contracting Parties shall individually and collectively protect and preserve the marine environment from all sources of pollution and take effective measures, according to their scientific, technical and economic capabilities, to prevent, reduce and where practicable eliminate pollution. . .”).

<sup>53</sup> Paris Agreement Annex at 21.

as a global carbon sink, and are estimated to have absorbed approximately a third of anthropogenic greenhouse gas emissions in the industrial period, thus mitigating climate change.<sup>54</sup> While the biological component of this sequestration is attributed to phytoplankton,<sup>55</sup> recent science suggests biodiversity is also important for this process, as various roles of larger marine animals in oceanic carbon capture and storage have been identified.<sup>56</sup> These include long-term storage of organic carbon in animal biomass; rapid transfer of organic carbon to deep oceans via excretion and sinking carcasses; and enhancement of photosynthesis by phytoplankton through movement of nutrients.

A recent article in *Science* describes the devastating effects of climate change on the deep seas.<sup>57</sup> While highlighting the known harms, the authors emphasize that there is still much that is unknown about the species of the deep oceans: “Most climate change impacts in the deep ocean will remain unknown unless attention is directed to its vulnerable ecosystems.”<sup>58</sup> Although the authors stress the limits of our knowledge, what we already know is cause for alarm. Warming oceans hold less oxygen, induce more thermal stratification, and as a result are deoxygenated, which we already know will harm many species.<sup>59</sup> We expect ocean acidification to be similarly harmful, though the article again notes our lack of good data about the exact contours of the phenomenon.<sup>60</sup>

There are several possibilities for introducing the concept of “common concern of humankind” to the oceans. Shelton notes that common concern does not apply to a thing itself, but rather to related actions and adverse impacts: “It is neither biological diversity nor the climate in isolation that are common concerns. It is rather the conservation of biological resources, and climate change and adverse effects therefrom, that are a common concern.”<sup>61</sup> Similarly, we might

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<sup>54</sup> S. Khatiwala, T. Tanhua, Mikaloff Fletcher S, M. Gerber, S.C. Doney, H.D Graven , N. Gruber, G.A. McKinley, A. Murata A, A.F. Rios and C.L. Sabine. *Global ocean storage of anthropogenic carbon*. Biogeosciences, 10 2169-2191 (2013). Doi: 10.5195/bg-10-2169-2013.

<sup>55</sup> T. Devries, F. Primeau and C. Deutsch. *The sequestration efficiency of the biological pump*. Geophysical Research Letters Vol. 39, L13601 (2012). Doi: 10.1029/2012GL051963.

<sup>56</sup> S.L. Martin, L.T. Ballance and T. Groves. *An Ecosystem Services Perspective for the Oceanic Eastern Tropical Pacific: Commercial Fisheries, Carbon Storage, Recreational Fishing, and Biodiversity*. Front. Mar. Sci. 3:50 (2016). Doi: 10.3389/fmars.2016.00050; C.N. Trueman, G. Johnston, B. O’Hea and K.M. MacKenzie. *Trophic Interactions of fish at midwater depths enhance long-term carbon storage and benthic production on continental slopes*. Proc. R. Soc. B 281: 20140669 (2014); A.J. Pershing, L.B. Christensen, N.R. Record, G.D. Sherwood and P.B. Stetson. *The Impact of Whaling on the Ocean Carbon Cycle: Why Bigger Was Better*. PLoS ONE 5(8) (2010). Doi: 10.1371/journal.pone.0012444; W.K. Dewar, R.J. Bingham, R.L. Iverson, D.P. Nowacek, L.C. St. Laurent and P.H. Wiebe. *Does the marine biosphere mix the ocean?* Journal of Marine Research 64 541-561 (2006); J. Roman, J.A. Estes, L. Morissette, C. Smith, D. Costa, J. McCarthy, J.B. Nation, S. Nicol, A. Pershing and V. Smetacek. *Whales as marine ecosystem engineers*. Frontiers in Ecology and the Environment 12 (2014). Doi: 10.1890/130220; G.K. Saba and D.K. Steinberg. *Abundance, Composition, and Sinking Rates of Fish Fecal Pellets in the Santa Barbara Channel*. Nature Scientific Reports 2:716 (2012). Doi: 10.1038/srep00716.

<sup>57</sup> Lisa A. Levin and Nadine Le Bris, *The deep ocean under climate change*, 350 Science 6262, 766 (Nov. 13, 2015). The article was part of a special issue published contemporaneously with the Paris Conference on climate change, making the case for centering a new agreement around oceans.

<sup>58</sup> *Id.* at 766.

<sup>59</sup> *Id.* at 767.

<sup>60</sup> *Id.*

<sup>61</sup> Shelton, *supra* note 1 at 85.

designate “the conservation of biodiversity in ABNJ,” or “the integrity of the oceans in the face of climate change,” as a common concern of humankind.

The Convention on Biological Diversity has already designated marine biodiversity as a common concern of humankind. Under the Convention, “biological diversity” refers to “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...”<sup>62</sup> However, a CBD Technical Series report states that in areas beyond national jurisdiction, the CBD does not “apply to the components of biodiversity *per se*, as they do within national jurisdiction.”<sup>63</sup> The CBD only applies to “processes and activities carried out under a Party’s jurisdiction or control which may have adverse impact on biodiversity.”<sup>64</sup> However, one could argue that the preamble, while nonbinding, expresses the critical importance of all biodiversity. Article 22 of the CBD states that Parties must implement the convention in relation to the marine environment consistently with States’ obligations under UNCLOS. Although the CBD offers some protection to marine biodiversity, as a subset of biodiversity writ large, these protections could be strengthened by a more targeted new treaty under UNCLOS.

## VII. Conclusion

The words of the World Commission on Environment and Development apply just as well today as they did in 1987: we are united by “a common concern for the planet and the interlocked ecological and economic threats with which its people, institutions, and governments now grapple.” Now, more than ever, we understand how vital the oceans, and their rich variety of life, are to the health of humankind and the Earth as a whole. By unequivocally designating the conservation of marine biodiversity as a common concern of humankind, States can create a strong foundation for ongoing global efforts to protect the ocean, and the planet.

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<sup>62</sup> Convention on Biological Diversity, Article 2: Use of Terms.

<sup>63</sup> Lee A. Kimball, *The International Legal Regime of the High Seas and the Seabed Beyond the Limits of National Jurisdiction and Options for Cooperation for the Establishment of Marine Protected Areas (MPAs) in Marine Areas Beyond the Limits of National Jurisdiction*, CBD Technical Series No. 19 (2005), 10.

<sup>64</sup> *Id.*