COMMON HERITAGE OF MANKIND - AN OUTDATED CONCEPT IN INTERNATIONAL SPACE LAW?

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Abstract

In the 1970ies and 1980 the conception of common heritage of mankind which was referred to in the Outer Space Treaty, the Law of the Sea Convention and in the Moon Agreement was „en vogue" in general international law as well as in international space law. It was considered to be an aproach which should introduce an element of solidarity into international (space) law. Against this doctrinal backgound of the common heritage concept as consisting of five core elements the attempt is made in this paper to asses its current importance. Thereby more recent developments leading to an amending „Implementation Convention" to the Law of the Sea Convention in 1994 and the UNGA Declaration on Space Benefits of 1996 show a tendency of softening the formerly harsh and economically restricting approach of the economic element of the common heritage conception. As can be exemplified with a view to the Uruguay Round of GATT the international community relies more and more on a liberal approach with regard to economic activities in the upcoming era of globalization. It may therefore be concluded that the common heritage approach paves the way for the states own conceptions on how to bridge the gap between the rich and the poor countries in this world.

I. Introduction

Whenever an observer of international politics in general and an international lawyer, in particular, is confronted with what is called "the common heritage of mankind", there is a high likelihood of him or her saying that one hears at least very diverging opinions on the very contents of that concept. Although the concept is codified in some international agreements which were basically drafted in the 1970s and early 1980s, there is seemingly no consensus even on its very meaning. Looking through state practice and legal literature, one finds such diverging statements with regard to the common heritage concept as being a principle of customary international law, or a concept with no legal validity,[2] or an international legal principle *in statu nascendi*, of eminent value for the further development of international law.[3] Be this as it may: As a matter of fact and of law, the common heritage concept is contained in international space law. Space law, however, is not the only field of international law where one can find expressions of this conception. As will be demonstrated in the following, it is even necessary to apply a comparative approach to international maritime law and other areas of international law, in order to get a more concise understanding of the very meaning of this concept. Therefore, in the

following, first the history of the common heritage idea will be explained in the first section of this paper (II), the second section will concern itself with the basic contents of this conception (III), before in section three a thorough discussion of its further implementation in the previous negotiations after the conclusion of the 3rd United Nations Conference of the Law of the Sea (UNCLOS III) and in the United Nations Legal Sub-Committee of the Committee on the Peaceful Uses of Outer Space (UNCOPUOS) (IV) takes place. This will allow us to draw some conclusions in section four (V) as to the actual meaning and contents of this concept.

II. The History of the Concept of Common Heritage of Mankind

As already indicated, the expression "common heritage of mankind" as a legal term was coined during the UN process of codifying international law of the sea and outer space. Until the late 1960s due to the technological development neither uses of outer space nor the use of the deep sea-bed were subject to a specific legal regulation. And as a general rule one can state: In case of non-regulation of an international activity such activity is subject to a regime of absolute freedom of action of states. More precisely: Before the legal codification of the principles for the uses of outer space as well as of the deep sea-bed every state was allowed to use outer space as well as the deep sea-bed without asking for any kind of permission. This regime of absolute freedom was, however, subject to growing criticism, in particular by the countries of the so-called Third World, those being mostly such countries which became decolonized in the late 1950s and early 1960s.[4] They considered such rules as being an expression of the old Darwinist maxim of the survival of the fittest. This traditional international law was considered to be framed by the old actors of international law the states that had formerly colonized many areas of the world. This did not, however, in the view of the newly independant states, give them a fair chance to participate in the formation of international law. Thus, in their general strife for a codification and implementation of a new international economic order,[5] the newly independant states worked for the formulation of new rules of international law which should take into particular account the specific interests of the developing world, and, as a consequence, they heavily criticized any regime of absolute freedom, because it would in their view, prolong and deepen the existing differences in wealth between the first and the third world. Thus, a legal rule was looked for, which expressed such basic needs of the developing countries. Finally the developing countries succeeded in reformulating the idea of common heritage into a concept of a solidarity of the first towards the third world. The main idea of common heritage is without any doubt its distinct solidarity feature which was at a relatively early stage of the considerations even advanced and supported by the US administration. In fact, the developing countries advanced the idea that the common heritage concept should contain a concretisation of the solidarity approach among states.[6] Therefore, areas outside national jurisdiction like the High Seas, the Deep Sea-Bed as well as Outer Space and the Celestial Bodies, should not only not be subject to national claims of sovereignty. They should, moreover, be exploited in a way which should take into account the specific interests of the developing world. It was in this context, that Art. 1 para. 1 of the Outer Space Treaty, reiterating the wording of some former General Assembly resolutions on outer space,[7] was drafted with the following wording:

> "The exploration and use of Outer Space, including the Moon and other Celestial Bodies, shall be carried out in the benefit and in the interest of all countries, irrespective of their degree of economic and scientific development, and shall be the province of all mankind."

Moreover, Art. 11 para. 1 of the Moon Treaty of 1979 states that:

> "The Moon and its natural resources are the common heritage of mankind which finds its expression in the provisions of this agreement in particular in para. 5 of this Article."

And Art. 139 of the United Nations Convention on the Law of the Sea of 1982 states that:

> "The area and its resources are the common heritage of mankind."

Finally we find in Art. 33 para. 2 of the ITU-Treaty in its version of 1982 the following provision:

> "In using frequency bands for space radio services, members shall bear in mind that radio frequences and the geo-stationary satellite orbit are limited natural resources and that they must be used efficiently and economically, in conformity with the provisions of the radio regulations, so that countries or groups of countries may have equitable access to both, taking into account the special needs of the developing countries and the geographical situation of particular countries."

It should also be mentioned that section VI of the Preamble of the Convention concerning the protection of the world's cultural and natural heritage adopted by the General Conference of UNESCO on 16 November 1972, states that:

> "Parts of the cultural and natural heritage are of outstanding interest and, therefore, need to be preserved as part of the world's heritage of mankind as a whole."[8]

Thus, one can clearly see that the common heritage conception has been concretely codified in international law. In the different areas of international law over and again the one basic idea find its expression: The respective good is of concern not only for one particular country, but for mankind as a whole. From this the consequence can be derived that the heritage idea expresses that the respective goods cannot be owned by some single countries but that they are vested in the whole of mankind and must, therefore, be protected by all mankind by way of some kind of international administration. Mankind, therefore, is as a whole the benifactor of this system based on trust.

Before some more precise description of the contents of the common heritage of mankind conception, one has to take into account some further considerations on its development.

With the concrete codification of the mankind conception in the above-stated international conventions its development had not come to an end. Rather, this codification opened not only a theoretical discussion, but also posed the problem of implementing in practice the common heritage of mankind idea. The most recent examples for such concretisation by state practice are on the one hand the discussion

in the Preparatory Committee in the aftermath of the 3rd United Nations' Conference on the Law of the Sea,[9] which started after the signature of the Convention in late 1982 and ended only in 1994 by the adoption of an Interim Agreement. On the other hand, since 1988 in the United Nations Committee on the Peaceful Uses of Outer Space Legal Sub-Committee, a discussion had started on the subject of so-called „space benefits" which basically sought for a practical implementation of the common heritage idea with regard to the different uses of outer space.[10] Therefore, in the following, in order to more precisely determine the contents of the common heritage of mankind conception, after the identification of the core of the general idea, specific consideration will be given to these most current developments. Furthermore for an eventual evaluation of the common heritage conception an assessment of the impact of the Rio-Conference on Environment and Development 1992 and the final results of the Uruguay-Round of the GATT, establishing the WTO is required.

III. The Contents of the Common Heritage of Mankind Conception

The heritage conception, that is the idea of mankind as trustee for some common goods in particular those in spaces outside national jurisdiction, has already been generally described in the previous section. It is important to note that it is not just the general idea, but the concrete elements that have shaped the common heritage conception during the codification process. In particular, five elements can be singled out which give the conception its distinct shape. Those elements are:[11]

- the non-appropriation element
- the scientific investigation element
- the peaceful use element
- the environmental protection element and
- the economic element.

As to the non-appropriation element, it has already been pointed out that one basic idea of the common heritage conception has been that the area and the resources of the respective common good cannot be appropriated by a single state or private person.[12] This is in order to prevent those areas respectively those resources from being exploited to the exclusive advantage of those countries who do possess the economic and technological capabilities of exploiting them. In order to preserve the respective areas and resources for the whole of mankind, the exercise of sovereignty through particular states is excluded.[13]

Moreover, the respective areas can only be used for peaceful means. It is, however, not entirely clear and consented what 'peaceful' in the context of the common heritage conception specifically means. Whereas, on the one hand, the position has been forwarded that no military use whatsoever could be made of the areas, another opinion which is supported by the majority holds that the respective uses of the areas may not be aggressive. Looking upon recent state practice, in particular with the uses of outer space, it becomes entirely clear that outer space is needed for some kind of military use, even for defence purposes.[14] Thus, intercontinental missiles need at least parts of outer space in order to be appropriately carried on. It therefore seems to be more or less consented that any military use of outer space may not be an aggressive one.

With regard to the element of freedom of scientific investigation there is no major dispute in doctrine or in state practice.

And as the fourth element, the protection of

the environment, is concerned until now there have been only a few indications of an actual implementation of this element of the common heritage concept. Generally speaking, the philosophy of the common heritage idea would strongly support the necessity to preserve the environment from any harm. There is, however, no implementing machinery, nor are there specific consequences as contained in more specific conventions which would allow for the conclusion of a specific behaviour protecting the environment by the actors in the international system.[15]

By far the most controversial element of the common heritage mankind conception is the one on economic uses.[16] This is self-evident if one looks into the history of the creation of the common heritage idea. As we have seen in the previous section, the very philosophy of the common heritage conception was to create a greater equilibrium between poor and rich countries in case of an exploitation of common resources. The problems become apparent if one first has a look at the respective provisions of the Law of the Sea Convention. Art. 140 states that the activities in the area, that is the deep sea-bed, should serve the benefit of all mankind, whereby, however, the interests and needs of developing countries should be taken into particular consideration. This finds its specific expression in para. 2 of Art. 140 where the Authority, an international organization representing mankind, is entrusted with the task of the distribution of the benefits from these activities in the area under particular consideration of the interests of the developing countries.[17] Deep sea-bed mining of minerals is possible only if a specific licence is granted from the Authority. Those licences can be granted to states or national or private enterprises. Moreover, any applicant has to designate an area which grants two mining fields whereby only one field can be used for its own purposes and the other one has to be transferred to the Authority. Decisions among more than one applicant must be taken by the Council of the Authority by a 3/4 majority whereby, besides technical and financial capability the geographic location plays a decisive role (Art. 7 para. 5 Annex 3, and Art. 150 lit. g). The Authority is also entitled to conclude agreements on raw materials, can order limitations of production on the deep sea-bed and can grant compensation for developing countries. Finally, besides the mandatory transfer of technology to the Authority in the case of the two-field exploration, which has been mentioned before, those member states whose enterprises already carry out deep sea-bed mining can be obliged to grant access to deep sea-bed technology and transfer such technology to the Authority (Art. 5 para. 5, Annex 3). This has to be done on fair and reasonable commercial terms and conditions. The Law of the Sea Convention in its original shape thus indicates, in particular with regard to the economic element of the common heritage conception, a shift away from the unregulated free use of the deep sea-bed. This area, which was not subject to any state jurisdiction, is now administered by an international authority that manages the heritage of mankind by granting licences and is capable of mining itself through its enterprise. The respective economic element is dominated by the idea of achieving an equilibrium of equal participation of all states and users through restrictions for the more advanced users. Moreover, elements of preferential treatment for developing countries and restrictions on potential deep sea-bed miners as well as mandatory transfers of technology to the Authority without a guarantee for adequate compensation limit economic freedom of particularly advanced countries in a considerable way. Thus, one

can say that in the Law of the Sea Convention's original shape, the economic element of the common heritage of mankind conception applies a rather rigid economic approach.[18] It preferred an approach of material rather than of formal equality among states.

The respective provision introducing the common heritage conception in the Moon Treaty is - as has already been mentioned - paragraph 7 of Art. 11 which lays down the main aspects of this regime. According to this provision, the main purposes of the international regime to be established shall include:

a) The orderly and safe development of the natural resources of the Moon;
b) the rational management of those resources;
c) the extension of opportunities in the use of those resources;

and

d) an equitable sharing by all states in the benefits derived from these resources, whereby the interests and needs of the developing countries, as well as the efforts of those countries, which have contributed either directly or indirectly to the exploration of the Moon, shall be given special consideration.

If one compares that provision with the respective implementing provisions for the economic element of the Law of the Sea Convention,[19] one can first of all state that the Moon Treaty does not necessarily link the economic element of the common heritage of mankind conception to the establishment of an international authority. Although the Treaty speaks of a rational management of the resources, no specific mentioning of any international organisation is made throughout the entire Treaty. Neither does one find such an idea in the Outer Space Treaty of 1967. The overall decisive provision of Art. 11 para. 7 lit. (d) of the Moon Treaty also indicates a more balanced approach as compared to the Law of Sea Convention. This is, first of all, because not only the interests and needs of the developing countries are specifically mentioned but the interests of those countries actually having contributed to the exploration of the Moon and other celestial bodies as well. That means that the compensatory element of the approach that eventually aims at a more rigid equilibrium of states is much less accentuated in the Moon Treaty as compared to the Law of the Sea Convention.

A third example is the ITU-Convention with the wording of Art. 33 para. 2 of the ITU-Treaty. Here, the geostationary orbit had been designated as a limited natural resource to which all states should have equitable access whereby the interests and special needs of developing countries should be taken into particular consideration.[20] Thereby the designation of the geostationary satellite orbit as a limited natural resource stems from the fact that these privileged places for stationing satellites which, due to the stationing of the orbit on the equatorial plane, guarantee a stand-still of the satellites and thus allow for an easy stationing of such satellites at about 36.000 kms above the equator, shall be taken for granted as a normative idea. Without going too much into detail, one can observe, however, that for some frequencies or frequency bands the way of allocating them for the use of satellites at least for some services, has considerably been changed as a consequence of the implementation of the equitable access philosophy of Art. 33 para. 2 of the ITU-Treaty.[21] Until the late 1970s for all frequency bands the so-called "*a posteriori* method" for the assignment and allocation of frequencies to specific services had been

applied. This so-called "first come, first served"-method effectively meant a method of distribution for the scarce resource according to the economic and technological capabilities of the respective users. If a country came and wanted to get a service alloted, it was granted a frequency or a frequency band if it came first. Starting at the World Broadcasting Administration Conference for Radio Communication Services 1977 in Geneva,[22] for the first time so-called "allotment plans" for specific regions led to the assignment of specific slots for specific states *a priori*. This *a priori* planing method basically means that the whole band is planned by the international administrative conference, before actual use has been asked for by specific users. The *a priori* planning method has now been more and more implemented in practice for even new satellite services. It basically has led to a more and more administrative approach restricting the states' freedom to freely use the respective frequencies or frequency bands.[23]

Concluding one can clearly identify five core elements: the non-appropriation element, the freedom of scientific exploration element, the peaceful use element, the protection of the environment element, as well as the economic use element as the core elements of the common heritage mankind conception. Moreover, one can say that the heritage of mankind idea tries to somewhat restrict the otherwise unlimited freedom of states to act. Because a resource is considered the heritage of all mankind, it is made subject to some sort of international administration on behalf of mankind. This can be clearly seen in the case of the Law of the Sea Convention with the Deep Sea-Bed Authority as well as in the case of the administration of frequency bands through ITU, whereas under general international space law no international space authority has been established yet. The overall decisive question is, however, whether the original conception of the common heritage idea already envisages a rather rigid and restricting economic approach of planning. Clearly the concept as contained in the Law of the Sea Convention foresees such restrictive elements, whereas in the Moon Treaty with its very explicit Art. 11 a less rigid approach as to the common heritage idea is envisaged. It is, therefore, that one cannot but conclude that during this first normative period of the common heritage idea no clear-cut concept of the overall decisive element, the element of the economic uses of the respective resource, had been shaped.[24] Therefore it remains to be seen how in the subsequent state practice in particular during the conferences in the aftermath of UNCLOS III as well as in the deliberations in the Legal Sub-Committee of the United Nations Committee on the Peaceful Uses of Outer Space, some more specific shape to the conception has been given. This will be done in the next section of this investigation.

IV. The 1990ies: Towards a New Shape of the Common Heritage Idea?

1. The Debate in the Preparatory Committee After UNCLOS III

Resolution I of the 3rd United Nations Conference on the Law of the Sea[25] had established a Preparatory Commission for the creation of the International Sea-Bed Authority and the International Maritime Court. Members of this Commission were such states which had signed the Convention or had acceded to it. The work of the Preparatory Commission was performed under the impression of a changing international economic environment which was characterized by lower prices for raw materials as well as a

considerable delay of the expected start of deep sea-bed mining. The basic focus was to find rules to actually implement the most controversial part of the Law of the Sea Convention, namely Part XI which contained the practical implementation of the common heritage of mankind conception for deep sea-bed mining. In 1990 UN Secretary-General Pérez de Cuéllar started informal consultations[26] on some points of the Law of the Sea Convention which until that time led some leading maritime and developed states to abstain from signing and ratifying the Convention. Mainly some major parts of the actual contents of the common heritage conception were subject to that discussion, *inter alia* the question of a transfer of technology, the structure of the International Sea-Bed Authority and the provisions obliging states to financial transfers of deep sea-bed mining enterprises to the Authority.

All this eventually led to the adoption of the „Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982",[27] which took place in New York on 28 July 1994. This Implementation Agreement considerably modified basic parts of Part XI of the Law of the Sea Convention. Concerning the common heritage conception, the parallel system of fields to be presented to the Authority for exploration has been abandoned.[28] Moreover, any mandatory transfer of technology has also been abandoned[29] and decisions of the Council of the International Deep Sea-Bed Authority through its shift to a 2/3 majority for votes must take more into consideration any minority standpoint and thus especially those of the developed states.[30] In conclusion it becomes apparent that the rather rigid economic approach which was favoured by the developing countries during the 1970s and early 1980s has been replaced by a more moderate approach which takes into consideration the necessity of a cooperation between developed and developing states for the benefit of all.[31] And this simply means that the ground rules for exploiting minerals in the deep sea-bed must be attractive enough for enterprises from developed states to be an incentive for commercial activities in the area. The lesson which can be learned from the maritime experience is that any too rigid economic conception of the common heritage idea does not find sufficient support in international state practice. It is simply unacceptable to developed states which for that reason did not ratify and thus become members of the LOS-Convention. As bottom line this example tells us that some form of cooperation for the benefit of mankind is needed - co-operation between developing and developed states - and that some kind of promotion of developing countries by the developed states is accepted as well. Therefore still a certain disequilibrium to the advantage of the developing countries gives the economic element of the common heritage conception its decisive shape.

2. The Discussion in the United Nations Legal Sub-Committee of the Committee on the Peaceful Uses of Outer Space

After the United Nations Committee on the Peaceful Uses of Outer Space had accomplished its work on the set of principles on remote sensing in 1986, the question arose how to continue the work. The Committee started to concern itself with questions of space debris, thus involving the environmental protection side of outer space activities.[32] In 1988 the Legal Sub-Committee started a discussion on so-called „space benefits" and it decided to put this as an Agenda item on its 1989 session.[33] In 1989 a working group on that Agenda

item was established which met for the first time during the 1991 session. The title of this Agenda item which only in its abbreviated form is named "space benefits", was the following:

> "Legal aspects related to the application of the principle that the exploration and utilization of outer space should be carried out for the benefit and in the interests of all states taking into particular account the needs of developing countries".[34]

It is obvious that this phrasing referred precisely to Art. 1 para. 1 of the Outer Space Treaty of 1967. The long title of that Agenda item indicated the lack of consensus on even the direction of the discussions.[35] It indicated, however, also that some need was felt among member states of the Committee to take a closer look at the actual implementation of this common heritage conception, because it was absolutely evident from the phrasing of the subject, that some kind of disequilibrium between developed and developing countries was stated which had to be compensated for. In 1991 the Chairman of the concerned working group of the Legal Sub-Committee concluded as common denominator of the discussions: "It would be safe to say that all respondents agree that the main, and perhaps the most practical and promising way of realizing the principle contained in the first sentence of Art. 1 of the Outer Space Treaty, is by further developing international cooperation in the exploration and peaceful uses of Outer Space."[36]

In 1991 a first set of principles was prepared by Argentina, Brazil, Chili, Mexico, Nigeria, Pakistan, the Philippines, Uruguay, and Venezuela.[37] This developing country proposal clearly reiterated the above-mentioned basic claims of the developing countries concerning the establishment of a new international economic order. *Inter alia*, Principle 2 No. 4 states that: "In pursuing international cooperation in the utilization and exploration of outer space, developing countries should benefit from special treatment. Preference should be given to developing countries in programmes orientated towards the dissemination of scientific and technological knowledge, and no reciprocity should be asked from countries benefitting from such special treatment."

During the discussions of this first set of Principles in the Legal Sub-Committee the industrialized countries made it very clear that they would not accept the introduction of economically rigid elements aiming at institutionalizing a responsibility for international cooperation and an automated transfer of resources. On the other hand, the developing countries were not given the chance to do more than explain their position and register the points made by the industrialized countries. A second set of principles was tabled in 1993 to the Legal Sub-Committee,[38] by the co-signatories of the first draft set of principles which were then joined by Columbia. Here its contents had undergone major changes and the discussion was considerably more lively. Particularly the harsh criticism of the industrialized countries concerning the rigid economic approach of the co-sponsored first draft put before the nine countries and with them the developing countries in UN-COPUOS confronted them with the need for a decision between risking a dead-lock by insisting on the extreme position or trying to find common ground for considering some basic objections of the industrialized countries. In particular, the new paragraph 3 of Principle I now states that: "States are sovereign in deciding the modalities of their co-operation", which means that the dirigistic approach which

had until that time been pursued by the developing countries, has been abandoned. Under this heading the means of co-operation like promotion of the development, indigenous capability in space science and technology, particularly in the developing countries, the continued exchange of information, data materials and equipment on space science and technology, the promotion of joint partnerships or ventures in the spheres of space science or technology, the promotion of easy and low cost accessibility and availability of remote sensing data, the ground receiving stations and the digital image processing system, technical cooperation to promote and facilitate the transfer of technology and expertise in space science and technology, particularly with developing countries, and finally, the equitable distribution of the benefits of space science and technology in particular taking into account the special means of the developing countries which are all contained in Principle VI No. 3 of the set of principles, indicated a considerable softening of the formerly rigid economic approach of the developing countries.

In the 1995 discussions of the Legal Sub-Committee, Germany and France tabled a new paper[39] which deepened the free cooperation approach that had been forwarded for the first time by the developing countries in 1993. It was grounded on the basic consideration that states are free to determine all aspects of their co-operation whether it is bilateral or multilateral or whether it is commercial or non-commerical including development cooperation, and that secondly, states shall choose the most efficient and appropriate mode of cooperation in order to allocate resources efficiently. The reactions to the German-French paper did indicate that even developing countries did not fundamentally reject any longer this more liberal approach to cooperation. In the March/April 1996 session of the Legal Sub-Committee consensus was almost reached on the wording of a „Working Paper submitted by the Chairman of the Working Group.[40] This Draft Resolution,was later slightly modified and thus served as the basis for the final Declaration that was adopted by the United Nations General Assemby. *Inter alia*, it incorporates the idea that the interests of the developing countries have to be taken into consideration. It reads:

„(2) States are free to determine all aspects of their participation in international cooperation in the exploration and use of Outer Space including the Moon and Other celestial Bodies. It shall be carried out for the benefit and in the interest of all States, irrespective of their degree of scientific or technological development, and shall be the province of all mankind. Particular account shall be taken to the needs of developing countries."

Moreover paragraph 4 foresees that

„(4) International co-operation should be conducted in the modes that are considered most effective and appropriate by the countries concerned, including inter alia, governmental and non-governmental, commercial and non-commercial, global, multilateral, regional or bilateral; and among countries in all levels of development."

These clauses, *inter alia*, were adopted in June 1996 by the UNCOPUOS[41] and later by the UN General Assembly as "Declaration on International Cooperation in the Exploration and Use of Outer Space for the Benefit and in the Interest of All States, Taking into Account the Needs of Developing Countries:"[42]

As one result interesting parallels to the

discussion in maritime law with regard to deep sea-bed mining can be drawn in that any too rigid planificatory interpretation of international economic cooperation does not lead to consensus over such documents any longer. And with a lack of consensus, most of the international conventions are simply inoperable because they need the economic support basically from the developed states in order to stimulate any kind of co-operation.

Thus, the bottom line of the two experiences, the maritime as well as the space experience, is that the extremely rigid approach to the economic element of the common heritage conception which was still valid at the time of the adoption of the International Moon Agreement and the Law of the Sea Convention in 1979 respectively 1982 has been modified considerably in that some kind of development cooperation is still recognized as a necessary duty of developed states, but that any mandatory duty which in detail is laid down in international conventions has been abandoned.

As a further example of concrete state practice with regard to the common benefit clause of utilizing outer space can serve the Intergovernmental Agreement of 29 January 1998 between Japan, the European States assembled in ESA, Russia, Canada and the United States of America of the construction of an International Space Station.[43] The applied partnership approach is firmly based on the principle of equality of the partners, but relatively little recourse is had to any developing country and thus third party interest with regard to results achieved from activities onboard the Space Station.[44]

This general direction can moreover be observed if one followes the discussions of the Uruguay- Round of the General Agreement on Tariffs and Trade (GATT).[45] At the end of the discussions in late 1994, developing countries did not stick so much to the necessity of preferential treatment anymore how they had done previously for a long time. Thus, the results of the Uruguay Round still contain clauses benefiting developing countries but the major focus really is that the best promotion for developing countries is their participation in international free trade.

For the time being the only area of international law still being influenced considerably by some idea of burden sharing is international environmental law. The Rio-Conference on Environment and Development has made obvious some parallels between economic development and the States' capacities not to harm the environment. There are some legal provisions which e.g. aim at an equitable duty in terms of reducing emissions thereby placing the more heavy burden on the shoulder of the developed States.[46]

V. Consequences and Conclusions

What are the major consequences and what can be concluded generally with regard to the contents of the conception of the common heritage of mankind?

In conclusion one can say that some parts of the common heritage of mankind conception are already firmly established in international law. There is a general acceptance of the non-appropriation of the area and of the resources, on the peaceful, i.e. non-aggressive, use of the area, on the scientific investigation element, on some kind of environmental protection whereby it is not entirely clear yet how the heritage approach is linked to the protection of the environment of common spaces outside national jurisdiction.[47] Finally there is

agreement on the existence of an economic element. This latter element remains, however, as has been demonstrated, the most controversial element of the common heritage of mankind conception. One can say at this moment that the very rigid application of the idea of equitable sharing of resources and benefits derived from the exploitation of common spaces, has been completely abandoned. Rather there seems to be an indication of a shift towards less rigid forms of cooperation whereby it is still clear that some form of preferential treatment as well as actions to the advantage of the developing countries remain within the scope of the economic element of the common heritage of mankind conception. The idea that economic activities in areas outside national jurisdiction are not solely governed by absolute freedom of action of states but that this freedom of action is limited by the necessity of cooperation whereby the interests of the developing countries have to be taken into consideration, still determines the distinct shape of the common heritage of mankind conception.

This all leads to the overall conclusion that the common heritage of mankind conception has not yet achieved any customary value *per se* in general international law and in international space law. On the other hand, certain elements of the overall conception, for example the non-appropriation element, have required such customary value. The overall decisive element, however, the economic element, needs further precision. Here the discussion in the Preparatory Commission which led to the Implementation Convention of the Law of the Sea Convention of 1982, as well as the most current discussion in the Legal Sub-Committee of the United Nation's Committee on the Peaceful Uses of Outer Space shaped the way for a modern interpretation of the current meaning of economic uses of common resources under the heading of common heritage of mankind. That is cooperation between developed and developing countries under the condition of a market-orientated international economic framework with some kind of preferential treatment at least for the least developed states.[48] Any further preferential treatment would, however, as the past has shown, not strengthen but weaken the economies of the developing countries by depriving them of the opportunity to develop their own capacities to fight hunger and underdevelopment.

It becomes readily apparent that the parameters of the international system and for international law have changed or are about to change considerably in the era of globalization. The general opening of the markets, the comprehension of the world as one global market, the technologically based world wide transactions - all this does not allow for such conceptions of international administration any longer that were favoured in the 1970ies. The interests of the less developed part of the world may, however, not be forgotten.

And a truly global approach to the persisting current problems must take such interests into consideration, since it is in the very interest of the entire world including the highly developed states that the environment be preserved and hunger and underdevelopment as reasons for warfare be effectively abandoned in order to secure the very survival of mankind.

[2] See on the one hand R. Wolfrum, The Principle of the Common Heritage of Mankind, Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 1983, 312 (principle of customary law) and, on the other hand e.g. A. Bueckling, Die Freiheiten des Weltraumrechts und ihre Schranken, in: K.-H. Böckstiegel (ed.), Handbuch des Weltraumrechts, Köln u.a. 1991, 55, 75 et seq (no legal value).

[3] E.g. W.A. Kewenig, Common Heritage of Mankind - politischer Slogan oder völkerrechtlicher Schlüsselbegriff?, in: Liber Amicorum H.-J. Schlochauer, Berlin et al. 1981, 385 et seq.

[4] E.g. J. Castaneda, The Underdeveloped States and the Development of International Law, International Organization 1961, 41 et seq.

[5] See for a description of such plans U.E. Heinz, International Economic Order, in: R. Wolfrum (ed.), United Nations: Law, Policies and Practice, vol. 2, München/Dordrecht et al. 1995, 749, 752 et seq.

[6] See verbal note of Malta to the 22nd Plenary Meeting of the United Nations General Assembly of 1967; see thereto the ambassador of Malta A. Pardo in UN Doc. A/C.1/PV.1515 of 1 November 1967.

[7] Such resolutions as UNGA res. 1721 of 20 December 1961 and 1962 of 13 December 1963.

[8] See Th. Fitschen, Common Heritage of Mankind, in: R. Wolfrum (ed.), United Nations: Law, Policies and Practice, vol. 1, München/Dordrecht et al. 1995, 149, 155.

[9] See for a general account J.T. Charney, Entry Into Force of the 1982 Convention on the Law of the Sea, Virginia Journal of International Law 1995, 381.

[10] See for further details infra IV.

[11] See Kewenig, op. cit., note 3, 393, 394.

[12] Cf. Art. 137 LOS-Convention, art. II Outer Space Treaty and art. 11 paras. 2, 3 Moon Agreement).

[13] Wolfrum, op. cit., note 1, 317

[14] See for the diffenent opinions on this issue W. v.Kries, Die militärische Nutzung des Weltraums, in: K.-H. Böckstiegel (ed.), Handbuch des Weltraumrechts, Köln et al. 1991, 307, 329.

[15] See S. Hobe, Das internationale Umweltrecht, Juristische Arbeitsblätter 1996, 160 - 166.

[16] See on this point S. Hobe, Die rechtlichen Rahmenbedingungen der wirtschaftlichen Nutzung des Weltraums, Berlin 1992, 113 et seq.

[17] R. Wolfrum, Die Internationalisierung staatsfreier Räume, Berlin/Heidelberg et al. 1984, 389

et seq.

[18] This was exactly the reason why the LOS-Convention was considered unacceptable by some of the major sea-faring nations, and the further negotiations went on for another 12 years (1982 - 1994).

[19] See for such a comparison Hobe, op. cit., note 16, 113 et seq.

[20] See R. Wolfrum, Telekommunikation, in: K.-H. Böckstiegel (ed.), Handbuch des Weltraumrechts, Köln et al. 1991, 367, 377 et seq.; Hobe, op. cit., note 16, 168 et seq.

[21] See Hobe, op. cit., note 16, 174 et seq.

[22] See R.L. White/H.M. White, The Law and Regulation of International Space Communication, Boston/London 1988, 156 et seq.

[23] K.-U. Schrogl, Gleichberechtigter Zugang zur Geostationären Umlaufbahn, Zeitschrift für Luft- und Weltraumrecht 1992, 415, 422; id., Weltweite Funkverwaltungskonferenz in Torremolinos, Vereinte Nationen 1992, 104 et seq.

[24] Hobe, op. cit., note 16, 129, 130.

[25] See Annex I to the Final Act of the Third Law of the Sea Conference, reprinted in R. Platzöder/H. Grunenberg (eds.), Internationales Seerecht, 240 et seq.

[26] See for a description M.B. Berenbrok/P. Nussbaum, Zum Inkrafttreten des Seerechtsübereinkommens der Vereinten Nationen, Recht der Internationalen Wirtschaft 1994, 910.

[27] Reprinted in ILM 1994, 1309

[28] See Charney, op. cit., note 9, 392 et seq; Berenbrok/Nussbaum, op. cit., note 26, 911 et seq.

[29] Berenbrok/Nussbaum, op. cit., note 26, 914.

[30] Berenbrok/Nussbaum, op. cit., note 26, 914.

[31] Berenbrok/Nussbaum, op. cit., note 26, 914.

[32] See generally to this problem B. Frantzen, Umweltbelastungen durch Weltraumaktivitäten, in: K.-H. Böckstiegel, (ed.), Handbuch des Weltraumrechts, Köln et al. 1991, 597.

[33] See for a general account K.-U. Schrogl, in: M. Benkö/K.-U.Schrogl (eds.), International Space Law in the Making, Gif sur Yvette 1993, 202 et seq.; for an account of the concept of space benefits see S. Hobe/K.-U.Schrogl, „Space Benefits": Towards a new international order for space, Space Communication 1993, 3 - 11.

[34] UN Doc. A/AC.105/484 of 4 April 1991, Annex III, paras 19-21

[35] Schrogl, in: Benkö/Schrogl, op. cit., note 33, 203.

[36] UN Doc. A/AC.105/C.2/L 187 of 22 January 1992.

[37] UN Doc. A/AC. 105/C.2/L.182 of 9 April 1991.

[38] UN Doc. A/AC. 105/C.2/L.182 rev. 1 of 31 March 1993.

[39] UN Doc. A/AC.105/C,.2/L.197 of 27 March 1995; for an account see M. Benkö/K.-U. Schrogl, The UN Committee on the Peaceful Uses of Outer Space: Progress on „Space Benefits" and Other Recent Developments, Zeitschrift für Luft- und Weltraumrecht 1995, 291.

[40] UN Doc. A/AC.105/C.2/C.202 of 27 March 1996.

[41] Doc. A/AC 105/C.2/L. 202 of 14 June 1996.

[42] UNGA Res. 51/122 of 13 December 1996, reprinted in ZLW 1997, 236. See K.-U. Schrogl/M. Benkö, Art. I of the Outer Space Treaty Reconsidered After 30 Years, in: G. Lafferranderie/D. Crowther (eds.), Outlook on Space Law for the Next 30 Years, The Hague/Boston/London 1997, 67 et seq.

[43] Agreement Among the Government of Canada, Governments of Member States of the European Space Agency, The Government of Japan, The Government of the Russian Federation, and the Government of the United States of America Concerning Cooperation on the Civil International Space Station of 29 January 1998, reprinted in Zeitschrift für Luft- und Weltraumrecht 1998, 149 et seq

[44] See A. Farand, Space Station Cooperation: Legal Arrangements, in: Lafferranderie/Crowther, op. cit., note 42, 125 et seq.

[45] See D. Thürer, WTO-Teilordnung im System des Völker- und Europarechts, in: Europa-Institut Zürich/Europa-Institut Basel (eds.), GATT 94 und die Welthandelsorganisation, 1996, 41.

[46] See F. Biermann, Common Concern of Humankind, Archiv des Völkerrechts 34 (1996), 426, 434.

[47] See Biermann, op. cit. note 46, passim.

[48] See R. Schütz, Solidarität im Wirtschaftsvölkerrecht, Berlin 1994, passim.