ILA Resolution 1/2002 with Regard to the Common Heritage of Mankind Principle in the Moon Agreement

by

Prof. Dr. Stephan Hobe
Director
Institute of Air and Space Law, University of Cologne
and
General Rapporteur of the ILA Space Law Committee

I. Introduction

According to the Terms of Reference emanating from the 68th ILA Conference in Taipei 1998, the Space Law Committee became involved with the commercial aspects of space activities.[1] It structured its work in a way that, as a first step, a review of the space treaties presently in force was undertaken in order to enable the Committee to come up with recommendations as to the need for changes to keep pace with the present international context. This international context was understood as characterized by a growing commercialisation and privatisation of space activities. Project 2001 of the Institute of Air and Space Law of the University of Cologne had exemplified the new challenges of growing commercialisation.[2] Moreover, the current Project 2001 Plus undertaken by the Institute of Air and Space Law of the University of Cologne in a cooperation with the German Aerospace Center that started in 2001 puts the process of commercialisation and privatisation in the context of globalisation and Europeanisation.[3]

[1] ILA Resolution 5/98 of the 68th Conference of the International Law Association held in Taipei.
[2] See the proceedings of the final conference of Project 2001 Plus in Karl-Heinz Böckstiegel (ed.), Project 2001 – Legal Framework for the Commercial use of Outer Space, Studies in Air and Space law (S. Hobe ed.), vol. 16, Köln/Berlin et al. 2002.
[3] See for a brief description of Project 2001 Plus S. Hobe/J. Hettling, Challenges to Space Law in the 21st century – Project 2001 Plus, IISL Proceedings of the 45th Colloquium on the Law of Outer Space Houston 2002, 2003, 57 – 62.

In the following, the main focus of attention will be placed on the Moon Agreement in order to explain how the Space Law Committee reached at its conclusion as contained in ILA Resolution 1/2002 that reads as follows:

> *"(4) Regarding the 1979 Moon Agreement:*
> *Considering further that the common heritage of mankind concept has developed today as also allowing the commercial uses of outer space for the benefit of mankind, and that certain adjustments are suggested to Article XI of this Agreement concerning the international regime to be set up for the exploitation of Moon resources which will make it more realistic in today's international scenario, ..."*

II. The Deliberations of the ILA Space Law Committee and at the 70th Conference

The Committee Chair had decided to entrust four Special Rapporteurs to make reports about the current status of the main space legislation relevant to commercial space activities, mainly the 1967 Outer Space Treaty,[4] the 1971 Liability Convention,[5] the 1974 Registration Convention,[6] and the 1979 Moon Agreement.[7] The Rescue Agreement was left out because it was not found to be particularly significant with regard to commercial applications.

With regard to the Moon Agreement, the respective Special Rapporteur considered the fact that this Agreement had achieved so far only a very little number of ratifications. Neither industrialized nor even developing countries had become parties to the Agreement. As a consequence, he recommended to seriously consider to discard this Agreement and draft a new one. Moreover, it would be very significant that, although Article 18 of the Moon Agreement calls for putting the question of the review of the Moon Agreement again on the Agenda of the General Assembly of the United Nations in order to consider on whether or not revisions were required and the fact that the

[4] Professor Dr. Stephan Hobe, Cologne. The report has been summarized in ILA, Report of the 69th Conference in London 2000, 573 et seq.
[5] Professor Maureen Williams, Buenos Aires. Her report has been summarized in ILA Report, supra note 4, 574 et seq.
[6] Professor Vladimir Kopal, Pilsen. His report has been summarized in ILA Report, supra note 4, 575.
[7] Dr. Frans von der Dunk, Leiden. His report has been summarized in ILA Report, supra note 4, 576.

Moon Agreement entered into force in 1982, no such action was taken by the General Assembly so far. On the other hand, the Special Rapporteur of course identified several provisions in the Moon Agreement that were especially relevant to commercial space activities and highlighted of course Article 11 proclaiming the Moon and its natural resources as the common heritage of mankind, thereby identifying some concepts for an international regime of the functioning of such commercial uses under the common heritage of mankind concept.[8]

Commentators among the Committee members also highlighted the importance of Article 11. On the one hand, the opinion was voiced that the freedom to use celestial bodies would not extend to its natural resources;[9] others referred to the fact that the common heritage of mankind principle would be an evolution of the commonly accepted common province clause as contained in Article I paragraph 1 of the Outer Space Treaty.[10]

Furthermore, commentators pointed to the fact that the Moon Agreement would give special consideration to the interests of those States who have directly or indirectly contributed to the exploration of the Moon.[11]

At its 70th Conference held in April 2002 in New Delhi, the Committee by presenting its findings went into an in-depth discussion particularly with regard to the question of how to deal with the 1979 Moon Agreement. The discussion dealt basically with attempts to clarify the notion of the common heritage of mankind concept. The Special Rapporteur had made some suggestions on a modification of the Moon Agreement that were particularly topical in view of current claims to real estate on the Moon. There was, inter alia, the recommendation to include into Article 4 para 1 a clause to the effect that "commercial exploitation and use" was only permissible in conformity with the provisions of Article 11. Moreover, it was recommended to replace the common

[8] Von der Dunk, supra note 7.
[9] Bin Cheng, Comment, in ILA Report, supra note 4, 586.
[10] Nandasiri Jasentulyana, Comment, in ILA Report, supra note 4, 587 et seq.
[11] Vladimir Kopal, Comment, in ILA Report, supra note 4, 588.

heritage language in Article 11 by the concept of province of all mankind. Furthermore, it was clarified in these suggestions that whereby the Moon and other celestial bodies could not be subject to national appropriation, this would not preclude the commercial exploitation as long as this would be in line with the special requirements as contained in the Moon Agreement. With regard to the operative part of the common province clause as the core of the legal regime governing the exploitation of Moon resources, an international regime was proposed that should include as a minimum a licensing obligation by means of national law with respective guidelines, the establishment of a transparent, fair and comprehensive monitoring system in respect of these license activities and a procedure for its international registration.

Moreover, it was recommended that until such international regime was established, the commercial exploitation and use of the Moon was permitted only under the condition that it would not seriously harm the interests of other State parties. Furthermore, it was recommended that Article 11 para 7 lit. d) that requires and equitable sharing of all parties in the benefits derived from the Moon resources should be abandoned.[12]

The discussion at the Conference mainly centred around the question on whether or not the common heritage language of the Moon Agreement should be recommended to be withdrawn or to be upheld. Whereas some speakers favoured the replacement by the common province clause as contained in Article I para 1 of the Outer Space Treaty, other speakers referred to the example of the Law of the Sea Convention where, on the one hand, by way of the 1994 Agreement on the Implementation of Part XI of the Montego Bay Convention, the conception of common heritage of mankind was considerably altered, on the other hand, the very wording "common heritage of mankind" was upheld.[13]

At the end of a lengthy discussion, the General Rapporteur summarized the opinions by stating that the Moon Agreement as it stood would not in principle prohibit

[12] Frans von der Dunk, in: Report of the ILA 70th Conference 2002, 219.

commercial uses because the current development of international law would lead to interpreting the common heritage of mankind concept as implying the possibility of commercial uses of outer space for the benefit of mankind. Therefore, only certain adjustments should be made to Article 11 on the international regime to be set up for the exploitation of the Moon resources. [14]

This was considered the main opinion of the Committee and allowed the adoption of the above mentioned Resolution.

III. Concluding Remarks: The Contents and Purpose of this Resolution

ILA Resolution 1/2002 is a major break-through in the interpretation of international space law. The stumbling block of the uncertainties about the notion and exact design of the concept of common heritage of mankind that had been introduced into international law and in particular into international maritime and international space law in the 1970ies and 1980ies has gone through a specific development by subsequence State practice.[15] The most important example of such subsequent State practice is certainly the 1994 Agreement on the Implementation of Part XI of the Montego Bay Convention.[16] But also the discussion in the United Nations Legal Subcommittee on the subject of "Legal aspects related to the application of the principle that the exploration and utilisation 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" that was held in the 1990ies led to interesting conclusions as to a guarantee of the State's freedom to determine aspects of their participation in

---

[13] See in particular Rainer Lagoni, in: ILA Report of the 70th Conference 2002, 222.
[14] See Stephan Hobe, in: Report of the 70th ILA Conference, 226.
[15] Se for a description Stephan Hobe, Aspects of the Current Development of the Common Heritage of Mankind Concept, in: ECSL (ed.), Proceedings of the 6th Summer Course on Space Policy and Space law, Paris 1998, 93, 100 et seq; id., Common Heritage of Mankind – An Outdated Concept in International Space Law?, in: IISL-98 – IISL 4.04, Proceedings of the 41st Congress of the IISL, 1999, 271, 277 et seq. For an account of the importance of subsequent state practice on the interpretation of international treaty (and customary) law see Art. 31 para 3 lit. b of the Vienna Convention on the Law of Treaties and Stephan Hobe/Otto Kimminich, Einführung in das Völkerrecht, 8th ed. 2004, 216.
[16] Reprinted in ILM 1994, 1309.

international cooperation in the exploration and use of outer space including the Moon and other celestial bodies.[17]

In its original conception, the common heritage of mankind concept contained five different elements: a non-appropriation element, a scientific investigation element, a peaceful use element, an environmental protection element, and finally and probably most importantly the economic element.[18] For any current interpretation, however, one must take into consideration that with the 1994 amendment to the Law of the Sea Convention major parts of part XI of the Law of the Sea Convention concerning the common heritage of mankind conception were modified. First, the parallel system of fields to be presented to the Seabed Authority for exploitation was abandoned; moreover, any mandatory transfer of technology had been abandoned, and decisions of the Council of the International Deep Seabed Authority through its shift to a 2/3 majority for decision-making must take more into consideration any minority standpoint and thus especially those of the developed States. Moreover, the language of the Resolution concerning space benefits calls for the freedom of States to determine all aspects of their participation in international cooperation for the exploration and use of outer space that however shall be carried out for the benefit and in the interests of all States irrespective of their degree of scientific or technological development and shall be the province of all mankind. Particular account shall be given to the needs of developing countries. In other words: any one-sided obligation imposed upon industrialized countries to contribute to an enlargement of opportunities of deep-seabed mining (or for the securing of space benefits) was abandoned. This allowed in the case of the Law of the Sea the industrialized world to ratify the Convention that little later came into force.

[17] Analysis by Hobe, Common Hertitage of Mankind, supra note 15, 280 et seq.
[18] See for a description Wilhelm Kewenig, Common Heritage of Mankind – politischer Slogan oder völkerrechtlicher Schlüsselbegriff, in: Liber Amicorum H.-J. Schlochauer, 1981, 385 et seq; Rüdiger Wolfrum, The Principle of the Common Heritage of Mankind, Zeitschrift für öffentliches Recht und Völkerrecht 43 (1983), 312; Thomas Fitschen, Common Heritage of Mankind, in: Rüdiger Wolfrum (ed.), United Nations: Law, Policies and Practice, vol. 1, 1995, 149 et seq.

Which conclusions can be drawn with respect to the different elements of the common heritage of mankind conception? First of all, it is important to note that there is no uniform common heritage of mankind principle in international law because the specific characteristics of the five elements under the concept of common heritage of mankind may differ, depending on the area to which they are applied. For example, the characteristics of common heritage with respect to the deep seabed (including inter alia a seabed authority, i.e. international administration) and the Moon Agreement without any such authority differ considerably.

Second, one can however make conclusions with regard to the different elements of which obviously the commercial element of the common heritage of mankind conception is of particular importance in our context:

(1) There is a general acceptance of the non-appropriation of the area and of the resources. In my opinion the non-appropriation of the area of common concern (deep seabed, outer space as well as the celestial bodies and, though in a different context, Antarctica) are part of customary international law of peremptory character in the sense of Art. 53 and 64 of the Vienna Convention on the Law of Trieaties of 1969.[19] Furthermore as so called statutory provisions for the common spaces they are self-executing, i.e. do not need special implementation by national legislation.

(2) Moreover, there is a general acceptance on the peaceful, i.e. non-aggressive use of the area of common spaces.

(3) There is furthermore consensus of the scientific investigation element. The common spaces to which the concept of common heritage of mankind is applicable are open to scientific investigation under the conditions set by international law.

(4) There is a certain unclarity with regard to the environmental protection element. Whereas it is clear in principle that the preservation of the common heritage per se is

one of the major goals of this conception, it is not entirely clear yet how the heritage approach is linked to the protection of the environment of common spaces outside national jurisdiction.

(5) The major problem is certainly the economic element. It remains controversial. However, as has been demonstrated above, State practice gives evidence of the fact that any rigid application of the idea of an equitable sharing of resources and benefits derived from the exploitation of common spaces has been abandoned. Rather there seems to be an indication for 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 concrete implementation is open to the free decision of the States. The idea that economic activities in areas outside national jurisdiction are not solely governed by the 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 with regard to economic uses.

This is very solidly reflected by ILA Resolution 1/2002 that also contributes to the refinement of theses rules of international law. The Resolution speaks of the common heritage of mankind concept and takes into account the subsequent State practice with concern to commercial uses. The adjustments asked for and suggested by Resolution 1/2002 could, e.g. include a licensing system by means of national law of a State party whose non-governmental entities are interested in undertaking relevant commercial space activities, the setting up of guidelines for the licensing requirements and for international registration of licensed Moon activities. This would, however, as a prerequisite require the main decision of the international community that the Moon shall be open for free commercial exploitation of Moon resources and not, as the example of Antarctica shows, to be preserved as it stands in order to save their

[19] See on the formation and prerequisites of customary international law, Hobe/Kimminich, supra note

environment. Arguably, even such interpretation could be covered by the environmental protection element of the common heritage of mankind concept.

What is, however, by no means permitted, is any kind of national appropriation of areas of the Moon or other celestial bodies. Any claims to private property on the Moon or other celestial bodies undermine this clear prohibition of self-executing character. States are therefore even under a legal obligation to prevent the coming into existence of such private claims to property in order to avoid their international legal responsibility. Here, international space law as contained in Article II of the Outer Space Treaty as well as by the clear language of Article 11 para. 2 of the Moon Agreement exclude those activities from the scope of permitted activities in outer space by virtue of a treaty and customary law obligation.[20]

The future will show which direction the international community will go. Basically, by preserving the complete exclusion of any kind of territorial appropriation of the celestial bodies, the major decision to be taken is a twofold one. On the one hand, one must decide on whether or not economic activities with regard to resources of celestial bodies shall be permitted at all or, alternatively, an environmental protection approach shall apply. On the other hand, if one decides on the general permissibility of such commercial activities, international space legislation must, preferably in a protocol to the Moon Agreement come up with international legal obligations with regard to commercial activities on celestial bodies preserving them in this respect as the common heritage of mankind.

15, 184 et seq.

[20] It should be clearly understood that it is not contradictory to prohibit, on the one hand, claims to territory and permit, on the other hand, some kind of commercial exploitation of the area – as the UNCLOS III Convention of Montego Bay clearly shows. Futhermore, in the absence of a legal regime for the mining of resources on the celestial bodies such mining is, if feasible, permitted under the conditions of international space law. This clear legal situation calls for a reaction of the international community in terms of the establishment of such legal regime for the commercial uses of the celestial bodies. See for a general account Stephan Hobe, Die rechtlichen Rahmenbedingungen der wirtschaftlichen Nutzung des Weltraums, 1992, 77 et seq; 93 et seq.