

The Principle of the Common Heritage of Mankind

Rüdiger Wolfrum*

1. Introduction

The development of general concepts like the freedom of the high seas or the common heritage principle reflects the spirit of a given historic period (*Zeitgeist*). Thus it seems to be of little importance whether the common heritage principle was created by Ambassador Pardo when he initiated the negotiations on a new law of the sea régime in August 1967 or by Ambassador Cocca, some months earlier in 1967, during the deliberations of the Outer Space Committee¹. Be that as it may, since then the common heritage principle has not only been accepted as an essential element of the Convention on the Law of the Sea – from where it found its way into the

* Prof. Dr. iur., Institut für Internationales Recht an der Universität Kiel.

¹ Aldo A. Cocca, *The Advances in International Law through the Law of Outer Space*, *Journal of Space Law*, vol.9 (1981), p.13 (15). Cocca refers to his statement made in Legal Sub-Committee of the Committee on the Peaceful Uses of Outer Space, Sixth Session June 19, 1967 UN Doc.A/AC.105/C.2/SR.75, pp.7–8. He stated: "First, the international community from now on possessed a written law of outer space which, for reasons of time and procedure, was not yet positive law valid for all legal systems, but was nonetheless valid for every inhabitant of the globe considered independently of such systems.

Secondly, the international community had recognized the existence of a new subject of international law, namely, mankind itself, and creates a *jus humanitatis*. Thirdly, the international community had, in the persons of the astronauts appointed envoys of mankind in outer space.

Fourthly, the international community had endowed that new subject of international law – mankind – with the vastest common property (*res communis humanitatis*) which the human mind could at present conceive of, namely outer space itself, including the Moon and the other celestial bodies".

national legislation relating to sea-bed activities² – but was also introduced into the outer space régime³ and – to a lesser degree – into the legal framework for the protection of the Antarctic environment⁴. Furthermore intentions existed to make use of the common heritage principle with respect to the transfer of technology⁵ and to govern the trade of commodities. Perhaps it should be mentioned too that the phrase of the cultural common heritage of mankind has been accepted legally⁶.

Leaving aside these recent developments it has to be stated that the common heritage principle has been invoked whenever the distribution or protection of areas or resources are at stake which lie outside the limits of national jurisdiction⁷. Accordingly, in evaluating this principle it has to be taken into consideration that it only gained legal significance in connection with the establishment of an international administration for areas open to the use of all nations. The significance that the common heritage principle received within the legal régime governing sea-bed activities should not be underrated. It is worth mentioning that attempts were made to declare it to be part of *jus cogens*⁸ and Art.311 para.6 Law of the Sea Convention as a

² See United States Deep Sea-Bed Hard Mineral Resources Act, U.S. Public Law 96-283 of June 1980 sec.2 (a) (7); the decree by the Supreme Soviet of the USSR April 17, 1982 only spoke of “the utilization of the mineral resources of the sea-bed beyond the limits of the continental shelf ... on a just and equitable basis, and taking account of the legitimate interests of all states”.

³ Agreement Governing the Activities of States on the Moon and Other Celestial Bodies, December 5, 1979, ILM vol.18 (1979), p.1434 *et seq.*

⁴ The Recommendation XI-1 of the Antarctic Consultative Parties on the elements of a régime on Antarctic mineral resources states: “The regime should be based on the following principles: ... the Consultative Parties, in dealing with the question of mineral resources in Antarctica, should not prejudice the interests of all mankind in Antarctica ...”.

⁵ The Draft International Code of Conduct on the Transfer of Technology of May 6, 1980, for example, contained in para.2 of its Preamble the following principle: “Believing that technology is key to the progress of mankind and that all peoples have the right to benefit from the advances and developments in science and technology in order to improve their standards of living”. (Doc.TD/CODETOT/33, May 12, 1981). The draft submitted by the Group of 77 was even more explicit in this respect. The relevant preambular paragraph read: “Believing, that technology is part of universal human heritage and that all countries have the right of access to technology, in order to improve the standards of living of their peoples”, Doc.TD/AC.1/9 annex II – reproduced in ILM vol.17 (1978), p.462 *et seq.*

⁶ For further details see Raymond H. M. Goy, *The International Protection of the Cultural and Natural Heritage*, Netherlands Yearbook of International Law, vol.4 (1973), p.117 *et seq.*

⁷ Wilhelm A. Kewenig, *Common heritage of mankind – politischer Slogan oder völkerrechtlicher Schlüsselbegriff*, Festschrift für Hans-Jürgen Schlochauer (Berlin, New York 1981), p.385 (386).

⁸ Informal proposal by Chile, UN Doc.A/CONF.62, GP 9, August 5, 1980.

result of this attempt still prohibits amendments to the common heritage principle and derogations therefrom.

The presentation shall focus on three different topics: First, it will try to analyse the common heritage principle by clarifying its actual content⁹. This analysis will be based, first, upon the understanding of the main ideas of the common heritage principle as reflected in the deliberations of the Sea-Bed Committee and the Third UN Law of the Sea Conference. An examination of the Convention on the Law of the Sea will, secondly, demonstrate which of the schools of thoughts voiced in these deliberations finally prevailed. May I emphasize that the analysis of the common heritage principle and not the analysis of Part XI of the Convention will stay in the foreground of this presentation. The third and final part will dwell upon the question of whether the common heritage principle has to be regarded as a part of customary international law, regardless of its incorporation into the Convention on the Law of the Sea. The answer will be affirmative. I shall demonstrate that the common heritage principle has to be regarded as a valid principle governing the use of areas which lie outside the limits of national jurisdiction. This leads to the problem of whether deep sea-bed mining will remain possible under national legislation for those States not adhering to the Convention after the Law of the Sea Convention has entered into force. I shall come to the conclusion that the common heritage principle as such does not prohibit deep sea-bed activities not taking place under the established régime of the Law of the Sea Convention.

The development of the common heritage principle has – as far as the law of the sea is concerned – three roots which still appear in its different facets. They prove that the creation of the common heritage principle did not come unexpectedly but has to be regarded as the continuation of already existing tendencies and intentions. They were, however, bundled

⁹ As to the interpretation of the common heritage principle see Madjid Benchikh, *L'intégration de la notion du patrimoine commun de l'humanité dans le système de relations dominant de notre époque*, *Revue algérienne des sciences juridiques, économiques et politiques* 1978, p.239 *et seq.*; Stephen Gorove, *The Concept of "Common Heritage of Mankind": A Political, Moral or Legal Innovation?*, *San Diego Law Review*, vol.9 (1972), p.390 *et seq.*; Lawrence Juda, *UNCLOS III and the New International Economic Order*, *Ocean Development and International Law Journal*, vol.7 (1979), p.221 *et seq.*; Kewenig (note 7), p.385 *et seq.*; Theodore G. Kronmiller, *The Lawfulness of Deep Seabed Mining*, U.S. Department of Commerce (Washington 1979), p.207 *et seq.*; Wolfgang Graf Vitzthum, *Die Bemühungen um ein Régime des Tiefseebodens*, *ZaöRV* vol.38 (1978), p.755 *et seq.* The Soviet position has been described by Christopher C. Joyner, *Towards a legal Régime for the International Seabed. The Soviet Unions evolving Perspective*, *Virginia Journal of International Law*, vol.15 (1975), p.871 *et seq.*

together through the catchword of the "common heritage of mankind" which thus worked like a lens giving those already existing lines of thought the necessary force to initiate, uphold and influence the global negotiations on the law of the sea and on outer space. These original facets are: The inauguration of the world community as the owner of the sea-bed (the status of the sea-bed), the demand that the marine resources should be used for the benefit of the developing countries, and the establishment of a respective institutional régime.

2. *Development of the Common Heritage Principle*

Already in 1966 the Economic and Social Council had asked the Secretary-General of the United Nations "... to attempt to identify those resources now considered applicable for economic exploitation, especially for the benefit of the developing countries ..."¹⁰. The basic idea behind this request was reiterated by the General Assembly in its 21st session¹¹. Consequently the Secretary-General declared it to be his main duty to inquire to what extent the resources of the sea-bed could be used for the benefit of the developing countries, as in his view their *de facto* underprivileged status demanded most urgently a revision of the Geneva law of the sea¹².

Whereas the actions of the Secretary-General and the Economic and Social Council emphasized the support of the developing countries, they did not mention the clause that the sea-bed had to be regarded as the common heritage of mankind, though the Outer Space Treaty which was negotiated and concluded at that very time contained corresponding wording. This idea, however, found its expression in Resolution 15 of the World Peace through Law Conference in July 1967, which was phrased as follows: "Whereas, new technology and oceanography have revealed the possibility of exploitation of untold resources of the High seas, and the bed thereof beyond the continental shelf; and, more than half of mankind find itself underprivileged, underfed and underdeveloped; and, that the high seas are the common heritage of all mankind [the Conference] resolved that

¹⁰ E/Res.1112 (XL), March 7, 1966; as to the development of the common heritage principle in general see Wolfgang Graf Vitzthum, *Der Rechtsstatus des Meeresbodens* (Berlin 1972), p.269 *et seq.*, and Kronmüller (note 9), p.19 *et seq.*; Lilliana Torrek-Bayouth, *UNCLOS III: The Remaining Obstacles to Consensus on the Deepsea Mining Regime*, *Texas International Law Journal*, vol.16 (1981), p.79 *et seq.* (82 *et seq.*)

¹¹ A/Res.2172 (XXI), December 6, 1966.

¹² UN Doc.A/C.1/952, October 31, 1967.

the World Peace through Law Center recommends to the General Assembly of the United Nations the issuance of a proclamation declaring that . . . the bed of the sea appertain to the United Nations and are subject to its jurisdiction and control”.

The three elements of the common heritage principle mentioned so far – the inauguration of the world community as owner or, perhaps more accurately, the one authorized to dispose of the sea-bed and its resources, that is the status of the area, the demand for preferential treatment for the developing countries, and the establishment of a respective institutional régime which provides that an agency exercises jurisdiction over the sea-bed and acts as a trustee for the world community, that is, speaking in broad terms, the régime of utilization – were taken up on the initiative of Malta¹³ which initiated the negotiations on the law of the sea. In the course of the negotiations, they received clarification, they were modified and supplemented.

3. *Content of the Common Heritage Principle*

a) Status of the Area

Let me first dwell on the status of the sea-bed areas and its resources. The changes deriving from the declaration of the sea-bed to be the common heritage of mankind compared to the existing law of the sea are twofold. They cover a negative as well as a positive side. As to the negative side, it was agreed from the beginning that the appropriation of the sea-bed area as well as the exercise of sovereignty or of sovereign rights over any part thereof was prohibited¹⁴. This rule was already laid down in operative para.2 of the Declaration of Principles Governing the Sea-Bed and the Ocean Floor, and the Subsoil Thereof, beyond the Limits of National Jurisdiction¹⁵. From there it found its way into Art.137 para.1 of the Convention on the Law of the Sea. So far, the legal significance of the common heritage principle is trifling, as Art.2 of the Geneva Convention

¹³ GAOR, 22nd Session, Annexes, agenda item 92 (Doc.A/6695).

¹⁴ Graf Vitzthum (note 10), p.241 *et seq.*; Kewenig (note 7), p.389 *et seq.* As to the status of the sea-bed under traditional international law see Kronmiller (note 9), p.106 *et seq.*

¹⁵ A/Res.2749 (XXV), December 17, 1970; according to Graf Vitzthum (note 9), p.769 *et seq.*, the extension of maritime zones under national jurisdiction deprived the common heritage principle of its primary content and rendered it into a mere political slogan.

on the High Seas already prohibits any claim of sovereignty thereto. Just as a point of interest it should be mentioned that according to the original common heritage concept there was no room for the establishment of exclusive economic rights of coastal States and for the enlargement of the continental shelf area as enshrined in the Convention on the Law of the Sea¹⁶.

Compared with the negative side just mentioned it is the positive side of the common heritage principle – the declaration of mankind to be the one to dispose of the sea-bed and its resources – which introduces a revolutionary new element. Mankind in turn is represented by the Sea-Bed Authority. Thus, the sea-bed, which under the Geneva law of the sea is an area beyond national jurisdiction, has been placed by the Convention on the Law of the Sea under the jurisdiction, though limited, of an international organization. Consequently the régime for utilization of the sea-bed altered its character completely. There exists a logical link between the status of the Area and its resources and the utilization régime. Attention should be given in this respect to Art.137 para.2 of the Convention on the Law of the Sea which prohibits the alienation of the resources of the sea-bed and to Art.1 of Annex III according to which title to the minerals depends upon whether the recovery was undertaken in accordance with the Convention.

To avoid any misunderstanding it should be emphasized that the establishment of an international organization empowered with a resource-orientated jurisdiction is no peremptory consequence derived from the common heritage principle. It would have been possible to stick to a solution more in line with the existing structure of the international community of States which results in leaving the administration of the common heritage to the individual States. The States would then act not on their own but – in the absence of an international organization – in the capacity of an organ of the international community.

By comparison, the prohibition of claims and of the exercise or acquisition of rights other than sovereignty, sovereign rights and appropriation as contained in Art.137 para.3 of the Convention on the Law of the Sea is more noteworthy. Thus para.3 has to be read not only as a confirmation of existing international law but as a State obligation which excludes any use of the sea-bed area except when carried out in accordance with Part XI of the Draft Convention.

¹⁶ Draft Ocean Space Treaty submitted by Malta August 16, 1971, UN Doc.A/AC.138/53.

One last item regarding the status of the sea-bed area is worth mentioning: It is striking that instead of "all States", "mankind" has been named the beneficiary. This term provokes several questions: Does this constitute a new subject of international law? Would it be possible to argue that the interests of mankind have to be distinguished from the interests of all States? Or does at least the term "mankind" indicate that the interests of those parts of mankind have to be taken into account which are not represented by the very States? The documents available are silent on these questions with one exception. The Convention on the Law of the Sea mentions as potential beneficiaries of the utilization of the sea – and this should be regarded as a logical conclusion to be drawn from the term "mankind" – also peoples who have not attained full independence or other self-governing status.

In the literature on the law of the sea and the outer space régime voices have been heard which attach another legal significance to the term "mankind". Fasan¹⁷ for instance, relying on Gorove's¹⁸ strand of arguments and followed by Cocca¹⁹, regards the introduction of the term into international treaties as a step permitting mankind to become a new subject of international law. Thus they regard the common heritage principle to be a so-called third generation human right²⁰.

Others²¹ however deny any legal significance to the term mankind. A compromise position which attaches some legal significance to the term seems to be most preferable.

The adoption of the term "mankind" from the Outer Space Treaty taken together with the term "heritage" at least indicates that the interests of future generations have to be respected in making use of the sea-bed. More substantively, it requires that deep sea-bed activities should avoid undue

¹⁷ Ernst Fasan, The Meaning of the Term Mankind in Space Legal Language, *Journal of Space Law*, vol.2 (1974), p.125.

¹⁸ Gorove (note 9), p.393.

¹⁹ Cocca (note 1), p.14.

²⁰ Philip Alston, A Third Generation of Solidarity Rights: Progressive development or obfuscation of international human rights, *Netherlands International Law Review* 1982, p.307 *et seq.*; Wil D. Verway, The International Economic Order and the Realization of the Right to Development and Welfare – A legal survey, *Indian Journal of International Law* 1981, p.1 *et seq.* (p.2). They both refer to Karel Vasak, For the Third Generation of Human Rights: The Rights of Solidarity, Inaugural Lecture to the Tenth Study Session of the International Institute of Human Rights, Strasbourg, 2–27 July 1979.

²¹ Manfred Dauses, Neuere Fragen des Weltraumrechts, *Archiv des Völkerrechts* 1976, p.69; Adrian Bueckling, The Strategy of Semantics and the "Mankind Provisions" of the Space Treaty, *Journal of Space Law*, vol.7 (1979), p.15 (19 *et seq.*).

waste of resources and provides for the protection of the environment. It still remains problematic to translate this prohibition of "undue waste" into reality. However, at least it should be accepted that the status of the sea-bed and the resources necessarily influences the structure of the utilization system. Any broader interpretation which suggests that not States but mankind must be regarded as a direct participant with respect to deep sea-bed activities does not take into account that only States and international organizations have the capabilities necessary to participate directly within an international legal community. The replacement of States by mankind would necessitate the establishment of an international organization vested with the legitimacy to represent mankind as such without the interposition of States. According to the Convention on the Law of the Sea such a conclusion cannot be drawn. Art.137 para.2 states that "all rights in the resources of the Area are vested in mankind as a whole on whose behalf the Authority shall act". This sentence, however, is supplemented by Art.157 para.1 according to which "the Authority is the organization through which States Parties shall organize and control activities in the Area". This is clear evidence that the participants with respect to the utilization of the common heritage are States and not "mankind" as an independent subject of international law.

b) Régime of utilization envisaged by the common
heritage principle in general

Whereas the status of the sea-bed area did not create extended controversies neither in the Sea-Bed Committee nor at the Third Law of the Sea Conference, the régime of utilization was under dispute until the last minute. Before touching upon the controversial parts of the utilization system, namely the demand that the use of sea should benefit all mankind, the two aspects of the utilization system which are more easily agreed upon – the demand for peaceful use of the sea-bed and for the protection of the marine environment – deserve mentioning.

The demand that the sea-bed should be used for peaceful purposes only was based on two grounds: First, it was argued that as the utilization of the sea-bed should be carried out for the benefit of all mankind and that since any military use, from its very nature, only served national interests, all military activities should be prohibited. Secondly, it was pointed out that the military use of the sea-bed might interfere with deep sea-bed mining. Discussions arose only with respect to whether any military activity on the deep sea-bed should be banned or whether aggressive activities only were

to be prohibited. Most of the developing countries and the Soviet Union favoured the former solution²². The representative of Sri Lanka even asked for respective restrictions with regard to the use of minerals derived from the sea-bed and called for the establishment of an inspection system similar to that of the International Atomic Energy Agency. The Soviet Union and the United States, however, challenged the authority of the Sea-Bed Committee to deal with military questions and referred those to the Disarmament Conference. There they succeeded in agreeing upon the Treaty on the Prohibition of the Emplacement of Nuclear Weapons and other Weapons of Mass Destruction on the Sea-Bed and the Ocean Floor and the Subsoil thereof. Hence this treaty has to be regarded as one of the primary results of the Malta initiative of 1967. Like the provisions of the Outer Space Treaty with respect to outer space, the Sea-Bed Arms Control Treaty prohibits only specified uses of certain weapons in a specified environment. Since the military aspect of the utilization of the sea-bed has been regulated separately by the Convention on the Law of the Sea, its Part XI in particular is more or less silent on this issue. The phrase "for peaceful purposes" is to be found only three times. The problem as how to interpret this clause has been solved through the insertion of Art.301 into the Convention on the Law of the Sea which states that only aggressive activities in the sense of Art.2 para.4 of the UN Charter are prohibited.

The wider demand for a complete demilitarization of the sea-bed as raised during the negotiations cannot be based on the principle that the utilization of the sea-bed should benefit mankind as a whole. This would render Art.301 meaningless and would not take into due account the system of Part XI of the Convention on the Law of the Sea.

Also undisputed was the demand that sea-bed activities should be carried out with due regard for the protection of the marine environment²³. As can be seen from Art.145 of the Convention on the Law of the Sea it will be one of the main functions of the Sea-Bed Authority to take care of this objective.

The controversies on the utilization system centred upon the question of how to make sure that deep sea-bed mining should benefit all mankind.

It was agreed from the very beginning²⁴ only that – in the wording of

²² For further details see Rüdiger Wolfrum, *Restricting the Use of the Sea to Peaceful Purposes: Demilitarization in Being*, German Yearbook of International Law, vol.24 (1981), p.200 *et seq.* (203).

²³ UN Doc.A/AC.138/SR.34, p.52.

²⁴ See Graf Vitzthum (note 10), p.298 *et seq.*

Art.140 of the Convention on the Law of the Sea – the activities in the sea-bed area should be carried out for the benefit of mankind as a whole taking into particular consideration the interests and needs of developing States – an idea taken from the Outer Space Treaty.

Two basically different schools of thoughts existed on how to achieve this purpose. At the beginning both acknowledged that, owing to the financial and technical implications of deep sea-bed mining, not all States could participate therein. The share of those not directly involved in deep sea-bed activities was seen accordingly in the receipt of revenues to be used for the economic development of the respective States. The corresponding obligation of deep sea-bed mining States to contribute to the revenues sharing system was dogmatically justified on two grounds, both of which as key elements have influenced the final structure of the law of the sea régime. First it was argued, breaking down the various statements made during the negotiations to their dogmatic content, that, as the use of the resources of the sea-bed was open to all States and was supposed to be carried out for the benefit of all mankind, the receipt of revenues formed the equivalent of direct participation in deep sea-bed activities. Thus, the receipt of revenues was to be regarded as a form of indirect participation in deep sea-bed mining or, in other words, a sort of compensation which – as all States enjoyed equal rights with respect to the sea-bed – constituted a right of the respective non-mining States²⁵.

The second justification for the obligation to provide for revenue sharing was seen in the demand that resources from the sea-bed should be used to foster the economic development of the developing countries – the original preferential treatment aspect.

c) The demand for equal participation in particular

These two aspects form the key to an understanding of the common heritage principle. The two schools of thoughts mentioned above have to be distinguished from each other on the ground as to whether the dominant element of the deep sea-bed régime based on the common heritage principle can be seen in the compensation or in the preferential treatment aspect.

²⁵ See for example the Report of the Committee on the Peaceful Uses of the Sea-Bed and the Ocean Floor beyond the Limits of National Jurisdiction, GAOR, 24th Session, Suppl.22 (Doc.A/7622) Part III, p.52 para.33, as well as the preliminary note by the Secretariat, *ibid.*, GAOR, 25th Session, Suppl.21 (Doc.A/8021) Annex IV.

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The industrialized countries – principally the United States of America – concentrated on the preferential treatment aspect. They accepted the idea that royalties should be levied upon deep sea-bed activities and revenues paid to developing countries. However, they regarded those revenues as being part of development aid and denied any respective right of developing countries thereto²⁶. According to their belief, the benefit of mankind was best served by a liberal deep sea-bed mining régime which provided for a loose framework and contained only those restrictions necessary to incorporate deep sea-bed mining into the traditional freedoms of the high sea. They apparently argued on the basis of Art.2 of the Geneva High Seas Convention.

The developing countries took a counterposition. In their opinion the development of a régime to govern deep sea-bed activities was not a case of fixing the conditions under which deep sea-bed mining could be regarded as a reasonable use of the sea. For them the structure of the régime to be elaborated was to be dominated by the element of distribution. They wanted to make sure that all States had actual and direct equal benefit from the use of the sea-bed which was the common heritage of mankind. Consequently they rejected the application of the freedom of the high sea principle, which in their opinion had a negative distributive effect as it only secured the access of those States equipped with the relevant technology²⁷. Thus, the demand that deep sea-bed mining should be carried out for the benefit of mankind as a whole, as endorsed by the developing countries, can analytically be split into two different aspects, the one dealing with equal participation in sea-bed activities²⁸, the other dealing with preferential rights.

Concerning the participation the following strand of arguments exists. As all States exercise equal rights concerning the use of the sea-bed and as it cannot be regarded as appropriate to limit some countries to the mere receipt of revenues, the latter have the right to be represented on a level with industrialized countries capable of conducting deep sea-bed activities. Speaking in general terms this approach has two results: a negative one,

²⁶ Doc.A/AC.138/25.

²⁷ See among others the statements made by the representatives of Chile Doc.A/AC.138/SR.30, p.13, the United Arab Republic Doc.A/C.1/PV.1676, para.150, Trinidad and Tobago Doc.A/C.1/PV.1677, para.25 and the Report of the Committee on the Peaceful Uses of the Sea-Bed and the Ocean Floor beyond the Limits of National Jurisdiction, GAOR, 25th Session, Suppl.21 (Doc.A/8021), p.40, opposing USA Doc.A/AC.138/SR.40, p.40, USSR Doc.A/AC.138/SR.40, p.147, France Doc. A/AC.138/SR.40. p.147.

²⁸ Ben chikh (note 9), p.240 *et seq.*

limiting the activities of industrialized countries so as to create room for all countries to participate in deep sea-bed activities, and a positive one, attributing to all countries the right to be given effective equal opportunities with respect to the utilization of the sea-bed. A consequence of the former is the demand for the ban of any monopoly of sea-bed activities; a consequence of the latter – among others – is the demand for the transfer of technology. To sum up, the envisaged compensatory effect by which States are represented on the same footing with respect to deep sea-bed mining is achieved by restricting activities of the deep sea-bed mining States on the one hand, and by endorsing activities of the other States on the other. That this approach would result in unequal treatment was soon recognized. For example, the representative of Belgium pointed out in the discussions of the Sea-Bed Committee that the principle of the freedom of the sea was based on the concept of formal equality among States which resulted in a *de facto* discrimination of the developing countries, whereas the common heritage concept was based on the demand for a *de facto* equality among States which resulted in a formal discrimination²⁹.

From this participation aspect the demand for preferential treatment has to be theoretically distinguished. As the preferential treatment idea was primarily connected with the distribution of the benefits derived from sea-bed activities, it lost its emphasis in the course of the negotiations, though in the inaugural speech delivered by Ambassador Pardo the demand for revenue sharing benefitting preferentially developing countries was one of the key elements of his idea.

Both aspects – *de facto* equal participation and preferential treatment – are rooted, dogmatically speaking, in a different background. Whereas the former derives from the common heritage concept, placing all States with respect to the use of the sea-bed on the same footing and accordingly benefitting all States, the latter favours only developing countries and has its roots in the development aid philosophy³⁰. It is quite obvious that the two aspects may conflict. The criticism of Part XI of the Draft Convention can be based mainly upon the fact that the demand for equal participation was limited so as to accommodate the preferential treatment idea.

²⁹ The representatives of Belgium Doc.A/AC.138/SR.5, p.37, Jamaica Doc.A/C.1/PV.1782, para.137, Guatemala Doc.A/C.1/PV.1676, para.32, and the United Arab Republic Doc.A/C.1/PV.1676, para.138 were stressing this view.

³⁰ Graf Vitzthum (note 9), p.768.

d) Establishment of international machinery

The last element of the common heritage principle to be mentioned is the establishment of international machinery. Here again the emphasis shifted completely during the negotiations. When Malta, for example, tabled its Draft Ocean Space Treaty, the envisaged Authority had only regulatory and supervisory functions. Its purpose was to ensure that deep sea-bed mining was carried out in accordance with the new régime, and the Draft therefore proposed the establishment of an Authority which fitted into the normal framework of international organizations. Two other drafts³¹, put forward by developing countries, however, altered the potential functions of the sea-bed authority drastically, as it was envisaged that only the Authority instead of States and private enterprises should carry out deep sea-bed mining. By that approach, the establishment of the institutional framework for deep sea-bed mining was dominated by the idea of compensation. The compensatory effect, however, is sought under this system in a manner different from the approach mentioned before. While under the former system deep sea-bed mining States were obliged to put other States on the same level with respect to deep sea-bed mining by giving them access to the relevant technology, under the latter all States are prohibited from direct participation in deep sea-bed activities and are confined to mere indirect participation in deep sea-bed activities within the framework of and dependent on the Sea-Bed Authority. Thus all States again are put on the same level and enjoy *de facto* equal rights with respect to deep sea-bed mining, although not through affirmative action but rather through cutting off potential deep sea-bed mining States from a direct access to the deep sea-bed which deprives them from making use of their advanced technology. The *de facto* equality among all States is, under this system, to be upheld by institutional matters such as equal rights of all States with respect to the decision-making process³².

4. *The Convention on the Law of the Sea*

Having worked out the dogmatic background of the different approaches on how to ensure that deep sea-bed activities should be carried

³¹ Submitted by Tanzania (Doc.A/AC.138/33) and by thirteen Latin American States (Doc.A/AC.138/49).

³² Graf Vitzthum (note 9), p.779 *et seq.*, argues that such an approach goes beyond the scope of the common heritage principles; but cf. Ben Chikh (note 9), p.240 *et seq.*

out for the benefit of mankind as a whole, it is now possible to turn to the second question as to which of them prevailed in the Convention on the Law of the Sea.

a) Preferential treatment aspect

The basic condition for preferential treatment of certain States is to be found in Art.140, the key provision on the utilization system and on revenue sharing, Art.148 dealing with the participation of developing countries in activities in the Area and Art.152 para.2, which deals with the exercise of powers by the Authority.

Art.140 is interesting for two reasons. First, it not only mentions developing States as potential beneficiaries of a preferential treatment but also includes peoples who have not attained full independence or other self-governing status. This casts new light on the term mankind. Even if no provisions exist which would allow those people to play an active role with respect to deep sea-bed activities, their interests nonetheless have to be taken into account. Thus, even if they are not made active subjects they play a certain role on the passive side as beneficiaries of deep sea-bed mining. Art.140 however, and that was the second point to be mentioned, does not constitute any rights to preferential treatment as it only refers to other provisions of Part XI of the Draft Convention. The most important provision in this respect is Art.160 para.2(f)(i). It obliges the Assembly to issue rules on the equitable sharing of benefits, taking into particular consideration the interests and needs of the developing States and peoples who have not attained full independence. Accordingly, when it comes to the distribution of revenues they will receive a larger share than other States from Eastern and Western Europe. Insofar Part XI of the Convention fully concurs with the common heritage principle.

At first glance a preferential treatment clause seems to exist in Art.143 which deals with the right to engage in scientific research activities concerning the sea-bed. Such a right is expressly formulated in Art.238 to which Art.143 para.1 refers and in para.3. Para.3 of Art.143 provides that States Parties shall promote international cooperation in marine scientific research by participating in international programmes. They shall ensure that those programmes are developed through the Authority or other international bodies so as to benefit developing and technologically less developed States. The entire Art.143 contains a mixture of preferential treatment in which the range of potential beneficiaries has been enlarged compared to those of Art.140 and of restrictions imposed on industrialized

States. Let us start with the restrictions. The right to engage in research activities on the deep sea-bed is restricted in a loose and unclear way by the duty of cooperation. Furthermore, such cooperation must be organized by or together with international organizations. Thus, the industrialized States cannot seek cooperation with selected developing States, and all developing States may draw profit from such cooperation. The object served by such a demand for cooperation in the field of scientific research relating to the sea-bed is evident. Such research, though not falling under the term "activities in the Area", has been regarded as an initial stage of deep sea-bed mining. Hence the respective furtherance of developing States intends to narrow the technological and scientific gap between developing and industrialized States. Accordingly the regulations of Art. 143 are more the outcome of the idea of compensation than of the preferential treatment aspect. It is important to emphasize that not only developing States but all technologically less developed States are named beneficiaries. Thus the development aid philosophy has not prevailed over the equal participation idea.

Developing States have been further mentioned specifically as beneficiaries in Art. 150 para. 1(g) which formulates the basic rule concerning the protection of landbased production of minerals derived from the sea-bed. The Convention on the Law of the Sea contains three instruments to achieve this objective. First, the Sea-Bed Authority is bound to enter commodity agreements which are used to stabilize the trade on commodities. Secondly, the Convention provides for the limitation of production of minerals derived from the sea-bed so that sea-bed mining may only produce a part of the increase in world demand in nickel. Thirdly, those States which suffer adverse effects in their export earning or economies caused by activities in the Area will receive compensation. The basis idea underlying this system may be described as follows: As the deep sea-bed is the common heritage of mankind and as this area is bound to be used primarily in the interest of developing countries, it must be assured that the use of the sea-bed area will not cause adverse effects to those supposed to be the privileged beneficiaries. These arguments do not take into account that cheap commodities may be much more in the interest of the majority of the developing countries than the maintenance of an artificial high price ceiling. Besides, the demand that the resources of the sea-bed should be used for the benefit of mankind involves their utilization, whereas Part XI of the Convention concentrates too much on prohibition of their production.

Furthermore, the production limitation system as well as the commodity agreements will benefit in the first instance industrialized States like

Canada and Australia, whereas the cobalt producing countries from among the developing States will have to rely on the compensation system, the effectiveness of which is at least doubtful. However, only the compensation system properly fits into the common heritage concept.

I shall now turn to Art.148 and Art.152 para.2. Art.148 provides that the effective participation of developing States in activities in the Area shall be promoted as specifically provided for in Part XI. Apart from the fact that this provision again creates no specific rights – as it is no more than a reference to other provisions – it covers the preferential treatment aspect only partly. Basically, it serves the establishment of *de facto* equality among States with respect to their participation in deep sea-bed mining. Thus, it belongs to the compensation aspect. However, as Art.148 calls not for effective participation of all States but of developing States only, the preferential treatment idea limits the realm of the demand for equal participation. It is questionable whether this concurs with the common heritage idea.

Art.152 para.2 expresses a logical consequence of the preferential treatment idea. As Art.152 para.1 requires the Authority to avoid discrimination in exercising its powers and functions, the preferential treatment needs to be declared a legal form of discrimination. Thus, Art.152 para.2 is a confirmation of the statement made above, that the attempt to achieve *de facto* equality among States with respect to deep sea-bed mining will result in their formal discrimination.

b) Idea of compensation

Let me now turn to the other aspect of the common heritage principle under discussion – the idea of compensation which is to ensure that all States enjoy *de facto* equal opportunities concerning participation in deep sea-bed activities. May I reiterate that such compensation consists of two facets, the one restricting the activities of deep sea-bed mining States, the other in affirmative action. I should stress in advance that the whole deep sea-bed mining régime of the Convention on the Law of the Sea is interwoven by the element of compensation and that it is hardly possible in the framework of this presentation to mention every single item.

The basic provisions formulating the restrictions imposed on potential deep sea-bed mining States are to be found in Art.137 para.3 and Art.153 para.2. Art.137 para.3 provides that no State or natural or juridical person shall claim, acquire or exercise rights with respect to the minerals recovered from the Area except in accordance with Part XI of the Convention on the Law of the Sea. This provision is supplemented by Art.153 para.2 which

states that deep sea-bed mining may be carried out only by the Enterprise of the Sea-Bed Authority and by States Parties or entities – the latter only in association with the Authority. In other words, the carrying out of deep sea-bed activities is absolutely dependent upon the permission of the Authority. With respect to deep sea-bed mining this means a complete change compared to a law of the sea régime based upon the principle of freedom of the sea. Under the Geneva Conventions on the Law of the Sea, every use was permitted as long as it did not run counter to the restrictions imposed by the Convention. Thus, the principle that “restrictions upon the independence of States cannot be presumed”³³ was valid to its full extent. Under the Law of the Sea Convention, however, this principle derived from State sovereignty has been completely abolished in the area of deep sea-bed mining³⁴. The same is true with respect to the utilization of deep sea-bed resources other than polymetallic nodules, which have been put under a moratorium (Art. 141 para. 3). By this means the potential deep sea-bed mining States have been deprived of the chance to make use of their advanced technology which was regarded as one of the preconditions in order to make the compensation idea workable. Similar limitations exist further with respect to the protection of pioneer investors, as only a limited number of States or entities qualify for such protection. Again the question arises whether Part XI of the Convention on the Law of the Sea truly transfers the common heritage principle into reality. However, deep sea-bed mining has not been reserved entirely, as proposed during the negotiations, to the Enterprise. The Third UN Law of the Sea Conference adopted by way of compromise the so-called parallel system, which leaves room besides the Enterprise for both States and private or State enterprises to engage in sea-bed activities. The undertakings of the first generation in particular received protection under the preparatory investment system. Whether this system will prevail for the second generation or will be changed by the Review Conference into a unified system with the Enterprise as the only participant in deep sea-bed mining is open to speculation. For the Convention on the Law of the Sea it has to be stated that heavy restrictions have been imposed upon the individual engaging in deep sea-bed mining, but that it was not made an activity to be carried out only jointly.

It is most illustrative for the view on the restrictive aspect of the utiliza-

³³ PCIJ Judgments No. 10, p. 18

³⁴ Wilhelm A. Kewenig, *Menschheitserbe, Konsens und Völkerrechtsordnung*, Europa Archiv 1981, p. 1 *et seq.* (4).

tion system expressed here that Art.6 Annex III provides for an antimonopoly clause. It ensures that deep sea-bed mining should not be dominated by some States. The idea receives even better expression in Art.7 para.5 Annex III according to which the selection with respect to the production authorization shall be made taking into account the need to enhance opportunities for all States Parties, irrespective of their social and economic systems or geographical locations so as to avoid discrimination against any State or system, to participate in activities in the Area and to prevent monopolization of such activities. Especially the mentioning of the "equality of social and economic systems" is worthy of note as it underlies – at least partly – the institutional structure of the Sea-Bed Authority.

Dealing now with the affirmative action aspect, one must distinguish between affirmative action benefitting States and that benefitting the Sea-Bed Authority.

Within the realm of affirmative action benefitting States, the provisions on the transfer of technology are of high significance. One of the basic provisions on the transfer of technology is Art.144. Its para.3 obliges the Authority and States Parties to cooperate in promoting the transfer of technology so that all States Parties may benefit therefrom. So far the provision is fully in line with the compensation idea, as it envisages spreading the technology necessary to participate directly in deep sea-bed mining. The following two subparagraphs, however, add the preferential treatment aspect which limits the scope of the potential beneficiaries and thus are detrimental to the idea of compensation. According to subparagraph (a) the Authority is supposed to develop programmes for the transfer of technology to the Enterprise and to developing States – and not all technologically less developed States – and it shall under subparagraph (b) foster measures directed towards the advancement of the technology of the Enterprise and the domestic technology of developing States.

A second way of transferring technology to developing States – it should be noted that again the scope of potential beneficiaries has been limited – is laid down in Art.5 para.3(e) Annex III. It provides for the transfer of technology to developing States by deep sea-bed mining operators. The technology has to be transferred not on market conditions but on fair and reasonable commercial terms and conditions. Accordingly, the benefit from the transfer of technology is twofold; it not only provides for access but also for favourable conditions. Disputes as to whether an appropriate offer has been made may be submitted to binding commercial arbitration.

Another sphere where the idea of compensation applies has to be seen in the right of the developing States to engage in deep sea-bed activities in the

so-called reserved areas. According to Art.8 Annex III of the Draft Convention each applicant for the approval of plans of work covering activities in the deep sea-bed area has to designate two potential mining sites one of which will be declared a "reserved site" by the Authority. The basic idea behind this banking system is to provide the Authority with the data of a prospected mine site which constitutes a high economic value. If the Authority decides not to carry out deep sea-bed mining in such a reserved site developing States may take its place and thus will be provided with the relevant prospection data. This privilege should be seen as a specification of the general principle already criticized as enshrined in Art.148 that the effective participation of developing States in activities in the Area shall be promoted.

In spite of the rules mentioned so far which have a compensatory effect with respect to the utilization of the sea-bed and which benefit especially developing States, the compensation idea has mainly been realized institutionally, that is through the establishment of the Sea-Bed Authority and its Enterprise. It has been mentioned already that, though Part XI of the Convention on the Law of the Sea is based upon the parallel system, individual and joint activities undertaken by the Enterprise are not on the same level. A distinct preferential treatment with respect to the latter exists³⁵. The first and most striking indication which points in that direction is to be found in Art.153, according to which activities shall be carried out by the Enterprise or in association with the Authority by States Parties or States Entities etc. In a true parallel system the words "in association with the Authority", even if their factual significance may be disputed, would have found no place.

To an even higher degree than the developing States, the Sea-Bed Authority has the right to request the transfer of technology to the Enterprise from those States or entities engaged in deep sea-bed mining according to Art.5 Annex III. This obligation has been inserted *mutatis mutandis* into the régime on the protection of pioneer investors. This obligation of deep sea-bed operators is supplemented by a State obligation. In the event of the Enterprise being unable to obtain appropriate technology to commence the recovery and the processing of minerals – in all other cases only technology on the exploration and exploitation is covered – those States involved in deep sea-bed activities or having access to relevant technology are obliged to consult and to take effective measures so as to ensure that such technology is made available to the Enterprise (Art.5 para.5

³⁵ See Ben Chikh (note 9), p.242 *et seq.*

Annex III). Apart from that, Art.144 creates a general State obligation to cooperate with the Authority in order to develop programmes for the transfer of technology to the Enterprise.

Furthermore, the States Parties pledged themselves to provide the Authority with the funds necessary to explore and exploit one mine site and to transport, process and market the metals recovered therefrom. The compensatory effect of such payments is clearly expressed in para.12 of Res.II. It has the following wording: "In order to ensure that the Enterprise is able to carry out activities in the Area in such a manner as to remain in step with States and other entities ... every certifying State shall ensure that the necessary funds are made available to the Enterprise in a timely manner ...".

Besides this financial aid, the Enterprise enjoys immunities and privileges in the territories of the States Parties and may even be exempted from direct and indirect taxation. This again constitutes a valuable privilege *vis-à-vis* competitors in deep sea-bed activities. The economically most valuable privilege however, is the banking system by which the Enterprise will be provided with prospected mine sites. This not only ensures that the Enterprise disposes of the same amount of sites as utilized individually by States or entities – thus paying tribute to the demand for equal participation – but it saves the Enterprise from doing its own prospecting.

That deep sea-bed mining carried out by the Enterprise will not fall behind activities undertaken by States and entities is finally guaranteed by Art.151 para.2(c) and Art.7 para.6 Annex III which both provide for a preferential treatment of the Enterprise with respect to the production authorization.

As the establishment of the Sea-Bed Authority has to be looked upon as a device by which the *de facto* equal though indirect participation of all States in deep sea-bed mining can be assured, precautions were taken so as to ensure that all States enjoyed equal institutional rights. This explains why the Assembly, as the organ in which all States Parties will be represented, was declared to be the supreme organ of the Authority (Art.160 para.1) and shall have the power to establish general policies which are binding for all organs. Different from the Security Council of the United Nations which disposes of independent functions of its own *vis-à-vis* the General Assembly, the Sea-Bed Council is intended to be an executive organ dependent upon the Assembly. Accordingly, the composition of the Council as well as the voting procedure does not reflect special responsibility but should be primarily looked upon from the point of view of equal participation. Basically, Art.161 provides that important decisions cannot

be taken without the consent of the developing States and either the Western European or the Eastern European Socialist States. Fundamental decisions, however, need the consent of all groups. Thus the demand for a *de facto* equal participation has been secured institutionally. A contradiction to this general principle, however, is the possibility that in the Review Conference developing States have the right to impose their will upon the rest of the international community. Art.155 accordingly is contrary to the balance of interests achieved by the rest of the law of the sea régime and required by the common heritage principle.

c) Conclusion

To sum up, the common heritage principle as specified by Part XI of the Convention on the Law of the Sea contains the following elements: It stipulates that the sea-bed has to be regarded as the common heritage of mankind which will be represented by the Sea-Bed Authority as its trustee. However, mankind is not considered to be an active subject in deep sea-bed activities but remains only an object the interests of which have to be taken into account. Therefore in deep sea-bed mining the interests of peoples not having attained full independence – and thus not being represented in the Authority as their States did not adhere to the Convention – and of further generations have to be considered. As a logical consequence of the common heritage principle, any claim or exercise of sovereignty or sovereign rights over the deep sea-bed area and its resources as well as its appropriation are prohibited. The régime on the utilization of the deep sea-bed and of its resources contains the following elements: peaceful use, protection of the marine environment, activities to be carried out for the benefit of mankind as a whole. The latter forms the crucial point of the régime, and is directed towards the idea of achieving an equal participation of all States therein. Equal participation is to be reached through three means: restrictions imposed upon potential deep sea-bed miners, affirmative action benefitting non-mining States – especially developing countries – and the conferring of jurisdiction over deep sea-bed mining to the Sea-Bed Authority so that all States Parties can equally though indirectly participate therein. Though based upon these principles, the Convention on the Law of the Sea fails partially to bring them into reality. The preferential treatment aspect has been overemphasized to the detriment of the idea of compensation. Furthermore, the two ways of achieving the envisaged compensatory effect do not match. Finally, the International Sea-Bed Authority – and even to a higher degree the Review Conference – do not concur with the demand for equal participation.

5. *The Common Heritage Principle as Part of International Customary Law*

The answer to the question of whether the common heritage principle can be regarded as a part of international customary law will bear some relevance upon the decision as to whether deep sea-bed mining may be further carried out under national law. To be more accurate, the problem raised involves two different questions: Does the common heritage principle, notwithstanding the entry into force of the Convention on the Law of the Sea, contain a moratorium with respect to unilateral national deep sea-bed mining, or does at least the common heritage principle rather foreclose deep sea-bed mining after the entry into force of the Convention save for that undertaken under the newly established régime? Art. 138 which provides that the general conduct of States – not only States Parties – in relation to the Area shall be in accordance with Part XI seems to point into this direction in spite of Art. 35 of the Vienna Convention on the Law of Treaties.

To accept the common heritage principle to be part of international customary law the following preconditions have to be met: The content of the principle must be distinct enough so as to enable it to be part of the general corpus of international law, and respective State practice accompanied by evidence of *opinio juris* must exist. Custom must finally be so widespread that it can be considered as having been generally accepted.

To prove the accuracy of the common heritage principle as to its content it is not sufficient to point to Part XI of the Convention on the Law of the Sea³⁶. On the contrary: the question has to be raised whether from the common heritage principle always the same or at least similar conclusions can be drawn. It has been stated at the beginning that the common heritage principle has been invoked in connection with the establishment of an international administration for areas open to use for all nations. Therefore, it seems appropriate to have a short look at the Agreement Governing the Activities of States on the Moon and Other Celestial Bodies³⁷, the second sphere in which it has been specified. Here again we find, generally speaking, that the régime established shows the same main features which characterize Part XI of the Law of the Sea Convention, namely: Declara-

³⁶ Günther Jaenicke, Die Dritte Seerechtskonferenz der Vereinten Nationen, ZaöRV vol.38 (1978), p.438 (498); Wolfgang Graf Vitzthum, Recht unter See, in: Recht über See, Festschrift für Rolf Stödter (Hamburg 1979), p.355 *et seq.*; Kewenig (note 7), p.392.

³⁷ UN Doc.A/Res/34/68 Annex. December 5, 1979 reproduced in ILM vol.18 (1979), p.1434 *et seq.*

tion of the moon and its resources to be the common heritage of mankind, prohibition of an occupation or appropriation of the moon, restrictions imposed upon the use of the moon under the viewpoints of peaceful use and protection of the environment, the obligation that the utilization of the moon and its resources is to be carried out for the benefit of mankind as a whole, and the establishment of an appropriate institutional machinery³⁸. Though the existence of differences between the régime governing the utilization of the moon and the régime with respect to deep sea-bed mining should not be denied, it has to be strongly emphasized that both are governed by the same basic elements. Thus, it can be summarized that during the negotiations on the law of the sea and on outer space the common heritage principle has, as a leading principle to govern the use of areas beyond national jurisdiction, been specified as to its basic content.

This leads to the question of whether with respect to the common heritage principle a general practice amounting to custom exists. Practice has a norm-creating effect³⁹ so that the particular conduct is obligatory if it is accompanied by statements on the part of States that this particular conduct is mandatory⁴⁰. Without delving into the discussion of which types of acts are exactly capable of constituting State practice⁴¹, with respect to the common heritage principle such practice can be deduced from numerous statements made at the Third UN Law of the Sea Conference, in the United Nations General Assembly, and in UNCTAD, as well as in the national legislation of the potential deep sea-bed mining States.

This deduction, however, does not yet answer the question raised as to whether the common heritage principle prohibits unilateral deep sea-bed activities. As already pointed out, this question embraces two problems:

³⁸ For details see Cocca (note 1), p.16; Rüdiger Wolfrum, *Der Mondvertrag von 1979 – Weiterentwicklung des Weltraumrechts*, Europa Archiv 1980, p.665; Kewenig (note 7), p.394 *et seq.* with further references.

³⁹ As to the reason of validity of customary law see Rudolf Bernhardt, *Ungeschriebenes Völkerrecht*, ZaöRV vol.36 (1976), p.50 (62). He rightly points out that the creation of customary law does not depend upon the will of every single State, but cf. Gregorij I. Tunkin, *Völkerrechtstheorie* (Berlin 1972), p.153 *et seq.*

⁴⁰ Anthony A. D'Amato, *The Concept of Custom in International Law* (Ithaca and London 1971), p.75; Michael Akehurst, *Custom as a Source of International Law*, *British Year Book of International Law 1974–1975* (1977), p.1 (36); Rudolf Bernhardt, *Verfall und Neubildung von Gewohnheitsrecht im Meeresvölkerrecht*, in: *Recht über See*, Festschrift für Rolf Stödter (Hamburg 1979), p.155 (156); Hermann Mosler, *The International Society as a Legal Community*, RdC vol.140 (1974 IV), p.1 (127).

⁴¹ For further details on the state of discussion see D'Amato, p.88, who has adopted a very restrictive definition of the type of acts capable of constituting State practice. His view has been challenged by Akehurst, p.2 *et seq.*

whether the common heritage principle prohibits national deep sea-bed activities or whether it rather forecloses deep sea-bed activities not covered by the new sea-bed régime after the entry into force of the Law of the Sea Convention.

In answering the first problem one has to proceed from the fact that the content of the common heritage principle has been accepted as part of customary international law only in its general aspects; no agreement, however, exists with respect to the specific obligations of potential deep sea-bed miners as enshrined in Part XI of the Convention on the Law of the Sea. The best proof of that is not only the voting result at the end of the Third UN Conference on the Law of the Sea but the contents of the more liberal régime envisaged in the Moon Treaty and in the Declaration of Principles Governing the Sea-Bed. The Moon Treaty especially is most specific in this respect. Its Art. 11, which declares the moon and its natural resources to be the common heritage of mankind, provides that "... States Parties have the right to exploration and use of the moon without discrimination of any kind ...". Thus, it envisages that the respective activities shall be carried out by States under the condition that those States actively engaged in the utilization ensure the equitable sharing of benefits and provide for cooperation among the States Parties. Thus far international cooperation has become a legal obligation which dictates the lawfulness of space activities. The differences *vis-à-vis* the law of the sea régime are twofold. The obligation created by the Moon Treaty still leaves to the discretion of the States concerned the means for achieving interstate cooperation, whereas the law of the sea régime envisages – in the long run through the review clause – the abolition of such discretion⁴². Further, cooperation under the Moon Treaty does not provide for a compensatory effect, whereas the law of the sea régime is governed by this very idea. Even the Declaration of Principles which stands at the beginning of the law of the sea negotiations does not provide for the compensation aspect under the idea of *de facto* equal participation which leads to the abolition of freedom to engage in deep sea-bed activities. Hence, the common heritage principle insofar as it is part of international customary law does not contain a moratorium prohibiting unilateral national deep sea-bed activities. It

⁴² Paul Laurence Saffo, *The Common Heritage of Mankind: Has the General Assembly created a Law to Govern Sea-Bed Mining?*, *Tulane Law Review*, vol. 53 (1979), p. 492 (514), points out that such a conclusion may be drawn from the common heritage principle if based upon the French or Spanish text. "Heritage" is translated as *patrimoine* or *patrimonio* which unlike the neutral English "heritage" involve connotations of possessory and property rights.

cannot be argued that UNCLOS III had the effect of developing new concepts and eroding the old international law⁴³. Such argumentation does not take into due consideration that negotiations as such do not have a norm-creating character. It lacks the proof that a substantive consensus exists to prohibit national deep sea-bed activities.

This way of reasoning may be used so as to deny that the common heritage principle is a part of international customary law.

However, even if one argues that the common heritage principle does not provide a clear answer as to whether unilateral national activities are prohibited, it can still be regarded as part of international customary law. It constitutes a basic principle⁴⁴ providing general but not specific legal obligations with respect to the utilization of areas beyond national jurisdiction. The substantial consensus with respect to the general content of the common heritage principle⁴⁵ is accompanied by a dissent on some of its specific implications. As such the common heritage principle has the same characteristics as basic principles such as sovereign equality, the banning of the use of force and the freedom of the high seas. It enters into competition with the principle of sovereignty as it raises in opposition to that principle the idea of international public utility and cooperation⁴⁶. However, it is up to each State to decide how to ensure that the respective activities are carried out for the benefit of all mankind. It is the State's discretion whether it tries to achieve this objective by refraining from individual in favour of joint activities, by seeking cooperation on a bilateral basis, or by distributing revenues or information.

The legality of unilateral deep sea-bed activities will ultimately not be effected for those States not adhering to the régime if the Law of the Sea Convention enters into force. It has to be agreed that the common heritage

⁴³ J. Alan Beesley, *The Law of the Sea Conference and its Aftermath*, Proceedings of the American Society of International Law 1977, p.111 (119).

⁴⁴ As to "general principles" in customary law in general cf. Bernhardt (note 39), p.52; Michel Virally, *Le rôle des «principes» dans le développement du droit international*, *En hommage à Paul Guggenheim (Genf 1968)*, p.531 *et seq.* He points out that these principles of international law have to be distinguished from "general principles" as mentioned in Art.38 para.1(c) Statute of the International Court of Justice. The existence of principles of international law "well known and well established" has been recognized by the Permanent Court of International Justice as well as the International Court of Justice, PCIJ Judgements No.10, p.32, ICJ Reports 1949, p.22.

⁴⁵ According to Kronmiller (note 9), p.258 *et seq.*, consensus in this respect has been reached already since 1970.

⁴⁶ Kewenig (note 7), p.402. He voices strong scepticism as to whether the common heritage principle has been used properly in international negotiations (p.405 *et seq.*).

principle envisages the establishment of a universally institutional framework applicable to all States. However, this does not mean that after such a régime has entered into force only two options exist – either to adhere to the régime or to refrain from deep sea-bed activities. The ultimate result of such an approach would be that – in the case of the law of the sea régime – legislative power would be attributed to those 60 States necessary to bring the Convention into force⁴⁷. This would not only run counter to the established principles of international law but would also be contrary to the common heritage principle itself. The representation of mankind certainly has not been vested in a minority of States as mentioned before, rather the participation of all social and political systems is required to bring the system into force, so as to avoid a state of tension between reality and law which would render the latter ineffective⁴⁸. Thus, the Convention on the Law of the Sea cannot be regarded as a so-called objective régime which, concluded by a group of States, imposes upon third States the obligation to acquiesce in it. Without delving into the problem as to what criteria have to be fulfilled for the creation of such a régime⁴⁹, it should be pointed out that the States which established it cannot be entirely free to abolish it⁵⁰. This is the logical consequence of the fact that such a régime has to serve a common interest and derives its authority therefrom. However, the Convention on the Law of the Sea provides for a denunciation and thus cannot be regarded as an objective régime. Accordingly, the common heritage principle permits no deviation from the reasoning given by the International Court of Justice that a conventional rule can be considered to have become part of international customary law if such convention gained “widespread and representative participation . . . including that of states whose interests are specially affected”⁵¹.

⁴⁷ This concurs with the reasoning of Virally (note 44), p.534, that the principles of international law « . . . ne se présentent pas toujours sous la forme d'une proposition normative, mais parfois sous celle d'un concept ».

⁴⁸ The same conclusion has been drawn by Benedetto Conforti, Notes on the Unilateral Exploitation of the Deep Seabed, Italian Yearbook of International Law 1978/79, p.3 *et seq.* (12).

⁴⁹ Art. 308 para. 1 of the Convention on the Law of the Sea.

⁵⁰ See the detailed analysis of Eckart Klein, Statusverträge im Völkerrecht. Rechtsfragen territorialer Sonderregime (Beiträge zum ausländischen öffentlichen Recht und Völkerrecht, Bd.76) (Berlin etc. 1980), p.45 *et seq.*

⁵¹ North Sea Continental Shelf Cases, ICJ Reports 1969, p.42 *et seq.* Mosler (note 40), p.132, speaks of “quasi-universal consent”.