Common Interests in the Ocean

Rüdiger Wolfrum

INTRODUCTION

Oceans (the high seas, the deep-ocean floor, and its subsoil) differ fundamentally from territories or spaces under national jurisdiction. Whereas the management of the latter rests in the responsibility of a given state, activities in the former are governed by international law, implemented and enforced by individual states or organs of the community of states as the case may be. It is to be assumed from this very fact that community interests in the proper management and preservation of the oceans are prevailing. In this chapter, I address the legal regime for common interests in the oceans focusing on the lessons learned from Antarctica.

STATUS OF THE AREA

The most evident expression of common interests in the oceans is to be found in the common heritage principle. The term was formally introduced by Malta in a note verbale on 18 August 1967 (UN Doc. A/6695) requesting the introduction of an agenda item into the agenda of the UN General Assembly: "Declaration and treaty concerning the reservation exclusively for peaceful purposes of the sea-bed and the ocean floor, underlying the seas beyond the limits of present national jurisdiction, and the use of their resources in the interests of mankind."

The common heritage principle is an essential element, even the basis, of Part XI of the UN Convention on the Law of the Sea (1982) concerning the deep seabed, from where it has found its way into national legislation relating to seabed activities. It was also introduced in 1967 into the then beginning discussion on a legal regime for outer space and, to a lesser extent, later into the legal framework for Antarctica. The Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982 (Implementation Agreement) has, in fact, modified the deep-seabed regime somewhat, but without sacrificing the core of the principle.

Rüdiger Wolfrum, Max Planck Institute for Comparative Public Law and International Law, Im Neuenheimer Feld 535/69120 Heidelberg, Germany. Correspondence: wolfrum@mpil.de.

In the UN Convention on the Law of the Sea the common heritage of mankind is set forth under different provisions. The Preamble refers to UN General Assembly Resolution 2749 (XXV) of 17 December 1970 (A/RES/25/2749) in which the UN General Assembly solemnly declared, inter alia, that the area of the "sea-bed and ocean floor, and the subsoil thereof, beyond the limits of national jurisdiction . . . as well as the resources of the area, are the common heritage of mankind." The principle is highlighted in Article 136 of the UN Convention on the Law of the Sea, according to which this area and its resources are the common heritage of mankind. The significance of this principle to the UN Convention on the Law of the Sea becomes evident through its Article 311, paragraph 6, which provides that there will be no amendments to the basic principle relating to the common heritage of mankind set forth in Article 136 of the UN Convention on the Law of the Sea. This attributes to Article 136 of the UN Convention on the Law of the Sea a special status above treaty law without qualifying it as *jus cogens* (i.e. peremptory international law). The common heritage principle as established by the UN Convention on the Law of the Sea contains several core elements, which will be discussed in the remainder of this chapter.

NONOCCUPATION/NONAPPROPRIATION

According to Article 137 of the UN Convention on the Law of the Sea, no state shall claim or exercise sovereignty or sovereign rights over any part of the seabed and the ocean floor or its resources, nor shall any state or natural or juridical person appropriate any part thereof. No such claim or exercise of either sovereignty rights or such appropriation shall be recognized.

The legal significance of the nonoccupation and the nonappropriation element of the common heritage principle concerning the high seas was minimal, as Article 2 of the Geneva Convention on the High Seas already prohibited any occupation of the high seas. Equally, an appropriation by private entities is excluded.

This element of nonoccupation is also inherent in Article IV of the Antarctic Treaty, which excludes new territorial claims. It is a matter to be looked into as to whether individuals or entities may appropriate parts of Antarctica. In my view, Article IV of the Antarctic Treaty, albeit not explicitly, indirectly rules out the possibility of appropriation.

As far as the seabed beyond national jurisdiction is concerned, Article 136 of the UN Convention on the Law of the Sea goes a decisive step further. It states that no such claim or exercise of sovereignty or sovereign rights or such appropriation shall be recognized. Thus, the prohibition of occupation and appropriation has been given a legal status, the effect of which is similar to that of *jus cogens*. Moreover, Article 137 of the UN Convention on the Law of the Sea is phrased as an obligation of all states and not only the States Parties to the convention. One of the objectives of the common heritage principle is to preserve the present legal status of the international commons against all states and, as indicated by the term "appropriation," all private persons. The latter has far-reaching consequences. It means that an illegal appropriation will not result in a title of ownership for the entity in question. States Parties are therefore obliged to modify their law on private ownership accordingly. This constitutes a viable mechanism to preserve the common interests in the resources of the deep seabed.

DUTY TO COOPERATE

The regime of utilization, furthermore, establishes the obligation of all states to cooperate internationally in the exploration and exploitation of the deep seabed. The institution through which such cooperation is to be achieved is the International Seabed Authority (ISA). A corresponding duty of states to cooperate in the peaceful exploration and use of outer space, including celestial bodies, has been formulated as a principle immanent in space law. Such an obligation to cooperate on deep-seabed and outer space matters surpasses the requirements of international law in general.

Although the obligation to cooperate constitutes a strong element in the Antarctic legal regime, it has not been institutionalized in a way similar to the one for the deep seabed. There is no question, however, of the interstate cooperation between states and between states and nongovernmental organizations at the Antarctic Treaty Consultative Meetings. Cooperation is a dominant feature of the Antarctic legal regime and even more evident in the day-to-day activities in Antarctica.

INTERNATIONAL MANAGEMENT

Apart from its negative side just described (i.e. nonoccupation and nonappropriation), the common heritage principle introduces a revolutionary new positive element into the law of the sea by indicating that the control and

management of the deep seabed is vested in mankind as a whole. Mankind, in turn, is represented as far as the deep seabed is concerned by the ISA, which is the organization through which States Parties organize and control deep-seabed activities (Article 157, paragraph 1, of the UN Convention on the Law of the Sea). Thus, States Parties are meant to act as a kind of trustee on behalf of mankind as a whole. It is in this respect that the common heritage principle introduces a fundamental change in the legal regime governing the deep seabed. However, no other international agreement implementing the common heritage principle, not even the Agreement Governing the Activities of States on the Moon and Other Celestial Bodies (Moon Agreement) follows this approach.

A particular legal regime governs the use of the geostationary orbit. The legal regime governing the geostationary orbit involves the International Telecommunication Union (ITU) in the administration of that part of outer space, although to a comparatively lesser extent. Many scholars hold that the establishment of an international management system like the ISA is a necessary feature of the common heritage principle. I beg to differ. In my view, it is perfectly possible to serve the interests of the international community even without establishing an international organization.

REGULATED UTILIZATION

The key provision on the system of exploration and exploitation of the resources of the deep seabed (Article 153 of the UN Convention on the Law of the Sea) avoids referring to the freedom of such uses. Instead, it states that activities in the international seabed area shall be carried out by the Enterprise (an organ of the ISA) and, in association with the ISA, by States Parties or their nationals when sponsored by such states. In that respect, the deep-seabed mining regime differs from the one governing the high seas as well as the one governing outer space. On the high seas as well as in outer space all states enjoy freedoms, although such freedoms are to be exercised under the conditions laid down by international law. The main difference between the two regimes rests in the fact that the freedoms of the high seas are to be exercised with due regard to the interests of other states, so as to coordinate the exercise of such freedoms and to protect against negative effects from such exercise, whereas the restrictions imposed upon the utilization of the deep seabed are also meant to protect the interests of humankind. In particular, when the legal regime concerning the utilization of the deep seabed was discussed, it was emphasized that the common heritage principle was meant to replace the freedom-based approach that traditionally governs the use of the high seas.

The approach pursued by the Antarctic legal regime is somewhat different. The Protocol on Environmental Protection to the Antarctic Treaty (Environmental Protocol) and its annexes are much more concrete than Part XI of the UN Convention on the Law of the Sea, which makes supplementary rules for deep-seabed activities necessary. In this respect, the so-called mining code of ISA is borrowed from the draft Convention on the Regulation of Mineral Resource Activities in Antarctica (CRAMRA) and the Environmental Protocol to the Antarctic Treaty. That was particularly true for the liability regime.

DISTRIBUTIVE EFFECT

Controversy over the utilization system concerning the deep seabed centered upon the question of how to make sure that deep-seabed mining would benefit all mankind. The term "benefit" mentioned in the UN Convention on the Law of the Sea should be understood broadly. What matters, on the one hand, is the immaterial benefit, i.e., the extension and deepening of mankind's knowledge concerning the international commons. On the other hand, the benefit thought of is the one that can be derived from the use of the resources of the seabed and ocean floor as well as of outer space and its celestial bodies. According to Article 140 of the UN Convention on the Law of the Sea, activities in the deep-seabed area should be carried out for the benefit of mankind as a whole, taking into particular consideration the interests and needs of developing states. This article merely describes a legal framework from which no specific legal rights and obligations can yet be drawn. However, the UN Convention on the Law of the Sea formulates further, more specific obligations: equal participation of all states despite their technological or economic development, sharing of revenues, transfer of technology (so as to provide for equal participation), preferential treatment of developing countries, protection against adverse effects of deep-seabed mining on land-based mining, and cooperation. The UN Convention on the Law of the Sea attempts to achieve the objective of equal participation by the following means: (1) restrictions imposed upon potential deep-seabed miners, (2) affirmative action benefiting nonmining states, and (3) conferring of jurisdiction over deep-seabed mining activities on the ISA so that all States Parties can equally, though indirectly, participate therein. This utilization system represents an attempt to

provide for distributive justice. It is in this respect that the Implementation Agreement has introduced modifications, in particular concerning a production policy and the obligation for a transfer of technology.

The introduction of the term "mankind" combined with the word "heritage" indicates that the interests of future generations have to be respected in making use of the international commons. More specifically, it requires that deep-seabed or outer space activities should avoid undue waste of resources and provides for the protection of the environment. An important part of the intertemporal dimension of the common heritage principle is the concept of sustainable development. Articles 145 and 209 of the UN Convention on the Law of the Sea provide for the protection of the marine environment against harmful effects of deep-seabed mining.

This concept of sustainable development is well enshrined in the Antarctic legal system. The Environmental Protocol, including its annexes, and the Convention on Antarctic Marine Living Resources are based thereon.

HIGH SEAS AND MARITIME AREAS UNDER NATIONAL JURISDICTION

Although the common interests in the oceans are most explicitly expressed as far as the utilization of the deep seabed is concerned, they influence the legal regime for the high seas as well as for maritime areas under national jurisdiction. This point will be highlighted regarding fisheries and the protection of the marine environment.

According to Article 61, paragraph 2, of the UN Convention on the Law of the Sea, coastal states shall ensure that the maintenance of the living resources in their exclusive economic zones is not endangered by overexploitation. Paragraph 3 continues to state that populations should be maintained and restored at levels whereby they can produce the maximum sustainable yield. In short, coastal states are entrusted with the management of the living resources in their exclusive economic zone, but they are not totally free in that respect. They are under an obligation to manage fisheries in a way that the resources in question will contribute to the nourishment of their populations or the populations of other states. The fact that coastal states are not totally free in their own policies is highlighted in Article 73, paragraph 1, of the UN Convention on the Law of the Sea, which indicates that they may only enforce such national laws and regulations on fisheries adopted in conformity with the convention. At last instance the implementation of this obligation is monitored by the International Tribunal for the Law of the Sea.

As far as the high seas are concerned, the flag states are originally mandated to ensure the sustainable management of the living resources (Article 119 of the convention). The UN Agreement Relating to the Conservation and Management of Straddling Fish Stocks and Migratory Fish Stocks has significantly clarified this approach, reflecting the common interest in a management regime dedicated to sustainability as the precautionary principle.

Part XII of the UN Convention on the Law of the Sea, which deals with the protection and preservation of the marine environment, again clearly mirrors the common interests in the oceans. According to Article 192 of the convention, all states have the obligation to protect and preserve the marine environment. This obligation is all-encompassing; it is further detailed in Part XII, which describes the distribution of the functions between coastal states, port states, and flag states.

The same approach applies to Antarctica. There the main responsibility rests upon the state whose nationality the expedition or the station concerned represents.

CONCLUSION

Let me conclude by stating the particularities and strengths of the Antarctic legal regime in pursuing common interest. These are (1) the flexibility of the governance system, (2) concentration on science and the protection of the environment, and (3) reliance on the interchange of science, politics, and law.

It has been indicated that the Antarctic Treaty Consultative Meeting (ATCM) and its secretariat were inadequate to deal with the complexities of Antarctica. I venture to disagree. The ATCM has proved to be remarkably flexible and effective if one compares the situation today with the one 20 years back. Such a metamorphosis would have been impossible had the original signatories decided to establish an international organization. To underline my point, I recommend considering the G8 Summit, which follows exactly the same pattern, although I doubt that its founders were aware of the Antarctic legal system. Modern international law is moving away from the establishing new international organizations. Instead, more informal fora are established, such as meetings of States Parties, some of them enjoying more substantial functions than traditional international organizations. The ATCM,

in my view, is a forerunner of this development, although it is rarely considered as such.

I see the second strength of the ATCM in the concentration of the Antarctic legal system on science and protection of the environment. This has not been duplicated elsewhere. Both objectives serve common interest, which makes it easier to solve conflicts that may and have developed.

Finally, I see the particularity and strength of the Antarctic legal system in its reliance on the interchange of science, politics, and law. Attempts to follow this pattern have been made in the context of the law of the sea with the Continental Shelf Commission. But there the integration was not well thought through. This interplay between science, politics, and law is the most valuable asset of the Antarctic legal regime—its primary export article—and it should be nourished and protected.