Common Interests in the Ocean

Oceans (high seas, 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.

The title of the Plenary indicates that we should deal with lessons to be learned from Antarctica whereas the title of my presentation seems to focus on the new legal regime of the ocean as a starting point. I will try to overcome this discrepancy by elaborating both.

I The Area

1. In General

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 of 18 August 1967 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 seabed and the ocean floor, underlying the seas beyond the limits of present national jurisdiction, and the use of their resources in the interest 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, however, without sacrificing the core of the principle.

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 in which the UN General Assembly ('UNGA') 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 Art. 136 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 Art. 311 (6), which provides that there will be no amendments to the basic principle relating to the common heritage of mankind set forth in Art. 136 UN Convention on the Law of the Sea. This attributes to Art. 136 UN Convention on the Law of the Sea a special status above treaty law without qualifying it as *ius cogens*. The common heritage principle as established by the UN Convention on the Law of the Sea contains several core elements.

2. Non-Occupation / non-appropriation

According to Art. 137 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 sovereignty rights nor such appropriation shall be recognized.

The legal significance of the non-occupation and the non-appropriation element of the common heritage principle concerning the *high seas* would have been minimal, as Art. 2 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 non-occupation also is inherent in Art. IV Antarctic Treaty which excludes new territorial claims.

As far as the seabed beyond national jurisdiction is concerned, Art. 136 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 *ius cogens*. Moreover, Art. 137 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. ~~In addition~~, 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 in consequence thereof 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.

3. Duty to co-operate

The regime of utilization, furthermore, establishes the obligation of all States to co-operate internationally in the exploration and exploitation of the deep seabed. The institution through which such co-operation is to be achieved with respect to the seabed is the *International Seabed Authority (ISA)*. A corresponding duty of States to co-operate 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 co-operate surpasses that required by general international law. Although the obligation to co-operate constitutes a strong element in the Antarctic legal regime it has not been institutionalized, so to speak, ~~and~~ it is a dominant feature of the Antarctic legal regime.

4. International Management

Apart from its negative side ~~as~~ just described, 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 International Seabed Authority which is the organization through which States Parties organize and control deep seabed activities (Art. 157 (1) 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 principles, not even the Moon Treaty, follows this approach. The legal regime governing the geostationary orbit involves the *International Telecommunication Union (ITU)* in the administration of this part of outer space although to a comparatively lesser extent. ~~Most~~ Many authors 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.

5. Regulated Utilization

The key provision on the system of exploration and exploitation of the resources of the deep seabed (Art. 153 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* ('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 sea 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, ie so as to co-ordinate 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 which traditionally governs the use of the high seas.

As already indicated, the legal regime concerning the utilization of the deep seabed has been modified by the Implementation Agreement. Art. 153 UN Convention on the Law of the Sea was not affected though.

Part XI UN Convention of the Law of the Sea only covers mineral resources of the Area as defined in the respective provision of the Convention. It is a matter of controversy whether this embraces genetic resources of the Area. From a legal point of view one may wonder whether a narrow reading of the Law of the Sea Convention or the common interests as expressed through the common heritage principle should prevail.

6. 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 'benefit' mentioned in the Convention 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 which 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 Art. 140 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 in spite of 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 co-operation. The UN Convention on the Law of the Sea attempts to reach the objective of equal participation by the following means: (i) restrictions imposed upon potential deep seabed miners; (ii) affirmative action benefiting non-mining States; and (iii) 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 a modification, in particular concerning 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*. Arts 145 and 209 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 is well enshrined in the international legal syste

II. 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 also influence the legal regime for the high seas as well as for maritime areas under national jurisdiction. This will be highlighted regarding fisheries and the protection of the marine environment.

According to Art. 61(2) of the Convention on the Law of the Sea coastal States shall ensure that the maintenance of the living resources in the exclusive economic zone is not endangered by

overexploitation. Paragraph 3 continues to state that populations should be maintained and restored at levels so that 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 this respect. They are under an obligation to manage fisheries in a way so that the resources in question will contribute to the nourishing of its population or the population of other States too. The fact that coastal States are not totally free in their policy is highlighted in Art. 73(1) of the Convention which indicates that they may only enforce such national laws and regulations on fisheries adopted in conformity with the Convention.

As far as the high seas are concerned the flag States are originally mandated to ensure the sustainable management of the living resources (Art. 119 of the Convention). The Straddling Stocks Agreement has modified this approach significantly more clearly reflecting the common interest in a management regime dedicated to sustainability the precautionary principle.

Part XII of the Convention dealing with the protection and preservation of the marine environment again clearly mirrors the common interests in the oceans. According to Art. 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, distributing the functins between coastal States, port States and flag States. The same applies to Antarctica.

III. Conclusion

The Convention on the Law of the Sea acknowledges that there is a common interest in the oceans. The Convention sets up a legal regime on this very basis and assigns the functions accordingly. Generally the fundamental rules are set by the Convention itself or by subsequent international agreements. The implementation rests with States.

Let me conclude by stating the particularities (and its strengthes) of the Antarctic legal regime in pursuing common interest

- The flexibility of the ~~many~~ governance system yesterday it has been indicated by some that the ATCM and the Secretariat were inadequate to deal with the more complexities of ~~the~~

has proved to be remarkably flexible if one compares today with the situation 20 years back. Such a metamorphosis would have been impossible had the original provisions decided to establish an international organization. (UN reform). One should take into consideration the G8 summit follows exactly the same pattern although I doubt that if founders were aware of the Antarctic legal system.

The second strength I see in the consideration of the Antarctic legal system is its science and protection of the environment. This cannot be copied otherwise.

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