

or to prevent serious harm to the environment falling within the subject matter of the dispute."¹

This norm is modelled on the UNCLOS provision on provisional measures. It reflects the specific situation of an arbitration in adding that, even though serious harm to the environment not being a violation of a party's right can justify the indication of provisional measures, this may only be done where it relates to the subject matter of the dispute. The tribunal is thus called upon to take into account matters of interest *erga omnes*, although only in the context of provisional measures.

The other innovative feature of the environmental rules are two rosters of eminent experts, administered by the Secretary-General of the PCA: one of international environmental law experts to be available as arbitrators, and the second – the true innovation – of international technical experts in the field of the environment.² Obviously, this is only an administrative provision authorizing the Secretary-General to receive nominations by member states of the PCA and to compile the pertinent lists. It is not likely that parties will stop soliciting their own experts. But if a tribunal wishes to do so, it is now in a much stronger position to proceed independently and appoint an expert.³ It is still the tribunal that ultimately has to assess the expert opinion and render the final award, but the permanent availability of previously nominated experts could facilitate recourse to independent expertise and thus contribute to a sound scientific basis of a decision.

All other provisions of the Rules are merely of a facilitative character for an effective and swift arbitration procedure taking into account specific needs of typical participants in those proceedings.

Conclusion

A reform of the ICJ Statute is neither politically feasible nor, in fact, needed for the Court to properly deal with environmental disputes. It is not advisable to go beyond this, for one should be careful to load procedural instruments like the Statute, that are supposed to be impartial and unbiased, with norms of a rather substantive character, which can be perceived to be slanted towards one party. Rules or provisions to reflect ecological concerns would, in almost all situations, be of advantage to one, and to the detriment of the other party. The PCA environmental rules, like, to some extent, the Statute of ITLOS, are a good example that there cannot much be added to the rules.

There is, however, no real need for a general reform of the Statute. Certain deficiencies of the ICJ, which may particularly concern environmentalists' interests, could be remedied within the current system. With regard to the problem of duration, the Court has recently taken far-reaching measures to shorten the average time in which a case is decided. Likewise, it is within the discretion of the Court to accept private statements from *amici curiae* if it should consider it useful. The demands for an amendment of the Statute, and likewise the recent proposals to estab-

lish a new International Environmental Court¹, fail to take into account the reform potential of the existing law and institutions and, as with arbitration under the new PCA environmental rules, turn a blind eye on available alternatives, while they are politically unfeasible. As a highly flexible mechanism, international arbitration using appropriate rules can fill a perceived gap and provide for a means for all states to comply with the request for the peaceful settlement of disputes relating to the environment in Principle 26 of the Rio Declaration.

Prof. Dr. Geert Van Hoorick – Professor in Administrative and Environmental Law, Faculty of Law, Ghent University

THE PRINCIPLE OF COMMON HERITAGE OF MANKIND AS BASIS FOR A WORLD ECOLOGICAL CONSTITUTION

The sources of international law, rights and duties of states in relation in the paper. The principle of common heritage of mankind regarded as one of cornerstones of World Ecological Constitution.

Проф. Герд Ван Хорік – Гентський університет

Принцип спільної спадщини людства як основа для Екологічної Конституції Землі

Висвітлено джерела міжнародного законодавства, права і обов'язки держави стосовно природних ресурсів. Розкрито сутність принципу спільної спадщини людства як наріжного каменя створення Екологічної Конституції Землі.

1. Introduction

1. In this contribution we want to show that the principle of common heritage of mankind² (further: principle of common heritage) must be regarded as one of the cornerstones of a world ecological constitution. Firstly we will briefly mention the sources of international law. Then we will discuss the rights and duties of states in relation to natural resources. Afterwards we will come to the 'piece the resistance' about the principle of common heritage. Finally we will give a brief conclusion.

2. Sources of international law

2. In international law we regard international customary law, international general legal principles, and treaties as the sources of law. In legal doctrine there is no uniform vision on the hierarchy between these sources of law. It may be assumed that the principles of international customary law come first and that all other sources of law are equal.

¹ See in general on the discussion of this proposal *Ellen Hey*, Reflections on an International Environmental Court, in: International Bureau of the Permanent Court of Arbitration (eds.), International Investments and Protection of the Environment, p. 271-301.

² See K. BASLAR, *The Concept of the Common Heritage of Mankind in International Law*, The Hague-Boston-London, Martinus Nijhoff Publishers, 1998, XXVII + 427 p.

¹ Article 26, para.1.

² There have been nominations by 30 member states as of February 2002 (out of then 95).

³ Article 27, para. 1.

When the same behaviour is repeated over the years (material element) and it is believed that such behaviour is legally necessary (psychological element), it is considered a principle of international customary law (e.g. not to undo the object and purpose of a treaty before its coming into effect), binding all legal persons in international law (states, etc.). Thus the EC Court of Justice¹ has accepted that EC institutions must comply with international customary law when exercising their (legislative) competences. The EC Court of First Instance² recently even squashed an EC regulation negating a treaty the EU had signed and that would soon take effect, due to its violation of the international law obligation not to undo the object and purpose of a treaty before its coming into effect.

There are international general principles of law that either derive from national law, but are common to numerous states (e.g. 'pacta sunt servanda'), or derive from the international situation (e.g. the principle of non-interference in domestic situations). Where the border lies with the principles of international customary law is often unclear, and of limited importance.

Various terms are used to refer to an internationally binding agreement, e.g. 'treaty', 'convention' and 'agreement'. The use of the various terms has no legal consequences. We will further stick to the term treaty.

3. Rights and duties of states in relation to natural resources

3. The development of international environmental policy is highly influenced by the rights and duties of states in relation to environmental issues: the sovereignty principle, the duty to preserve common or shared natural resources, the prohibition of 'harmful use of territory', and the protection of free trade. Below it is shown that these rights and duties only offer a very partial protection to the environment and that some do not even counteract damaging the environment.

3.1. Sovereignty principle

4. States have sovereign rights, and therefore exclusive ownership or jurisdiction, of the natural resources in their territory (e.g. tropical forests) and of those in the so-called exclusive economic zone (200 nautical miles from the coastline). This gives the relevant state the possibility to take measures (such as enacting legislation) to preserve its natural resources. However, it is never more than a possibility, because according to international law *the state can basically freely exploit the natural resources that come under its exclusive jurisdiction*. This principle of international customary law is called the sovereignty principle. In principle, an adverse influence on one's own environment is thus legally permitted. It goes without saying that this fundamental attitude of international law causes problems in cases where countries wish to capitalise on their natural resources in a short term.

3.2. Duty to preserve common or shared natural resources

5. Some areas (such as the Antarctic and the high seas), also called 'global commons', do not come under the jurisdiction of states. They are the common pro-

perty of all states. Thus on the high seas there is the freedom of open sea (comprising the freedom of fishing, etc.).

Other natural resources (such as international waterways) are an intermediate category (between exclusive ownership and common property). These shared resources are subject to the rights of a limited number of states.

Unlike natural resources that are governed by the sovereign rights of a state, common and shared natural resources involve the problem that an administrator who can stand up for its conservation, is lacking. The recalcitrant attitude of a single state (for instance, committing over-fishing at open sea) may jeopardise the preservation of these natural resources, no matter how good the intentions of other states may be. Therefore, as a result of disputes between states, principles of international customary law have come about that limit the manoeuvring room of states, depending on the conservation of these natural resources. One might say that, according to positive international law, *states are obliged to limit any exploitation to such an extent that the preservation of common or shared natural resources is not jeopardised*.

By way of illustration, there is the evolution of international jurisdiction regarding living natural resources of the open sea. In the Bering Fur Seals Arbitration of 1893¹ it was determined that the United States did not have the right to protect seals beyond their three-mile zone. The US argument that if other countries commit over-exploitation, other states "have a right to interfere and secure their share" was not accepted. In the Icelandic Fishery Dispute of 1974², on the other hand, the International Court of Justice confirmed that all states involved have an obligation pertaining to reasonable use. This means they must take into account "the needs of conservation for the benefits of all".

Currently, the above-mentioned obligation is generally concretised in treaties (e.g. the Antarctic Treaty System).

3.3. Prohibition of 'harmful use of territory'

6. In international law it is accepted that in a conflict between the national sovereignty and an international obligation, the latter takes precedence. One of these obligations is the prohibition of 'harmful use of territory'. This principle implies that *states are prohibited from using their territory in a manner that causes (significant) damage to the environment of other states' territory or beyond their jurisdiction*. This principle also applies when they allow their territory to be used by private persons. It is also called the principle of 'not harmful use of territory' or the principle of ecological responsibility of states, and it is a principle of international customary law. The prohibition of harmful use of territory can be related to the prohibition of abuse of law or the requirement of good neighbourliness.

In the Trail Smelter case of 1938 and 1941³ this principle was applied by arbitration in a dispute between the United States and Canada whereby a Canadian

¹ ECJ November 14, 1992, no. C-286/90, Poulsen and Diva Navigation, [1992] ECR I-6019, paragraph 9.

² CFI January 22, 1997, no. T-115/97, [1997] ECR II-39.

¹ Pacific Fur Seal Arbitration (United Kingdom v USA) of August 15, 1893, in: P. SANDS, R. TARASOFSKY & M. WEISS (ed.), *Principles of International Environmental Law IIA. Documents in International Environmental Law*, Manchester-New York, Manchester University Press, 1994, 881.

² Fisheries Jurisdiction Case (United Kingdom v Iceland) 1974, in: P. SANDS, a.o. (ed.), o.c. (IIA), 810.

³ Trail Smelter Arbitration (USA v Canada), April 16, 1938 and March 11, 1941, in: P. SANDS, a.o. (ed.), o.c. (IIA), 85.

blast-furnace caused damage to American agriculture through its emissions of sulphur dioxide.

In the current state of international law, however, the principle has two important limitations. The object of the protection is limited to the environment pertaining to the territory of other states and areas beyond national jurisdiction. Thus the protection does not extend to the environment pertaining to one's own territory (where e.g. tropical forests are located that are not exploited in a sustainable way). Based on the prohibition of harmful use of territory, a non-sustainable exploitation of natural resources or environmental damage under the exclusive jurisdiction of a state can hardly be counteracted. Only when cross-border effects occur, the principle can be invoked. In addition, the obligation is essentially negative: it is aimed at preventing, restricting and repairing environmental damage.

3.4. Protection of free trade

7. On a global scale there is free trade between the signatories (more than 130 countries), governed by the Treaty of Marrakech of 1994¹, founding the World Trade Organization (WTO). The WTO Treaty does not only comprise the foundation of this organization, but is also an umbrella framework treaty for a number of treaties included in this treaty, such as the 1947 General Agreement on Tariffs and Trade (GATT). This implies, among other things, that no discriminatory and quantitative trade restrictions are allowed between the signatories. Article XX of the GATT, however, does provide the possibility to depart from this provision, for instance for environmental protection reasons: "Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures: (...) (a) necessary to protect human, animal or plant life or health; (...) (g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption."

8. As environmental policy has gained more impact, states increasingly challenge environmental measures entailing a trade restriction which they consider contrary to GATT. Especially *unilateral environmental measures with extraterritorial effect (that essentially protect natural resources outside their own jurisdiction) pose a problem and are readily considered contrary to GATT* by the arbitration boards.

This problem was strikingly exposed in the judgments of the GATT Panel of 1991 and 1994 in the famous Tuna/Dolphin cases². The basis of these cases is that the capture of tuna with drift nets may also result in the unintended capture of dolphins. The United States had issued an import ban for countries that capture their

tuna in a dolphin-unfriendly manner. In this way they tried to prevent dolphins, that are saved by their fishing fleet that meets their own strict standards, from being caught in the nets of foreign fishing fleets. However, Mexico has successfully challenged this measure as contrary to GATT twice (the second case pertained to an 'intermediary nation embargo', an import ban on tuna caught in a dolphin-unfriendly manner by third countries). The philosophy behind the arbitration boards' viewpoints, is that the GATT – as a framework for trade relations between states – would otherwise only apply between states with equal environmental protection levels (and this could be further extended to social law levels, etc.). From an economic viewpoint it would thus become rather useless.

Recently the Tuna/Dolphin Cases had a sequel with the judgment of the WTO Panel and the WTO Appellate Body in 1998 in the Shrimp/Turtle case¹. The dispute was about an American ban on the import of shrimps and shrimp products caught with the aid of techniques that might endanger the lives of turtles. It should come as no surprise that the WTO panel reached a decision analogous to the second Tuna/Dolphin case. These decisions however do not absolutely rule out environmental measures with an extraterritorial effect (as opposed to the very first decision).

Also certain trade-restricting European Community measures, primarily inspired by reasons of animal well-being, are under discussion.

4. The principle of common heritage

9. In this part we will focus on the principle of common heritage. Firstly we will show that the need for a counterweight for the sovereignty principle. Then we will briefly mention the underlying thoughts concerning the principle of common heritage from the environmentalists' viewpoint. After examining the legal status of the principle of common heritage in positive international law, we will discuss the content of the principle of common heritage, and its potentials for the development of environmental policy.

4.1. The need for a counterweight for the sovereignty principle

10. We may conclude that according to present international law:

- the state can basically freely exploit the natural resources that come under its exclusive jurisdiction (sovereignty principle);
- states are obliged to limit any exploitation to such an extent that the preservation of common or shared natural resources is not jeopardized (duty to preserve common or shared natural resources);
- states are prohibited from using their territory in a manner that causes (significant) damage to the environment of other states' territory or beyond their jurisdiction (prohibition of 'harmful use of territory');
- unilateral environmental measures with extraterritorial effect (that essentially protect natural resources outside their own jurisdiction) pose a problem and are readily considered contrary to GATT.

¹ Agreement of Marrakech of April 14, 1994 Establishing the World Trade Organisation, 33 *I.L.M.* 1994, 1; [<http://www.wto.org>].

² GATT Panel of August 16, 1991, Mexico v. United States, *I.L.M.* 1991, 1594; P. SANDS, R. TARASOFSKY & M. WEISS (ed.), *Principles of International Environmental Law IIB. Documents in International Environmental Law*, Manchester-New York, Manchester University Press, 1994, 1210; GATT Panel of May 20, 1994, European Community and the Netherlands v. United States, *I.L.M.* 1994, 936; for the text of these decisions see also [<http://www.american.edu/TED/TUNA.ITTM>]; [<http://www.wto.org>].

¹ WTO Panel May 15, 1998, Import Prohibition of Certain Shrimp and Shrimp Products; WTO Appellate Body of October 12, 1998, Import Prohibition of Certain Shrimp and Shrimp Products, *I.L.M.* 1999(1), 118; see for the text of these decisions also [<http://www.ciel.org/Publications>]; [<http://www.wto.org>]; see for a comment G. VAN CALSTER, "The WTO Appellate Body in Shrimp/Turtle: Picking up the Pieces", *European Environmental Law Review* 1999, 111-115.

11. Thus in international law especially the natural resources under the exclusive jurisdiction of a state lack protection. There is no world government conducting an international environmental policy that can call countries to order that overexploit their natural resources. It is up to states and international organisations to give birth to treaties that tackle the problem of overexploitation of natural resources. But the legal starting point makes this very difficult. It is evident that it is easier to reach an agreement on the use of common natural resources (such as the open sea) than on the exploitation of natural resources coming under the sovereignty principle (such as tropical forests). And the more states around the negotiating table, the less stringent the text will tend to be, due to the search for a compromise. Since an important requirement of environmental treaties is that there are as many as possible signatories, they tend to suffer from a rather weak formulation.

12. The fact that *the environment is in such a poor state, globally, is from a legal viewpoint to a major extent due to the sovereignty principle*. As DE KLEMM¹ says states "may conserve, exploit or destroy their natural resources, or allow them to be destroyed as they wish". It is thus highly time for a reinterpretation of sovereignty². But the question arises how this principle can be mitigated or how an environmental component can be added. We think that the principle of common heritage could play a major role in this. It is necessary that the principle of common heritage would be recognised as a principle of international customary law, especially with regard to natural resources coming under sovereign rights, as a counterweight for the sovereignty principle.

4.2. The underlying thoughts concerning the principle of common heritage from the environmentalists' viewpoint

13. The basic idea of the principle of common heritage in the environmentalists' viewpoint is that regardless of their location, geographic spread and legal status, certain matters must be safeguarded in the interest of mankind. According to some, this includes the environment in its entirety or all natural resources, and according to others at least the wild flora and fauna, nature areas and valuable landscapes, as the foundations of human existence and human well-being. The preserving of these matters must be everyone's care and responsibility. At the same time it must be recognized that the safeguarding of this heritage is in everyone's interest, wherever it may be located. These are the underlying thoughts concerning the principle of common heritage. It implies that certain elements of the environment are of such great interest to mankind that they are considered a common heritage. Their preservation is a common concern and responsibility.

4.3. The legal status of the principle of common heritage in positive international law

14. As far as positive law is concerned, the principle of common heritage can be regarded as a *principle of international customary law, but only in relation*

to outer space, the sea and, perhaps also, the Antarctic, which are common properties.

In two treaties related to this matters we find the principle as a legal principle. In the Moon Treaty of 1979¹ is laid down that the moon and its natural resources are the common heritage of mankind. The Law of the Sea Convention of 1982² declares the seabed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction, and its resources as the common heritage of mankind. Further in the Law of the Sea Convention³ is referred to this provision as "basic principle relating to the common heritage of mankind".

In the Antarctic Treaty System, on the basis of the Treaty on Antarctica of 1959, the principle of common heritage is not laid down explicitly. However one may argue that the more recent texts, as the Protocol on Environmental Protection of 1991, in which the signatories proclaimed Antarctica a "natural reserve, devoted to peace and science" and provide for an absolute ban on the exploitation of mineral resources, make an application of the principle of common heritage.

In another treaty one refers to the term, without provoking legal consequences. This is in the African Charter on Human and Peoples' Rights of 1981⁶, that declares that all peoples shall have the right to their economic, social and cultural development "in the equal enjoyment of the common heritage of mankind".

4.4. The content of the principle of common heritage in positive international law

15. In positive international law, so far as the relevant provisions of the Moon Treaty and the Law of the Sea Convention are concerned, the principle of common heritage contains four undisputed elements in relation to relevant natural resources:

- non-appropriation;
- international management;
- benefit-sharing;
- reservation for peaceful purposes⁷.

4.5. The legal status of the principle of common heritage related to natural resources in general

16. When we look at the principle of common heritage related to natural resources in general in treaties and soft-law, we see a rather diffuse picture.

In a lot of treaties and soft-law in the environmental field from the period 1970-1980 one refers to the principle of common heritage, but merely not in entire

¹ Agreement of New York of December 18, 1979, Governing the Activities of States on the Moon and Other Celestial Bodies, 18 I.L.M. 1979, 1434; [<http://www.iasl.mcgill.ca/space>], art. 11.

² UN Convention of Montego Bay of December 10, 1982, on the Law of the Sea, I.L.M. 1982, 1261; P. SANDS, a.o. (ed.), o.c. (IIA), 352; [<http://www.un.org>], art. 136.

³ Art. 311 (6) Law of the Sea Convention.

⁴ Treaty of Washington of December 1, 1959 on Antarctica, 402 U.N.T.S. 71; U.K.T.S. (1961) 97; 12 U.S.T. 794; T.I.A.S. 4780; [<http://www.unep-wcmc.org>].

⁵ Protocol of Madrid of October 4, 1991 on Environmental Protection, 30 I.L.M. 1991, 1461; [<http://www.unep-wcmc.org>].

⁶ African (Banjul) Charter of June 27, 1981, on Human and Peoples' Rights, 21 I.L.M. 1982, 59, art. 22/1.

⁷ See K. BASLAR, o.c., 82-83.

¹ C. DE KLEMM & C. SHINE, *Biological Diversity Conservation and the Law*, Gland, IUCN, 1993, 1.

² See also K. BASLAR, o.c., 139.

terms. Here we can mention the Declaration of Stockholm of 1972¹ (here one speaks from the 'heritage' of wild fauna and their habitats) and the preambles of the Ramsar Convention of 1971² (that considers waterfowl as an 'international natural resource'), the Bonn Convention of 1979³ (that considers the resources of earth as an 'heritage') and the Bern Convention of 1979⁴ (that considers the wild flora and fauna as an 'natural heritage'). Only the World Heritage Convention of 1972⁵ is very explicit in its preamble (stating that the cultural and natural heritage of exceptional value must be preserved as part of the 'world heritage of mankind'). The mentioned treaties provide also for a system of preservation and sustainable use of the natural resources that are covered by the relevant texts.

In more recent treaties and soft-law one notices that the states are far more reluctant to accept the principle of common heritage, even in preambles. Here we can mention the Rio Declaration of 1992⁶, the Forest Declaration of 1992⁷, and the Biodiversity Convention of 1992⁸. In the preamble of the latter one avoids the term heritage (in this text one considers the preservation of biological diversity only as a 'common concern').

Also one refers rather explicitly to the principle of common heritage in the two major EC directives about nature conservation, this is in the preamble of the EC Birds Directive of 1979 (that considers migratory birds as a 'common heritage' and bird protection as a 'common concern') and the EC Habitats Directive of 1992 (that states that endangered habitats belong to the 'natural heritage of the European Community'). Also has attorney-general Fennelly in the recent case of the Danish Bees before the European Court of Justice⁹ stated that the preservation of biological diversity is a 'common concern of mankind'.

17. In legal doctrine the legal status of the principle of common heritage related to natural resources in general, is uncertain and disputed.

In environmental law doctrine some authors consider the principle of common heritage as a principle of international customary law¹⁰, while others strongly

reject this thesis¹. The latter also make a distinction between the concept of common concern, that they apply to natural resources that come under the exclusive jurisdiction of a state, and the concept of common heritage, that they only see in relation to common natural resources.

We think that such a distinction is rather artificial and that both concepts are the emanation of the (same) principle of common heritage. However what differs is the legal status of the principle of common heritage in positive international law. The principle of common heritage is certainly a legal principle in relation to outer space, the sea and, perhaps also, the Antarctic. It is *questionable whether it is already a legal principle in relation to natural resources in general, owing to lack of definition, state practice and widespread acceptance*. But we think that could be a matter of time. One can assume that it will become a legal principle in the near future in relation to the wild flora and fauna, nature areas and valuable landscapes, etc. For this thesis one can refer to the many signatories of the World Heritage Convention of 1972, the statements in the preambles of the mentioned nature conservation treaties and EC directives, especially the World Heritage Convention of 1972, the EC Birds Directive of 1979 and the EC Habitats Directive of 1992, the insertion of environmental rights in the constitution of many countries, and developments in national environmental legislation towards the principle of common heritage².

4.6. Towards a more general content of the principle of common heritage

18. In the vocabulary of the common heritage of mankind³ lies a potential bridge to environmental issues.

The term 'common' is to be seen as a functional rather than a territorial one (e.g. migratory birds don't belong to a certain territory) and is to be understood as not necessarily concerned with the ownership of the area where natural resources are found. It expresses the *interest, concern and responsibility that mankind has in safeguarding the heritage*. This implies that there is a possible place for the principle of common heritage besides the sovereignty principle, applying to natural resources, even when they are the exclusive property of a state. The word 'heritage' should not necessarily be associated with inheritance and patrimony (as in translations into some other languages, such as French: 'patrimoine'). Some authors restrict the term to the wild flora and fauna, nature areas, etc. wherever they may be located (cf. the mentioned treaties, see above). Others extend the term to a high quality air, an ecologically rich environment, etc. However the principle of common heritage can never play a major role as legal principle if one do not restrict it to those *natural and cultural resources which globally affect the survival*

¹ UN Declaration of Stockholm of June 16, 1972 on the Human Environment, 11 *I.L.M.* 1972, 1416; in: P. SANDS, a.o. (ed.), o.c. (IIA), 7, principle 4.

² Convention of Ramsar of February 2, 1971 on Wetlands of International Importance Especially as Waterfowl Habitat, as amended by the Protocol of December 3, 1982 and the Amendments of May 28, 1987, in: P. SANDS, a.o. (ed.), o.c. (IIA), 737; [<http://www.ramsar.org>].

³ Convention of Paris of November 16, 1972 concerning the Protection of the World Cultural and Natural Heritage, 11 *I.L.M.* 1972, 1358

⁴ Convention of Bonn of June 23, 1979 on the Conservation of Migratory Species of Wild Animals, in: P. SANDS, a.o. (ed.), o.c. (IIA), 822; [<http://www.wcmc.org.uk/cms>].

⁵ Convention of Bern of September 19, 1979, on the Conservation of European Wildlife and Natural Habitats, in: P. SANDS, a.o. (ed.), o.c. (IIA), 945; [<http://www.ecnc.org/doc/europe/legislat>].

⁶ UN Declaration of Rio de Janeiro of June 16, 1992, on Environment and Development, *I.L.M.* 1992, 874; in: P. SANDS, a.o. (ed.), o.c. (IIA), 49; [<http://www.unep.org>].

⁷ Non-legally Binding Authoritative Statement of Principles for a Global Consensus on the Management, Conservation and Sustainable Development of All Types of Forests, of Rio de Janeiro of June 13, 1992, *I.L.M.* 1992, 881; in: P. SANDS, a.o. (ed.), o.c. (IIA), 874; [<http://www.un.org/oo/conf/unced>].

⁸ Convention of Rio de Janeiro of June 5, 1992 on Biological Diversity, 31 *I.L.M.* 1992, 818; in: P. SANDS, a.o. (ed.), o.c. (IIA), 845; [<http://www.biodiv.org>].

⁹ ECJ December 3, 1998, no. C-67/97, Bluhme, [1998] ECR I-8033.

¹⁰ See A. KISS, "The Common Concern of Mankind", *Environmental Policy and Law* 1997, 244-247; P. VAN HEIJNSBERGEN, *International Legal Protection of Wild Fauna and Flora*, Amsterdam, IOS Press, 1996, 68-74.

¹ See P. BIRNIE & A. BOYLE, *International Law & the Environment*, New York, Oxford University Press, 1992, 120-122, 424 and 487-489; (less explicitly) C. DE KLEMM & C. SHINE, o.c., 53-54.

² E.g. France where one has in 1995 inserted an article in the Countryside Act that explicitly refers to the principle of common heritage. Art. L. 200-1 Code rural: « Les espaces, ressources et milieux naturels, les sites et paysages, la qualité d'air, les espèces animales et végétales, la diversité et les équilibres biologiques auxquels ils participent font partie de patrimoine commun de la Nation. » See C. CANS, "Grande et petite histoire des principes généraux du droit de l'environnement dans la loi du 2 février 1995", *Revue Juridique de l'Environnement* 1995, 195-217.

³ See K. BASLAR, o.c., 38-78.

and welfare of mankind¹ (e.g. the tropical forests, the polar regions, the endangered species of wild flora and fauna, etc.).

The notion '*mankind*' refers to the *present and future generations* (or international community), so bringing in the intra- and intergenerational equity in the concept, that can also be found in the notion of sustainable development.

19. The concept of common heritage should be freed from being equated solely with the exploitation of natural resources beyond national jurisdiction. The key elements in the principle of common heritage should be²:

- *sustainable management and use*; The non-appropriation clause can hinder successful implication of the concept in ecologically important global commons. In the cases of rain forests and the atmosphere, the principle of common heritage can be fruitfully applied without requiring states to relinquish their sovereignty over their territories and air spaces. What is important is that states should have the use non-exclusively for the benefit of present and future generations, in other words that they have only the right to make sustainable use and the duty to sustainable management. In other words, states should not exploit and destruct vital life support ecosystems exclusively for their development at the expense of the rest of mankind or future generations.
- *benefit- and burden-sharing*; There is a inequality in the geographic spread of common heritage and in income among nations. The aim of benefit- and burden-sharing is to rectify this inequality. We think especially burden-sharing is important, as much of the common heritage is situated in developing countries. The principle of common heritage not only imposes the obligation to preserve the common heritage on states wherein these are situated but also places compensatory financial obligations to the international community to support the successful implementation of the mentioned obligation. The application of the principle of common heritage thus should be in accordance with the principle of common but differentiated responsibility.
- reservation for peaceful purposes.

20. Another key-element according to BASLAR is *planetary administration*. We think that this element is more a matter of implementation rather than part of the concept of common heritage itself. We agree however with the author that this is a very important issue. The interests of mankind can only be protected from the avaricious attacks of national governments by establishing a strong supranational authority whose power surpasses those of states. This authority should be empowered with the identification of the common heritage. The preservation and exploitation of the common heritage should be controlled by this authority. This equally means that states in whose territories a common heritage is situated should be accountable before this authority. But what is also important is that states yield the right to exclusive use, over a particular common heritage for the sake of the common interests of mankind.

Another important implementation measure is that every state should have *locus standi* against other states not respecting their duties under the principle of common heritage.

¹ See also K. BASLAR, , o.c., 110.

² Cf. K. BASLAR, o.c., 85-111.

4.7. Potentials of the principle of common heritage for the development of environmental policy

21. The principle of common heritage, once it would become a legal principle, has a very potential for the development of environmental policy.

States would have the *duty to co-operate for the sustainable management and use of the natural resources*, including these that come under national jurisdiction (e.g. virgin woods). An isolationist attitude, like the United States momentarily have in the climate change issue, would contravene this duty. Thus the acknowledgment of the principle of common heritage would facilitate more the development of environmental treaties.

States which destroy or exploit natural resources, wherever they be located, in a non-sustainable way, could be held responsible by other states.

Unilateral trade restrictions against states doing such wrongful acts, could be justified calling upon the principle of common heritage.

5. Conclusion

22. In this contribution we proved that, when drafting a world ecological constitution, the principle of common heritage – with a new jacket – should be part and indeed one of the cornerstones thereof. It can only be a step forward towards the acknowledgment of the principle of common heritage as principle of international customary law by solving the mentioned problem of lack of definition, state practice and widespread acceptance. For the international community and the present and future generations, such developments are highly needed. But whether the principle of common heritage will become a legal principle or not, for the foreseeable future the principle will have to be implemented through the co-operation of states.

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Т.Я. Довгий*, канд. юрид. наук – ЛНУ ім. Івана Франка

ПРАВОВІ МЕХАНІЗМИ ЗАБЕЗПЕЧЕННЯ СТАЛОГО РОЗВИТКУ

Розглянуті правові механізми забезпечення сталого розвитку держави в умовах глобалізації екологічних проблем. Зроблено аналіз розвитку екологічної політики передових країн світу, сучасних правових механізмів та інструментів охорони навколишнього середовища. Подано конкретні пропозиції щодо покращення екологічної ситуації в Україні, з огляду на міжнародний досвід.

T.Ya. Dovhyj – Board of Internal policy of Lviv Regional State Administration

The legal mechanism of sustainable development

The article is devoted to the legal mechanisms of sustainable development in conditions of environmental problems growth. The analysis of environmental policy development, modern legal mechanisms and the environmental protection instruments are executed. The concrete offers concerning improvement of an environmental situation in Ukraine are given, taking into account the international experience.

* Управління з питань внутрішньої політики Львівської облдержадміністрації