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THE COMMON HERITAGE OF HUMANKIND AND GLOBAL COMMONS: INTERRELATION BETWEEN CONCEPTS

Summary

The article is dedicated to the notions and interrelation of the common heritage of humankind and global commons concepts in the science of international law. The topic is relevant due to a growing interest of states to the possibility of exploitation of areas and resources falling under the regulation and protection of the common heritage of humankind principle. There are only few spaces that can be exactly recognized as having the common heritage status. But recently we have seen bold attempts to broaden their list with objects that don't correspond to the legal notion of the common heritage of humankind principle. The global commons concept is often used in this regard.

Keywords: common heritage of humankind, global commons, global public goods, natural resources.

Problem statement. For a long time in the international law the principle of national sovereignty on natural resources was dominating. But after the Second World War the situation changed crucially. Due to the technological progress states got the possibility for prospecting, exploitation and exploration of deep seabed resources and other hard-to-reach territories and spaces. This achievement raised the question about a legal status of such territories and their resources. The most developed countries having military, economic and technological possibilities tried to promote the idea of their nationalization, while many developing countries could stay outside of the process. This situation pushed the international community to the search of the political and legal solutions. In this context the principle of heritage of humankind came to the world. Elaborated in the sixties by Maltese Ambassador Arvid Pardo this concept – albeit embodied in some international legal acts – still remains quite undetermined and controversial. It leads to the uncertainty towards its objects. States and commentators have promoted the common heritage principle as applying particularly to areas beyond the limits of national jurisdiction and to natural resources found there [1, p. 449]. Some commentators have advocated applying the principle to other common space resources, including geostationary orbit and high seas fisheries [1, p. 450]. While the regime of heritage of humankind is unanimously recognized for the deep seabed, and mostly recognized for the outer space, in the international law science still there are disagreements about the status of the Antarctic. Some scientists suggest including to the list of common heritage of humankind such spaces and objects as the high seas, the cyberspace, and even the human genome, that seems quite premature taking into the account the lack of precise normative definition of the concept.

At the same time in publications it's possible to meet more often the reference to the called global commons, the term unknown for binding international legal acts. But being used broadly this concept embraces almost the same list of objects that have the common heritage of humankind status. It must be said that the notion of global commons is more typical for economic sciences that study such categories as public goods, global public goods, etc. It seems that being borrowed from economic studies this term is sometimes misused in juridical context. It creates even more intricate situation for understanding and practical use of the common heritage of humankind concept. So, a precise definition of both concepts and a clear

understanding of their interrelation seem necessary for their future studies and development in international law norms.

Analysis of the latest researches and publications. There are many foreign publications dedicated to the study of common heritage of humankind principle and its aspects. Among them attention should be paid to works of Rudger Wolfrum, John E. Noyes, Edward Guntrip, Kemal Baslar, R.P. Anand, Jean Buttigieg, etc. It's worth mentioning also the dissertation thesis of Siavash Mirzaee "The Concept of Common Heritage of Humankind in Modern International Law". Unfortunately in Ukraine there are not many publications and studies dedicated to the topic. As for global commons, their concept – albeit broadly used in juridical publications – is more studied in publications of related to economics.

Purpose statement. Given the above-mentioned reasoning, the purpose of the article is to study the notions and main features of the common heritage of humankind concept and the global commons concept and to find out whether they have any interrelation between them in the international law perspective.

Main part of the research paper. Let's begin with a study of the legal definition of the common heritage of mankind. It's worth mentioning that the basic document for References to this concept is the United Nations Convention on the Law of the Sea (hereinafter – UNCLOS). Part XI contains provisions about the so called "Area" which for the convention scopes means the seabed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction (art. 1) (hereinafter – the Area). Article 136 constitutes that the Area and its resources are the common heritage of mankind. Unfortunately there is no legal definition of the concept in the convention. Only the analysis of the provisions of Section 2 of Part XI can help to make conclusions about inherent elements of the principle of the common heritage of humankind [2].

Article 137 "Legal status of the Area and its resources" sets out the fundamental basis of the concept: 1) no State shall claim or exercise sovereignty or sovereign rights over any part of the Area or its resources, nor shall any State or natural or juridical person appropriate any part thereof. No such claim or exercise of sovereignty or sovereign rights nor such appropriation shall be recognized; 2) all rights in the resources of the Area are vested in mankind as a whole, on whose behalf the Authority shall act. These resources are not subject to alienation. The minerals recovered from the Area, however, may only be alienated in accordance with this Part and the rules, regulations and procedures of the Authority; 3) 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 this Part. Otherwise, no such claim, acquisition or exercise of such rights shall be recognized [2].

Another famous act that mentions the common heritage of humankind is Agreement Governing the Activities of States on the Moon and Other Celestial Bodies of 1979 (so called "Moon Treaty"). Article 11 of the agreement says that "the moon and its natural resources are the common heritage of mankind, which finds its expression in the provisions of this agreement, in particular in paragraph 5 of this article". Correspondently par. 5 and 7 constitutes that "states parties to this agreement hereby undertake to establish an international regime, including appropriate procedures, to govern the exploitation of the natural resources of the moon as such exploitation is about to become feasible. The main purposes of the international regime to be established shall include: a) the orderly and safe development of the natural resources of the moon; b) the rational management of those resources; c) the expansion of opportunities in the use of those resources; d) an equitable sharing by all states parties in the benefits derived from those resources, whereby the interests and needs of the developing countries, as well as the efforts of those countries which have contributed either directly or indirectly to the exploration of the moon, shall be given special consideration [3].

The principle of common heritage has become a part of "soft law" acts. It has been confirmed in resolutions of the UN General Assembly and UNCTAD resolutions that in general reject one-sided approach to seabed activities.

The term is used in other international acts but with no interpretation. One of the latest acts to mention is the Advisory Opinion of the International Tribunal for the Law of the Sea of

February 1, 2011 “Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area (Request for Advisory Opinion Submitted to the Seabed Disputes Chamber)”. In the opinion the tribunal affirms and develops the common heritage concept. In particular, it states that the principle of the common heritage of mankind requires faithful compliance with the obligations set out in Part XI (of UNCLOS) (par.76). Also the tribunal emphasizes that the spread of sponsoring states “of convenience” would jeopardize uniform application of the highest standards of protection of the marine environment, the safe development of activities in the Area and protection of the common heritage of mankind (par.159). Finally, in the case of damage to the Area and its resources constituting the common heritage of mankind, and damage to the marine environment “subjects entitled to claim compensation may include the International Seabed Authority, entities engaged in deep seabed mining, other users of the sea, and coastal states (p. 179). No provision of the convention (UNCLOS) can be read as explicitly entitling the International Seabed Authority to make such a claim. It may, however, be argued that such entitlement is implicit in Art. 137, par. 2, of the Convention (UNCLOS), which states that the Authority shall act “on behalf” of mankind. Each state party may also be entitled to claim compensation in light of the *erga omnes* character of the obligations relating to preservation of the environment of the high seas and in the Area (p.180) [4].

So, the tribunal insists on the basic character of rules exposed in Part XI of UNCLOS for the definition of common heritage of humankind regime. The analysis of its provisions and the provisions of the Moon Treaty permits the scientists to individualize the most important traits of the common heritage concept.

First of all, the common heritage of mankind is the principle of the international law of the sea that is a fundamental legal norm of great importance. According to some scientists, in particular to Rudger Wolfrum, it can be recognized, although with some reservations, a part of international customary law: “the common heritage principle permits no deviation from the reasoning giving by the International Court of Justice that a conventional rule can be considered to have become part of international customary law if such a convention gained “widespread and representative participation ... including that of states whose interests are specially affected” [5, p. 337].

Some commentators even attribute to the common heritage principle a character of *jus cogens*. To support the idea of it they refer to Art. 311 of UNCLOS: “States parties agree that there shall be no amendments to the basic principle relating to the common heritage of mankind set forth in Art. 136 and that they shall not be party to any agreement in derogation thereof” [2]. This approach looks like quite premature taking into consideration that the *jus cogens* status attribution to an international legal norm requires a common recognition of all states that seems very difficult to achieve in the situation where we have no precise normative definition of the common heritage principle.

According to the principle some territories and their resources have a special status and a special regime of exploitation. The common heritage of mankind principle consists of four elements. It prohibits states from proclaiming sovereignty over any part of the deep seabed, and requires that states use it for peaceful purposes, sharing its management and the benefits of its exploitation [6, p. 2].

Some scientists define more elements of the principle. In the opinion of John Noyes, features often associated with it include: 1) a prohibition of acquisition of, or exercise of sovereignty over, the area or resources in question; 2) the vesting of rights to the resources in question in humankind as a whole; 3) reservation of the area in question for peaceful purposes; 4) protection of the natural environment; 5) an equitable sharing of benefits associated with the exploitation of the resources in question, paying particular attention to the interests and needs of developing states; and 6) governance via a common management regime [1, p. 450-451].

For the scopes of our research it’s important to underline that such a regime regards both: the areas beyond the limits of national jurisdiction and the natural resources found there.

The uncertainty towards the necessary elements of the common heritage concept and the lack of normative regulation lead to discussions about the list of its objects. As has already been said traditionally the common heritage of humankind principle was connected with the deep seabed and its resources. The majority of scientists recognize, albeit with some reservations, the outer space with the Moon and other celestial bodies and the Antarctic as its objects. But there many other quite bold approaches that propose to use the common heritage regime for the spaces and resources that fall into the national jurisdiction or in general don't have a precise territorial or/and jurisdictional location. They mention high seas, air space, cyberspace, human genome, human rights, plant genetic resources, etc, in particular reasoning that "initially the concept was focused on objects located outside the territorial boundaries of states, but the recognition of the interest of the world community in relation to objects located within the state territory raised the question of the possibility of extending the legal regime of this concept" [7, p. 100].

It seems that at the present stage of the common heritage principle development such affirmations can only cause harm to its establishment as a part of binding rules of customary international law.

In contemporary scientific publications in a line with References to the common heritage of humankind principle we can meet a broad use of another term that seems even less defined – "*global commons*".

For example in the Report "Global Governance and Governance of the Global Commons in the Global Partnership for Development Beyond 2015" published on the UN site they state: "Global commons have been traditionally defined as those parts of the planet that fall outside national jurisdictions and to which all nations have access. International law identifies four global commons, namely the High Seas, the Atmosphere, the Antarctic and the Outer Space. These resource domains are guided by the principle of the common heritage of mankind. Resources of interest or value to the welfare of the community of nations – such as tropical rain forests and biodiversity – have lately been included among the traditional set of global commons as well, while some define the global commons even more broadly, including science, education, information and peace" [8].

The provisions mentioned above push us to some conclusions: global commons are territories outside of national jurisdiction; global commons can be seen as objects of the common heritage regime. But the mentioning among them tropical rain forests and biodiversity gives rise to the question about its basic characteristics, because in their case we can't talk about non-state jurisdiction or about territories but rather about resources.

At the same time another definition of global commons emphasizes its territorial character: global commons are "geographical areas that are outside the jurisdiction of any nation, and include the oceans outside territorial limits and Antarctica. Global commons do not include contiguous zones and fisheries zones of foreign nations." (Legal Information Institute of Cornell Law School, Electronic Code of Federal Regulation: Title 32 "National Defense"; Chapter 187–3) [9].

The Glossary of Environment Statistics defines global commons as "natural assets outside national jurisdiction such as the oceans, outer space and the Antarctic" [10, p. 37]. "Asset" means "something having value, such as a possession or property, that is owned by a person, business, or organization" [11]. One of the synonyms for "asset" is "resource" [12].

It's interesting that the Glossary of Environment Statistics mentions a French equivalent of "global commons" – "*patrimoine commun*". The term "*patrimoine*" can be translated in English as "heritage".

It might be assumed that the definitions given above don't help with a clear understanding of global commons nature. Furthermore, they contribute to confusion between the concepts of global commons and common heritage of mankind.

However, for the scope of further legal establishment in international law of both concepts it's absolutely necessary to distinguish them, so far there has been no normative basis for the statement of their equality.

The notion of “global commons” derives from the notion of “commons” that is a traditional legal term for common land. The Merriam Webster Dictionary defines “common” as: 1) something “of or relating to a community at large, for example: public work for the *common* good, or 2) a piece of land subject to common use: such as a) undivided land used especially for pasture; b) a public open area in a municipality, for example: a food and jazz festival will be held at the town *common*” [13].

Thus, initially the term “common” was related precisely to “land” or “area”, therefore it seems more correct to define “global commons” as “geographical areas”, rather than “assets” or “resources”. The tendency for global commons and common heritage objects extension with tropical rain forests, biodiversity, human genome, etc, poses a question of whether the resources separately from their territorial location can be seen as global commons and common heritage objects. Another question is whether the resources that fall inside national jurisdiction can also have this status.

For the moment it seems more reasonable to distinguish at least 3 pairs of objects: 1) areas that come under regulation of the common heritage principle and global commons areas, 2) global commons areas and the resources that can be located in these areas, 3) global commons areas and other resources of interest or value to the welfare of the community of nations, but locating outside global commons areas, sometimes inside national jurisdiction of states.

Talking about the second pair, another term to mention is “global public goods”. They are “goods with benefits and/or costs that potentially extend to all countries, people, and generations. Global public goods are in a dual sense public: they are public as opposed to private; and they are global as opposed to national” [14].

There is a good suggestion to distinguish global commons and global public goods. The authors of the expert paper on global commons mention: “Global commons are the resource domains that do not fall within the (exclusive) jurisdiction of any one government. They include such diverse resources as the global climate, the stratospheric ozone layer, outer space, Antarctica, high-seas fisheries, international waters and migratory wildlife. Some of these resources, such as the global climate, have the characteristics of global public goods: no state can be prevented from consuming them, and the consumption of such goods by one state does not diminish the amount available to others. Other resources are managed under common property and open access regimes. For these resources, such as fisheries, consumption by one state depletes the resources, leaving less for others. But they are fundamentally alike once opportunities for nationalization, private ownership or other restrictions on access have been exhausted [15, p. IX].

Conclusions and suggestions. Such an approach seems more correct and legally reasonable as it permits to separate four different in their nature regimes for objects that sometimes wrongly perceived as identical. They are global commons, global public goods, common property, and open access regimes. The fifth regime that should be studied separately is the common heritage of humankind.

As it was showed before this regime has some necessary features and should be established for a certain area and its resources by international treaty or customary legal norms. Taken in their restricted definition as resource domains that do not fall within national jurisdiction, global commons – albeit not all of mentioned by scholars areas – can be seen as objects of the common heritage legal regime.

So, all above-mentioned regimes and their objects need fundamental and scrupulous studies for being correctly used during the process of elaboration of their regulation in international law. A wrong and unreasonable attribution of such regimes to a wide range of objects can only discredit the idea of the common heritage of humankind principle or other valuable ideas for protection of international community’s interests. If we want to broaden the list of areas and resources falling under the common heritage regime with global commons or similar objects that don’t correspond to its fundamental characteristics established by international binding acts, we need to make modifications in the notion of global commons and changes in the legal definition of the common heritage principle.

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ЗАГАЛЬНА СПАДЩИНА ЛЮДСТВА І ЗАГАЛЬНЕ НАДБАННЯ: ВЗАЄМОЗВ'ЯЗОК КОНЦЕПТІВ

Резюме

Статтю присвячено вивченню понять і взаємозв'язку концепцій «загальної спадщини людства» і «загального надбання» в науці міжнародного права. Актуальність теми обумовлена інтересом держав, що зростає, до можливості експлуатації територій і ресурсів, які підпадають під дію і охорону принципу загальної спадщини людства. Наразі можна визнати такими, що мають статус загальної спадщини людства тільки кілька просторів. Але останнім часом ми спостерігаємо сміливі спроби розширити їх список об'єктами, що не відповідають юридичному змісту принципу загальної спадщини людства. В цьому відношенні часто використовується концепція загального надбання.

Принцип загальної спадщини людства розглядається як звичаєва норма міжнародного права, застосування якої, однак, є неоднозначним. Об'єктами, на які поширюється її дія, виступають простори та їхні ресурси, що знаходяться поза юрисдикцією держав. Джерела міжнародного права не містять ні вичерпного переліку таких просторів, ні їхніх ознак, які, як наслідок, виокремлено в науці міжнародного права. Однозначно визнаними об'єктами загальної спадщини людства є глибоководний район морського дна, космос, включаючи небесні тіла, а також Антарктика, хоча і з певними застереженнями. Є пропозиції віднести до них також відкрите море, кіберпростір і людський геном. Однак через різномірність і невідповідність класичному розумінню принципу загальної спадщини ці об'єкти зараз складно однозначно визнати «загальною спадщиною людства».

Додаткові труднощі у визначенні переліку таких об'єктів викликає також все більш частотне вживання в літературі і наукових дослідженнях терміна «загальне надбання». Він не визначений в нормативному масиві міжнародного права і є ще більш розмитим, адже до категорії загального надбання відносять як простори та їхні ресурси за межами національної юрисдикції, так і ресурси, щодо яких діє національна юрисдикція певних держав. У зв'язку з цим ототожнення об'єктів загального надбання та об'єктів загальної спадщини людства наразі здається передчасним.

Ключові слова: загальна спадщина людства, загальне надбання, глобальні суспільні блага, природні ресурси.

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ОБЩЕЕ НАСЛЕДИЕ ЧЕЛОВЕЧЕСТВА И ВСЕОБЩЕЕ ДОСТОЯНИЕ: ВЗАИМОСВЯЗЬ КОНЦЕПТОВ

Резюме

Статья посвящена изучению понятий и взаимосвязи концепций «общего наследия человечества» и «всеобщего достояния» в науке международного права. Актуальность темы обусловлена растущим интересом государств к возможности эксплуатации территорий и ресурсов, подпадающих под действие и охрану принципа общего наследия человечества. На данный момент можно признать имеющими статус общего наследия человечества только несколько пространств. Но в последнее время мы наблюдаем смелые попытки расширить их список объектами, не соответствующими юридическому содержанию принципа общего наследия человечества. В этом отношении часто используется концепция всеобщего достояния.

Принцип общего наследия человечества рассматривается в качестве обычной нормы международного права, применение которой, однако, является неоднозначным. Объектом, на который распространяется ее действие, выступают пространства и их ресурсы, находящиеся вне юрисдикции государств. Источники международного права не содержат ни исчерпывающего перечня таких пространств, ни их признаков, которые, как следствие, выделяются в науке международного права. Однозначно признанными объектами общего наследия человечества являются глубоководный район морского дна, космос, включая небесные тела, а также Антарктика, хотя и с определенными оговорками. Есть предложения отнести к ним также открытое море, киберпространство и человеческий геном. Однако из-за разнородности и несоответствия классическому пониманию принципа общего наследия человечества данные объекты в настоящий момент сложно однозначно признать «общим наследием человечества».

Дополнительные сложности в определении перечня таких объектов вызывает все более частотное употребление в литературе и научных исследованиях термина «всеобщее достояние». Он не определен в нормативном массиве международного права и является еще более размытым, т.к. к категории всеобщего достояния относят как пространства и их ресурсы за пределами национальной юрисдикции, так и ресурсы, в отношении которых действует государственная юрисдикция. В этой связи отождествление объектов всеобщего достояния с объектами общего наследия человечества в настоящий момент кажется преждевременным.

Ключевые слова: общее наследие человечества, всеобщее достояние, глобальные общественные блага, природные ресурсы.